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INFORMAL RULEMAKING: IN QUEST OF NUCLEAR LICENSING REFORM

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In recent years, efforts to reform the nuclear licensing process have generally been unsuccessful. The last significant effort was made by the Atomic Energy Commission in August of 1972 when the restructured rules of practice were adopted.[1] These rules, designed to make licensing more efficient, did not accomplish their purpose. Delays have continued and have even increased so that today nuclear power plants have become a less attractive alternative for producing energy—not because of public health and safety considerations and not because of environmental impacts but because of the ever-increasing time needed to license and construct a nuclear plant.[2] Legislation providing comprehensive, fundamental reforms in nuclear licensing is desirable; however, it may not happen soon.[3] If it does not, what can the industry

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[1] 37 Fed. Reg. 15,127 (1972).

[2] In the period of 1963 and 1964 when the first large nuclear plants were ordered, the average time between the filing of a construction permit application and the granting of the permit was 9 months. In 1970, this application time increased to 20 months and has since risen to 41 months in 1977 and is continuing to rise. This delay has continued to increase even though the early plants represented innovative technology, whereas the technology of the current plants has remained stable for years. This delay is a direct result of the growing regulatory load. The Atomic Industrial Forum's licensing review group recently concluded that the current licensing process itself adds fours or five years to the overall project time. For example, in 1972, nuclear plants were subject to 32 Regulatory Guides (a report promulgated by the NRC Regulatory Staff which, although not legally binding as a regulation, outlines acceptable methods for implementing NRC's regulations); this number was doubled in 1973; and the number has continued to increase at an astounding rate. Presently 250 Regulatory Guides and Branch Technical Positions are either in existence or under development. As a consequence, the period now required to construct a large nuclear power plant can extend over 12 years.

[3] The long-awaited legislative nuclear licensing reform proposal by President Carter, H.R. 11704 and S. 2775, 95th Cong., 2d Sess. (1978), has not yet emerged from either the House (Science and Technology, Interior and Insular Affairs, and Interstate and Foreign

itself do to initiate reforms? Industry should consider engaging in some self-help. Rulemaking, largely neglected as a reform technique, may provide an opportunity for this self-help. In order to effectively utilize rulemaking, new trends in the law must be recognized, understood, and applied.

Courts required administrative agencies, including the Nuclear Regulatory Commission (NRC),[4] to adopt adjudicatory procedures in informal rulemaking proceedings. The requirements of due process[5] and the applicable provisions of the Administrative Procedure Act (APA)[6] provided no firm foundation for the impo-

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Commerce) or Senate (Environment and Public Works) Committees which are considering it. Additionally, the House Subcommittee on Energy and the Environment indicated that it will substantially revise the bill before it is reported to the full committee.

[4] The Energy Reorganization Act of 1974, 42 U.S.C. § 5801 (Supp. V 1975), abolished the Atomic Energy Commission (AEC) and divided its duties between the Nuclear Regulatory Commission (NRC) and the Energy Research and Development Administration (ERDA). NRC received the licensing and related regulatory functions of the AEC. The Atomic Energy Act of 1954, *as amended*, 42 U.S.C. §§ 2011-2296 (1970 & Supp. V 1975), outlines NRC's powers and duties. Hereafter, the AEC and the NRC may be jointly referred to as the Commission.

[5] *See* California Citizens Band Ass'n v. United States, 375 F.2d 43 (9th Cir. 1967); Superior Oil Co. v. FPC, 322 F.2d 601 (9th Cir. 1963), *cert. denied*, 377 U.S. 922, *rehearing denied*, 377 U.S. 960 (1964). The Constitution does not mandate an across-the-board right to oral argument in administrative proceedings. FCC v. WRJ, 337 U.S. 265 (1949). The Supreme Court has held that the requirement of an opportunity for oral argument varies from case to case in accordance with differing circumstances, as do other procedural requirements; in some cases it is essential to due process, Londoner v. Denver, 210 U.S. 373 (1908), while in other situations opportunity for submitting written comments is sufficient, Morgan v. United States, 298 U.S. 468 (1936). This distinction arises from the difference between adjudication, in which a small number of persons are "exceptionally affected, in each case upon individual grounds" and rulemaking in which policy-type rules generally affecting a large number of persons are promulgated. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445-46 (1915). The Supreme Court recently cited the *Bi-Metallic* distinction with approval and reemphasized that the due process clause recognizes the distinction between "proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." United States v. Florida E. Coast Ry., 410 U.S. 224, 244-45 (1973).

When rules of general applicability are involved, *Bi-Metallic* indicates that the Constitution imposes no procedural constraints upon the agency. *Bi-Metallic*, *supra* at 445. *But cf.* Appalachian Power Co. v. EPA, 477 F.2d 495, 503 (4th Cir. 1973) (where due process did not require that administrator afford hearings prior to approving state air quality plan). This conflict is epitomized by the important due process concept that the practical needs of effective government must be balanced against the need to protect individuals against unfair official action. *See, e.g.*, Richardson v. Perales, 402 U.S. 389 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

[6] Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946), *as amended*, Pub. L. No. 89-544, 80 Stat. 378 (1966) (codified in scattered sections of 5 U.S.C.).

sition of these procedures, but were used as a judicial springboard for them. Courts, starting with the express APA requirements and the requirements of fundamental fairness, engaged in creative lawmaking by basing their holdings on the necessities of adequate judicial review. In addition to this putative reason for imposing such procedures, there were other basic and often unstated reasons: constriction of administrative discretion and the necessity of making factual determinations in informal rulemaking proceedings. These three factors, acting synergistically, led to an expansive interpretation of the APA requirements for informal rulemaking. Although the Supreme Court recently reversed a decision imposing adjudicatory procedures in an informal rulemaking context,[7] the Court presented no resolution of the underlying problems which caused the Court to impose the procedures. These problems must be understood if one is to comprehend where rulemaking was, where it is, and where it is going.

Reform of the nuclear licensing process through informal rulemaking provides the impetus for this article. It will outline the law concerning rulemaking, how it was recently changed, and the reasons why courts required administrative agencies to adopt procedures in excess of traditional rulemaking requirements. Finally, the article will demonstrate how the nuclear power industry can utilize rulemaking to accomplish its purpose.

I. BACKGROUND

The Atomic Energy Act of 1954[8] grants the NRC the authority to "make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this [Act]."[9] Rulemaking has been the primary method chosen by the NRC to interpret its obligations under the Atomic Energy Act and the National Environmental Policy Act.[10] Once passed,

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[7] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., No. 76-419 (Sup. Ct. April 3, 1978), *rev'g* Natural Resources Defense Council v. NRC, 547 F.2d 633 (D.C. Cir. 1976).

[8] 42 U.S.C. §§ 2011-2296 (1970 & Supp. V 1975).

[9] *Id.* at § 2201(p) (1970).

[10] 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975). This act requires all federal agencies to evaluate environmental impacts by utilizing "a systematic, interdisciplinary approach" of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1970). The Court of Appeals for the District of Columbia in the seminal case of Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), held that in order for the NRC to comply with NEPA, it must review both radiological environmental issues.

rules and regulations adopted in informal rulemaking proceedings have the force of law.[11] Both the APA[12] and the NRC's regulations[13] grant "interested persons" the right to petition for the issuance, amendment, or repeal of a rule. The courts of appeals have exclusive jurisdiction to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders"[14] "for the issuance or modification of rules and regulations"[15] of the NRC.

The APA provides the format for administrative lawmaking by the NRC under the Atomic Energy Act.[16] Two alternative types of procedures for the promulgation of rules are expressly established by the APA. One, known as "formal" rulemaking,[17] closely resembles adjudication[18] and is only required to be utilized in a limited number of circumstances.[19] Formal rulemaking is only required where the authorizing legislation requires the rules

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[11] *See* Yiatchos v. Yiatchos, 376 U.S. 306, 309 (1964).

[12] 5 U.S.C. § 553(e) (1976).

[13] 10 C.F.R. § 2.805(b) (1977).

[14] 28 U.S.C. § 2342(4) (Supp. V 1975).

[15] 42 U.S.C. § 2239 (1970). Jurisdiction may be obtained by any party aggrieved by the order who files a petition in accordance with 28 U.S.C. § 2344 (1970). Alternatively, an aggrieved party may obtain jurisdiction under 28 U.S.C. § 1331(a) (1970), which has been amended to eliminate the requirement of a specified amount-in-controversy as a prerequisite to the maintenance of any "action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Pub. L. No. 94-574, § 703, 90 Stat. 2721 (1976). The Supreme Court has interpreted the effect of this modification as conferring authority on federal courts to review agency action regardless of whether the APA may itself serve as a jurisdictional predicate. Califano v. Sanders, 430 U.S. 99 (1977).

[16] 42 U.S.C. § 2331 (1970). This section also authorizes the Commission to promulgate regulations providing for parallel procedures designed to safeguard and prevent disclosure of restricted data or defense information.

[17] 5 U.S.C. §§ 556-557 (1976) (hereinafter also referred to as "sections 556-557").

[18] The APA requires essentially the same procedures for formal rulemaking as for adjudication, as in both cases there is a hearing with a right of cross-examination before an administrative judge. 5 U.S.C. § 556(b) (1976). Some differences exist, however, including allowing settlements in adjudications, 5 U.S.C. § 554(c)(1) (1976); allowing all or part of the evidence to be submitted in written form in rulemaking when a party will not be prejudiced thereby, 5 U.S.C. § 556(d) (1976); allowing the decision of the hearing examiner to be omitted because rulemaking is not subject to 5 U.S.C. § 554 (1976); and not applying the separation of functions requirement of 5 U.S.C. § 554(d) (1970) to rulemaking.

[19] Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1278 (1972). *See generally* Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976).

to be made "on the record after opportunity for an agency hearing."[20] The second rulemaking provision, "informal" or "notice and comment" rulemaking,[21] requires no formal hearing and is applicable to the great bulk of rulemaking authority bestowed on Federal agencies.

Section 553 prescribes three obligations for the rulemaking agency. First, public notice must be published in the *Federal Register* stating the time, place, and nature of the proceedings, "the legal authority under which the rule is proposed," and "either the terms of substance of the proposed rule or a description of the subjects and issues involved."[22] Second, interested persons must be granted "an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation."[23] Finally, the agency must "incorporate in the rules adopted a concise general statement of their basis and purpose."[24]

Because of the relative informality of section 553 procedures and the extreme costliness in time, staff, and money of sections

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[20] The Supreme Court interpreted this hearing requirement in United States v. Florida E. Coast Ry., 410 U.S. 224 (1973). This case concerned the power of the Interstate Commerce Commission (ICC) to promulgate incentive per diem rates under the Interstate Commerce Act,which provides that the rate prescription should be be made only "after hearing." 49 U.S.C. § 1(14)(a) (1970). The ICC promulgated the rates after publishing a notice and soliciting comments on proposed rule. The Court held that section 1(14)(a) was not the equivalent of a requirement that the rule be made "on the record after opportunity for an agency hearing" as the APA requires to make the hearing requirements of sections 556-557 applicable. Rather, the ICC's rulemaking proceeding was governed by section 553 of the APA, which authorizes an agency to restrict interested parties to the submission of written evidence and argument without oral presentation and, accordingly, upheld the ICC's rule. The Court reasoned that, despite the paucity of statutes where the words "on the record" or their equivalent appear, courts are obligated to adhere to the congressional language and must find the requisite phrase before directing the application of sections 556-557. The Court in effect rendered the Interstate Commerce Act's express requirement of a "hearing" nugatory, as section 553 would have required these minimal procedures even if the act had been silent.

Despite the inapplicability of sections 556-557 in these circumstances, the Court did not rule out such application in all statutes which do not prescribe *in haec verba* that the hearing be "on the record," nor did the Court elevate this phrase to *sine qua non* status. 410 U.S. at 238. However, after *Florida E. Coast Ry.* it is unlikely that a court would require a formal rulemaking proceeding when the statute calls for a "hearing", unless the statute is unmistakably clear, as by the addition of "on the record," or unless the legislative history clearly provides for such a proceeding.

[21] 5 U.S.C. § 553 (1970) (hereinafter referred to as "section 553").

[22] 5 U.S.C. § 553(b)(1)-(3) (1976).

[23] 5 U.S.C. § 553(c) (1976).

[24] *Id.*

556-557 procedures, the vast majority of administrative agencies utilize informal rulemaking. The Supreme Court has demonstrated its reluctance to prescribe formal rulemaking procedures.[25] The ponderousness of formal rulemaking renders innovation difficult, allows exigencies to often go unmet, and fosters changed conditions prior to the completion of the proceeding. These factors cause the industries which are subject to adjudicatory regulation to be left in a state of perpetual uncertainty.[26] By contrast, informal rulemaking combines the advantages of legislative decisionmaking with some of the requirements of an adjudicatory proceeding. The agency is not limited to a decision based entirely on a carefully delineated record; rules can be promulgated efficiently and expeditiously and a broad base of public participation is encouraged because participation may be in written or oral form without the necessity of undergoing prolonged cross-examination. While these formidable advantages are widely recognized, at some point the wide range of discretion committed to the administrator gives cause for alarm. Nonagency participants have had the impression that this very flexibility and lack of adjudicatory safeguards have denied them a "full hearing."[27]

The Atomic Energy Act does not mandate a hearing "on the record" either on its face or as judicially construed.[28] Accordingly, the Commission took the position early that formal rulemaking procedures were not required by the Atomic Energy Act.[29] Despite

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[25] *Cf.* United States v. Florida E. Coast Ry., 410 U.S. 224 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972).

[26] This was the position of the utilities regulated by the Federal Power Commission (FPC) prior to the Permian Basin Area Rate Cases, 390 U.S. 747 (1968), which allowed more informal rulemaking procedures and allowed the FPC to set rates for an entire area in one proceeding.

[27] *See, e.g.*, American Pub. Gas Ass'n v. FPC, 498 F.2d 718 (D.C. Cir. 1974); Siegal v. AEC, 400 F.2d 778 (D.C. Cir. 1968).

[28] *See* Siegal v. AEC, 400 F.2d 778 (D.C. Cir. 1968), wherein the Court of Appeals for the District of Columbia upheld the Commission's use of informal rulemaking procedures. The court explained section 553 as follows:

> This language seems to say, and has been read by an authoritative source as saying, that the formal procedures of Sections 7 and 8 [of the APA] obtain only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be "on the record." [Here the court cited page 314 of the Attorney General's Manual on the Administrative Procedure Act (1947) in a footnote.] There is no such prescription in the Atomic Energy Act, either in terms or by clear implication . . . .

Id. at 785.

[29] *See* STAFF OF THE JOINT COMM. ON ATOMIC ENERGY, 87th Cong., 1st Sess., 2

the absence of a statutory obligation, the Commission has on occasion granted extensive procedural rights to afford the public an opportunity for more significant participation.[30] Such participation can generate public confidence in rulemaking and can facilitate the representation of otherwise neglected values.[31] Judicial recognition of the public's role has fostered the gradual erosion of the restrictive standing doctrine, which had previously curtailed the public's intervention.[32]

II. HYBRID RULEMAKING AND ITS UNDERLYING FACTORS

Both courts[33] and commentators[34] have advocated that the APA's strict dichotomy between formal and informal rulemaking should yield to a more flexible analysis which would be guided by considerations of due process and public policy and which would produce *ad hoc* procedures tailored to fit each rulemaking scenario. The courts are confronted with a dilemma in this area: they must effectively perform their reviewing role and therefore require explanations and reasons for the agency's actions;[35] but they must recognize that the rulemaker should not be circumscribed by onerous, time-comsuming adjudicatory encumbrances[36] and that the courts should not substitute their decision for the agency's.[37] As a potential solution to this problem, some courts compelled agencies to afford opponents of a rule substantial pro-

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IMPROVING THE AEC REGULATORY PROCESS 149 (Comm. Print 1961).

[30] *See* Freeman, *The AEC's Recent Experiment in "Evidentiary" Rule Making*, 28 BUS. LAW. 663 (1973).

[31] Johnston, *AEC Rulemaking and Public Participation*, 62 GEO. L.J. 1737 (1974).

[32] *See, e.g.*, Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 153 (1970) (standing to seek judicial review need not flow from any express Congressional grant); Barlow v. Collins, 397 U.S. 159, 165 (1970) (a court must determine whether Congress precluded judicial review); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1000-01 (D.C. Cir. 1966) (standing does not require the assertion of an economic interest); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (aesthetic or environmental interest is sufficient to confer standing). *But cf.* Easton Utils. Comm'n v. AEC, 424 F.2d 847, 850-53 (D.C. Cir. 1970) (untimely application to intervene precludes standing).

[33] *See, e.g.*, Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1251-54 (D.C. Cir. 1973).

[34] *See, e.g.*, Clagett, *Informal Action—Adjudication—Rule Making: Somme Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51, 85-88.

[35] *See* SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

[36] *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., No. 76-419 (Sup. Ct. April 3, 1978); International Harvester Co. v. Ruckleshaus, 478 F.2d 615, 631 (D.C. Cir. 1973).

[37] Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

cedural protections by mandating adjudicatory procedures despite the absence of an "on the record" hearing requirement.[38] Several of these cases did not place their brands of rulemaking anywhere within the APA classification;[39] rather, this procedural imposition was labeled "hybrid rulemaking."[40] The Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[41] stayed the judicial hand which mandated adjudicatory procedures in informal rulemaking contexts. Although courts may no longer impose rigorous procedural requisites upon the rulemaking process, the factors which prompted this judicial response still exist and will continue to influence judicial review of agency actions. To fully understand this area of the law and to comprehend the significance of the Supreme Court's recent landmark case, the three primary factors underlying hybrid rulemaking must be understood. These factors are outlined in the next three subsections. The fourth subsection demonstrates how these factors were used to expand the scope of section 553.

A. *Constriction of Administrative Discretion*

Agencies, unlike courts, have express authority to make law prospectively through the exercise of rulemaking power and have commensurately less need or reason to rely on *ad hoc* adjudication in formulating new standards.[42] Although all potential problems cannot be handled through rulemaking, agencies should strive towards filling the interstices in their authorizing statutes through the promulgation of rules.[43] Rules have the salutary effect of exposing agency policy to public scrutiny, whereas case-by-case adjudication, with its limited effect and restricted participa-

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[38] *See* text accompanying notes 161-176, *infra*.

[39] *See* Public Serv. Comm'n v. FPC, 487 F.2d 1043, 1069 (D.C. Cir. 1973) (declining to reach classification problem); Appalachian Power Co. v. EPA, 477 F.2d 495, 500 (4th Cir. 1973) (discarding APA classifications for determining the type of hearing required); Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971) (basing the impositions of procedural requirements on considerations of "fairness").

[40] *See, e.g.*, Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975).

[41] No. 76-419 (Sup. Ct. April 3, 1978).

[42] SEC v. Chenery Corp., 332 U.S. 194, 202 (1947).

[43] *Id.* Commentators have also exhorted agencies to make greater use of rulemaking. *See, e.g.*, Fuchs, *Agency Development of Policy Through Rulemaking*, 59 NEV. U.L. REV. 781 (1965); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

tion, often does not.[44] Absent promulgation of rules, administrative actions are often chaotic and inequitable because neither the parties nor the administrators know what standard is to be applied.[45] In recognition of these factors, agencies which had previously promulgated policy in *ad hoc* piecemeal fashion through adjudication are now adopting prospective policy standards, rules, and regulations, which apply generically to a variety of parties in eclectic situations. The pattern of promulgating regulations is especially prominent in the agencies entrusted with environmental and energy problems.[46]

Many statutes, such as the Atomic Energy Act, merely establish a legislative framework within which the administrator enjoys broad discretion when promulgating rules.[47] Congress, in recognizing this fact, evinced serious misgivings about agencies utilizing minimum notice and comment rulemaking procedures. During the last decade, many statutes have required procedures in excess of minimum notice and comment rulemaking procedures.[48] These contrast with most older statutes which do not impose any procedural requirements for rulemaking.[49]

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[44] *See* Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking*, 26 AD. L. REV. 199, 202 (1974).

[45] *See generally* Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863 (1962).

[46] That both Congress and the agencies emphasize and favor rulemaking over adjudication as the most efficient and useful means of promulgating administrative policy is demonstrated by the statutory authority bestowed upon the Environmental Protection Agency (EPA). EPA has been specifically authorized to establish, in conjunction with state governments, comprehensive standards for pollution control by focusing on broad environmental questions involving different pollutants in diverse industries and areas. *See* Federal Water Pollution Control Act amendments, Pub. L. No. 95-217, 91 Stat. 1567 (1977) (codified at 33 U.S.C. §§ 1251-1265 (Supp. V 1975)); Clean Air Act amendments, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified at 42 U.S.C. §§ 7401-7642 (1976)). Similarly, the NRC has been prolific in the promulgation of rules, regulations, and standards. *See* 10 C.F.R. §§ 0-170 (1977).

[47] The court in Siegal v. AEC, 400 F.2d 778 (D.C. Cir. 1968), stated: "Congress agreed by enacting a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Id.* at 783. *See also* Power Reactor Dev. Co. v. International Union of Electrical Workers, 367 U.S. 396 (1961).

[48] Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276 (1972).

[49] *Id.* at 1278. Of course, the APA's procedures apply to rulemaking under these statutes.

Rulemaking protects the rights of individual parties by circumscribing unguided discretionary power to decide individual cases.[50] Similarly, in some cases, the broad discretion to fashion generally applicable rules must be subject to some restraint. If only notice and comment procedures are used, the record is ordinarily so unfocused and ponderous that the administrator could find support for choosing any of the alternatives offered.[51]

Courts, in refusing to blindly rely upon the unstructured exercise of administrative discretion,[52] have required agencies to clarify decisionmaking standards, to consistently apply these standards to guide their decisions, and to state findings of fact and the reasons for decisions. The courts, demonstrating their uneasiness about the extent of administration discretion, have felt that justice requires judicial intervention to circumscribe unnecessary and uncontrolled discretionary power.[53] However, in any endeavor to circumscribe agency action, the court must fully allow for the reality that agency matters typically involve some quantum of expert discretion.[54] Expertise may form a legitimate basis for rules resolving questions of policy, but it cannot justify procedural inadequacy in factual controversies. Expertise is strengthened in its proper role when it is denied the opportunity to "become a monster which rules with no practical limits on its discretion."[55]

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[50] *See* Holmes v. New York City Housing Auth., 398 F.2d 262 (2d Cir. 1968); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).

[51] *See* City of Chicago v. FPC, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).

[52] *See* Environmental Defense Fund Inc. v. Ruckelshaus, 439 F.2d 584, (D.C. Cir. 1971), wherein the court stated that:

> Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible . . . . Discretionary decisions should more often be supported with findings of fact and reasoned opinions.

Id. at 598.

[53] *See generally* K. DAVIS, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY (1969). Professor Davis has argued that arbitrary administrative action can be effectively restricted only by requiring agencies to formalize their policies in clear rules of prospective application.

[54] *See* NLRB v. Brown, 380 U.S. 278, 290-92 (1965); Braniff Airways, Inc. v. CAB, 379 F.2d 453 (D.C. Cir. 1967).

[55] Greater Boston Tel. Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 167 (1962)).

B. *Factual Determinations in Informal Rulemaking*

Three types of questions are raised in rulemaking proceedings: policy questions, factual questions, and interdependent questions of policy and fact. Although many of the issues presented to the NRC are primarily technical, other issues involve trade-offs between competing values and judgments of broad social and environmental import. Resolution of such policy questions denigrates the significance of detailed factual investigation and minimizes the need for the constraints afforded by the procedural protection of an adjudicatory hearing.[56] Policy issues disguised as scientific problems should not be consigned to technical experts nor decided by administrators and reviewing judges, but should be directly confronted as questions of policy by the elected representatives of the people. However, in the absence of congressional action, policy issues must be decided in rulemaking proceedings open to broad public scrutiny. This is the type of issue which pure notice and comment procedures were designed to resolve.

Conversely, adjudicatory procedures work best with narrowly defined factual issues.[57] Informal rulemaking is handicapped in its fact-resolution endeavors by the absence of a clearly defined mechanism to sift the many topics addressed in the comments; such sifting would occur if testimony was shaped by witnesses subject to cross-examination. Hybrid rulemaking decisions attempted to diminish informal rulemaking's fact-finding inadequacies by mandating the application of the traditional methods relied on by Anglo-American jurisprudence to ensure accuracy in adversarial proceedings—adjudicatory procedures,[58] including cross-examination with its unique potential as an "engine of truth."[59] Of course, after *Vermont Yankee,* this is no longer a

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[56] *See* Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis,* 42 U. CHI. L. REV. 401, 408 (1975).

[57] *See* Hamilton, note 48 *supra,* at 1313. *Cf.* Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting,* 58 VA. L. REV. 585, 586 (1972).

[58] *See* Verkuil, *A Study of Informal Adjudication Procedures,* 43 U. CHI. L. REV. 739, 743 (1976).

[59] International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631 (D.C. Cir. 1973). Commentators are divided over cross-examination's utility in resolving factual matters in administrative proceedings. *Compare* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform,* 118 U. PA. L. REV. 485, 522 (1970) ("cross-examination can serve a more valuable function

viable option.[60] Courts are now limited to examining the factual

in testing forecasts and generalized conclusions underlying future policy planning than in making findings concerning specific past events"), *with* Homburger, *Functions of Orality in Australian and American Civil Procedure*, 20 BUFFALO L. REV. 9, 36 (1970) ("If cross-examination really is the 'greatest engine ever invented for the discovery of truth,' one wonders why other legal systems have not imported that fabulous 'engine' ").

[60] The Court set forth a number of policy reasons for refusing to allow courts to impose adjudicatory procedures on administrative agencies. In order to evaluate the effect of the Court's opinion, these reasons must be examined. First, the Court reasoned that if courts are allowed to review agency proceedings to determine whether the agency employed the "best" procedures, judicial review would be totally "unpredictable." No. 76-419, slip op. at 24 (Sup. Ct. April 3, 1978). The reasoning underlying this reason is hard to fathom; judicial review should be no more "unpredictable" if additional procedures are available as a remedy. None of the hybrid rulemaking cases mandated a particular procedure—they required a system of procedures as a means of developing an "adequate record." If an agency develops a record without utilizing such procedures, it could nevertheless be adequate. Such procedures should be permissible if they are used as a tool to remedy a perceived inadequacy, but not if they are used to evaluate the agency's proceeding. Judge Friendly places this debate into perspective:

> It is thus not too consequential whether a court invalidates a rule on the ground that the procedures have not developed substantial evidence to support it or even evidence adequate to rebut a claim that it is arbitrary and capricious, or, instead, takes the route of prescribing ad hoc procedural requirements in addition to those of section 553. Although the former course seems more in keeping with the statutory language and less likely to promote undue judicial activism, the practical result is much the same. Both roads lead to the conclusion that an administrator engaged in rulemaking governed by the APA cannot always be sure that rudimentary notice and comment procedures . . . will always suffice.

Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1314 (1975). The Court also fears that if agencies are forced to operate under such a "vague injunction," they "would undoubtedly adopt full adjudicatory procedures in every instance," thus losing all the inherent advantages of informal rulemaking. No. 76-419, slip op. at 24 (Sup. Ct. April 3, 1978). This concern, although possessing superficial validity is in part untrue and in part exaggerated. Courts mandating hybrid procedures granted agencies discretion in adopting procedures so long as "reasoned decisionmaking" was assured. There would be no need for an agency to adopt full adjudicatory procedures for the limited-effect, noncontroversial rules that compose the bulk of rulemaking proceedings. The Court recognizes this fact in its opinion when it states: "Since 1970 [after American Airlines, Inc. v. CAB, 359 F.2d 624 (en banc), *cert. denied*, 385 U.S. 843 (1966), the seminal case in hybrid rulemaking] the Commission has conducted a large number of rulemaking proceedings, some of which involved matters of substantial importance, and almost none of which involved cross-examination." No. 76-419, slip op. at 21 n.17 (Sup. Ct. April 3, 1978). Although during this time period NRC had not been required to adopt such procedures, other agencies had been so ordered, and it was not unforeseeable that a court would order NRC to use similar procedure in a future situation.

The Court gives as its third reason the fact that agency procedures cannot be looked at with hindsight; rather, the procedures must be evaluated on the basis of the information available when the procedures were formulated. The final reason presented by the Court is also hard to decipher as it does not fit into any syllogistic pattern. The Court reasoned that informal rulemaking under section 553 does not require an agency to rely exclusively

underpinning of a rule without mandating procedures to assist them in this task; the agency itself must determine what type of procedures will ensure an adequate record.

The most difficult issues in NRC rulemakings, however, involve questions of policy and interdependent questions of complex technological and environmental fact for which pure informal rulemaking may not be sufficient.[61] However, across-the-board use of formal rulemaking procedures is unpalatable because that would militate against the advantages of informal rulemaking. Adjudicatory procedures have both advantages and disadvantages depending on the function they are to achieve. Superimposing the adjudicatory model on administrative decisionmaking in a complex scientific and technological scenario exposes the shortcomings of adjudicatory techniques. The NRC has been entrusted with broad powers and multiple functions and is not expected to behave as an impartial umpire presiding over a private dispute.[62] NRC proceedings focus on future, not past, events and their consequences. Most importantly, this type of issue cannot be couched in a form conducive to a simple answer; rather, the NRC must balance competing values when consider-

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on the transcript generated at a hearing, or to hold a formal hearing at all. From these premises the Court concludes that "the adequacy of the record . . . is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency [complied with the APA and other relevant statutes]." *Id.* at 25. The Court could not have meant that using adjudicatory procedures to gather more evidence and to focus the information it received would not make the record more "adequate." Although such procedures may not be necessary to render the record adequate, the "record," regardless of how it is defined, must be more complete after using such procedures. Considering the historical context in which this opinion was written, this reason can only be interpreted as requiring courts to ensure that the agency complied with the statutory minimums without prescribing hearing procedures to generate on-the-record testimony in support of the rule generaged. In light of SEC v. Chenery Corp., 318 U.S. 80 (1943), and its progeny, the Court could not have meant that the agency is not required to take a "hard look" at the major questions before it and to support each major portion of its rule with some data and reasoning. *See, e.g.*, Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971).

[61] *See* Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 193 (1974).

[62] In re Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752 (1977); In Re Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123 6 AEC 331, 335 (1973), *rev'd on other grounds sub nom.;* Aeschliman v. NRC, 547 F.2d 622 (D.C. Cir. 1976), *rev'd on other grounds sub nom.;* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., No. 76-419 (Sup. Ct. April 3, 1978). *See also* Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

ing the vagaries of an uncertain technology applied in a context of scientific dispute.

Perhaps the wisest course in resolving this type of issue is the middle ground in which the agency would use the most efficacious procedure for each type of dispute. No single set of procedures will be appropriate for all NRC rulemakings because of the diversity of issues and the variety of factual and policy questions involved. The NRC should discriminatively use hybrid procedures, so that mundane noncontroversial rules could be promulgated with dispatch, but the NRC would have the option of increasing the quantum of information submitted for more significant rules. What is needed is some pattern of procedures to fully develop the record and to supply the basis of judicial review.[63] This maintains administrative flexibility, but can also be conducive to administrative confusion and delay.[64] As yet, no precise formula for ascertaining the procedural aspects of such proceedings has emerged.

C. *The Requirements of Judicial Review*

The scope of judicial review is outlined in section 10(e) of the APA,[65] which provides that a reviewing court shall set aside agency action found not to meet six separate standards.[66] The APA putatively describes two alternate standards of judicial review: (1) "arbitrary and capricious"[67] in informal rulemaking pro-

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[63] International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

[64] *See* FitzGerald, *Mobil Oil Corp. v. Federal Power Commission and the Flexibility of the Administrative Procedure Act*, 26 AD. L. REV. 287, 299 (1974).

[65] 5 U.S.C. § 706 (1976).

[66] The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Id.

[67] Although no APA provision states expressly the appropriate standard of review for informal rulemaking it is widely assumed that 5 U.S.C. § 706(2)(A) (1976), which states: "The reviewing court shall . . . set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," is applicable to informal rulemaking. *See* Recommendations of the Administrative Conference of the

ceedings and (2) "unsupported by substantial evidence"[68] when either formal rulemaking is involved or the agency's authorizing legislation requires it.[69] Courts have applied both standards to informal rulemaking.[70]

1. The Traditional Tests

The potential differences between these two standards lie in the review of the agency's factual findings.[71] The Supreme Court has defined the traditional substantial evidence standard as mandating a determination of whether the agency's decision was reasonably supported by the record as a whole.[72] The reviewing court must ensure that evidence used in making predictions was adequately adduced and rationally applied. Exercising review under this test, a court cannot disturb the factfinder's resolution of conflicting evidence merely because it is "clearly erroneous," but can only upset those determinations which are "patently unreasonable."[73] Additionally, courts are less inclined to delve into the

United States, 1 CFR § 305.74-4 (1977); Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968).

[68] 5 U.S.C. § 706(2)(E) (1976). ("The reviewing court shall . . . set aside agency action . . . found to be . . . unsupported by substantial evidence." *Id.*).

[69] The introductory clause of section 10, 5 U.S.C. § 701(a)(2) (1976), limits the application of section 10(e) by providing that, "This chapter applies . . . except to the extent that . . . agency action is committed to agency discretion by law." This section means that to some extent agency action may be committed to agency discretion with no judicial review, but that such delegation need not be an all-or-none proposition. A reviewing court may not set aside an agency's decision to the extent that discretion is committed to the agency. This has been held to be a narrow exception and is applicable only in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). *See also* Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 58-83 (1965); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

[70] *See, e.g.*, Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973) (substantial evidence test); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973) (arbitrary and capricious test); Phillips Petroleum Co. v. FPC, 475 F.2d 842 (10th Cir. 1973) (substantial evidence test).

[71] Under both standards the agency's policy choices are reviewed under the arbitrary and capricious standard which allows a court to defer to agency discretion if the policy choice is rationally related to the factual findings. SEC v. Chenery Corp., 318 U.S. 80 (1943). *See also* Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199. The Supreme Court in Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 284-45 (1974), approved this unsymmetrical treatment of fact and policy questions.

[72] Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

[73] *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.02 (1958).

record when its factual underpinning is not "provable" within the judiciary's accepted definition of "proof."[74] By contrast, the traditional arbitrary and capricious standard was limited to merely determining whether the agency possessed sufficient authority to issue the rule and whether a rational basis for the rule exists,[75] *i.e.*, whether any set of facts could be imagined to support the rule in question.[76]

2. The Appropriate APA Standard of Review for Informal Rulemaking

The District of Columbia Court of Appeals in *Automotive Parts & Accessories Ass'n v. Boyd*[77] held that, unless clearly required by the agency's organic statute, the substantial evidence test is inapplicable to informal rulemaking.[78] In this case, manufacturers of automobile accessories challenged a regulation promulgated under the National Traffic and Motor Vehicle Safety Act,[79] which required all new cars to be equipped with frontseat head restraints.[80] The manufacturers argued that the act's requirement that the agency file with the court "the record of the proceedings on which the Secretary based his order"[81] necessitated formal rulemaking. The court rejected this argument and approved section 553 procedures.[82] The "record" requirement was met by filing all information the agency had before it when it made its decision.[83] In dicta, the court stated that the substantial

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[74] *See, e.g.*, International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973), where EPA was attempting to predict future events with no past experience on which to rely and with sketchy and speculative factual information on the available emission control technology. Similarly, in Industrial Union Dep't v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974), the Department of Labor was attempting to promulgate an exposure standard based on a problematical prediction of the percentage of asbestos workers who would develop fatal cancers in two to three decades if subjected to some unknown level of exposure through a biological mechanism as yet unidentified.

[75] *See, e.g.*, United States v. George S. Bush & Co., 310 U.S. 371 (1940); Superior Oil Co. v. FPC, 322 F.2d 601 (9th Cir. 1963), *cert. denied*, 377 U.S. 922 (1964). *See* L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 564 (1965).

[76] Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935).

[77] 407 F.2d 330 (D.C. Cir. 1968).

[78] *Id.* at 337. *Accord*, Bunny Bear, Inc. v. Peterson, 473 F.2d 1002 (1st Cir. 1973); Boating Indus. Ass'n v. Boyd, 409 F.2d 408 (7th Cir. 1969).

[79] 15 U.S.C. §§ 1381-1390 (1976).

[80] Motor Vehicle Safety Standard No. 202, 33 Fed. Reg. 2945 (1968).

[81] 15 U.S.C. § 1394(a) (1976).

[82] 407 F.2d at 338.

[83] *Id.* at 337.

evidence test is applicable only to formal rulemaking and adjudication. The court in describing the appropriate standard of review under section 706(2)(A) stated: "The paramount objective [of judicial review] is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future."[84] However, the Sixth Circuit obfuscated this clear analysis by reaching the opposite conclusion in *Chrysler Corp. v. Department of Transp.*[85] The court held that the applicable scope of review under the National Traffic and Motor Vehicle Safety Act is the substantial evidence test and rejected the test set out in *Automotive Parts* as providing "virtually no review at all."[86]

The court in *City of Chicago v. FPC*[87] described the purpose of reviewing rulemaking actions as determining whether a reasoned conclusion from the whole record could support the premises upon which the agency decision rests.[88] The substantial evidence test in the court's view is an application of this analysis to a particular kind of record—one containing specific information tested by cross-examination.[89] The court in effect obliterated all distinctions between judicial review of formal and informal rulemaking except the name. This broad scope of review was based on an analysis of the nondelegation doctrine. Although rulemaking is a quasi-legislative function, it is not the equivalent of legislative action, and agency findings of fact are not accorded the same deference as legislative conclusions.[90] If an agency's findings were exempt from judicial review, the law governing delegation would be "little more than formalistic mutterings," as it would make little sense to require the legislature to articulate intelligible standards to govern agency action of an authentic inquiry into whether those standards are being complied with *vel non* is foreclosed.[91] The court concluded that inquiry into the factual predicate for adopted rules is authorized and that the

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[84] *Id.*
[85] 472 F.2d 659 (6th Cir. 1972).
[86] *Id.* at 667.
[87] 458 F.2d 731 (D.C. Cir. 1971).
[88] *Id.* at 744.
[89] *Id.*
[90] *Id.* at 742.
[91] *Id.*

nature of the inquiry depends on the nature of the record on review.[92]

These cases demonstrate the lack of consensus as to the appropriate standard of review.[93] This disagreement has helped erode the traditional distinction between the respective standards of judicial review of rulemaking.[94] The merging of reviewing standards has rendered mechanical labeling of the appropriate reviewing standard a Sisyphean effort, which is often counterproductive because it obscures the mandatory flexibility of judicial review.[95] The label used to identify the type of review is not as important as the judicial philosophy underlying review.

The increased judicial vigilance[96] demonstrated in rulemaking actions and the consequent reduction in the deference accorded agency discretion[97] stems from the emergence of broad and

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[92] *Id.* at 743.

[93] The Supreme Court has further obfuscated the matter by apparently equating formal and informal rulemaking and assuming that substantial evidence is the appropriate standard for reviewing informal rulemaking. *See* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 753 (1972); United States v. Midwest Video Corp., 406 U.S. 649, 671-73 (1972); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414-15 (1971). However, Camp v. Pitts, 411 U.S. 138, 142 (1973), clarifies the situation by limiting judicial review of informal rulemaking to the arbitrary and capricious standard of section 706(2)(A). *See* Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L.J. 1750, 1757 (1975).

[94] *See* Associated Indus. of N.Y. State, Inc. v. United States Dep't of Labor, 487 F.2d 342 (2d Cir. 1973) ("[I]n the review of rules of general applicability made after notice and comment rulemaking, the two criteria do tend to converge." *Id.* at 349-50.). National Nutritional Foods Ass'n v. Weinberger, 512 F2d 688 (2d Cir. 1975) (Lumbard, J., concurring) (agency abuses discretion and acts arbitrarily and capriciously if its actions are not supported by substantial evidence. *Id.* at 705).

[95] *See* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.01 (1976) (judges accept or reject agency rules not by applying a formula of judicial review, but by discerning the level of care used in the development of the rule); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (lack of certainty in the standard of judicial review reflects the impossibility of a single formula describing all factors involved in judicial review). *Cf.* City of Chicago v. FPC, 458 F.2d 731, 739 (D.C. Cir. 1971).

[96] *See* L. JAFFEY, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 589 (1965). The new judicial activism is in marked contrast to the prevalent attitude of earlier days succinctly epitomized by Chicago B & Q Ry. v. Babcock, 204 U.S. 585 (1907), wherein the Supreme Court upheld the "sensible judgments" of a board of tax assessors on the ground that they "express an intuition of experience which outruns analysis." *Id.* at 598.

[97] Prior to Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), reviewing courts, even when utilizing the substantial evidence standard, often felt constrained to uphold the agency's determination if it was supported by some evidence anywhere in the record "without reference to how heavily the countervailing evidence may preponderate." *Id.* at 481. *Universal Camera* changed this attitude by requiring that the decision be supported by the record "as a whole."

sweeping rulemaking authority. Agencies can affect individual rights and interests throughout society without any type of hearing,[98] and this broad authority evokes an apprehensive judicial reaction. The broad sweep of the statutes also promotes a heightened belief in the importance of providing participation by interested parties and careful articulation of agency methodologies and conclusions. Perhaps the emphasis on an increased opportunity for participation in the rulemaking arena is a manifestation of an analogous phenomenon in other areas. Since *Goldberg v. Kelly*,[99] there has been a torrent of due process cases in disparate areas of governmental activity in which the Supreme Court has expanded the hearing requirement.[100] However, the case which directly propagated rigorous scrutiny of administrative actions is the Supreme Court's opinion in *Citizens To Preserve Overton Park v. Volpe*.[101]

3. *Overton Park*'s Substantial Inquiry

Although dealing with judicial review of an administrator's informal decision and not informal rulemaking, the *Overton Park* decision has been repeatedly applied to rulemaking proceedings. This case dealt with the scope of the Secretary of Transportation's authority under the Federal Highway Act, which authorized expenditure of federal funds to construct highways through public parks only if no "feasible and prudent" alternative exists and if such program is designed to minimize harm to the park.[102] The Secretary concurred in the judgment of local officials that the highway should be built through the park, but did not include a statement of his factual findings in his decision. The district court and the court of appeals upheld the Secretary's determination, believing that the Secretary had broad discretion and that reviewing courts had a narrow scope of review.[103] The Supreme Court reversed, rejecting these contentions and subjecting the Secretary's decision to judicial review under the APA.[104]

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[98] *See* 5 U.S.C. § 553(c) (1976).

[99] 397 U.S. 254 (1970).

[100] *See, e.g.*, North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Morrissey v. Brewer, 408 U.S. 471 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972).

[101] 401 U.S. 402 (1971).

[102] 49 U.S.C. § 1653(f) (1970).

[103] 401 U.S. at 409.

[104] Petitioners were entitled to judicial review under 5 U.S.C. § 701 (1976), which

The Supreme Court went on to order the district court to conduct a plenary review of the Secretary's decision[105] based on the full administrative record that was before the Secretary when he made his decision. If the record does not disclose the determinative factors in the Secretary's construction of the evidence, the district court was empowered to require additional explanation, even to the extent of requiring administrative officials to give testimony explaining their actions.[106]

The critical portion of the decision dealt with the standard of judicial review under APA section 706. The Court held that despite the inapplicability of the substantial evidence test to the Secretary's decision, "the generally applicable standards of § 706 require the reviewing court to engage in a *substantial inquiry*."[107] After recapitulating the aphorism that the Secretary's action is entitled to a presumption of regularity, the Court declared that "that presumption is not enough to shield his action from a thorough, probing, in-depth review."[108]

Under *Overton Park*, a court has three functions to fulfill in reviewing agency action. First, it must delineate the scope of the agency's authority and discretion and then determine whether the agency acted within the scope of its authority by scrutinizing the facts.[109] Second, the court must find that the actual choice

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provides that the action of "each authority of the Government of the United States" is subject to judicial review unless there is a statutory prohibition on review or where "agency action is committed to agency discretion by law." The Court held that there was "law to apply" and the "committed to agency discretion" exemption of 5 U.S.C. § 701(a)(2) was inapplicable. 401 U.S. at 410.

[105] On remand, the district court conducted a "substantial inquiry" by mandating diverse procedural safeguards. Citizens To Preserve Overton Park v. Volpe, 335 F. Supp. 873 (W.D. Tenn. 1972). The court ruled that the plaintiffs were entitled to discovery to determine whether the record was complete and to explore the mental processes of the agency personnel. *Id.* at 877. They were also entitled to adduce expert testimony to show that feasible and prudent alternative routes existed and to evaluate the Secretary's investigation of such alternative routes. *Id.* Finally, a plenary hearing was conducted which consumed 25 trial days and admitted 240 exhibits and 287 pages of posttrial briefs. *Id.* at 878.

[106] 401 U.S. at 420. Although such an inquiry into the mental processes of the decisionmakers is usually to be avoided, if there are no contemporaneous formal findings, such an inquiry may be the only effective method of judicial review. *Id. See* Nathanson, *Probing the Mind of the Administrator: Hearing Variations & Standards of Judicial Review Under the Administrative Procedure Act & Other Federal Statutes*, 75 COLUM. L. REV. 721 (1975).

[107] 401 U.S. at 415 (emphasis added). Informal rulemaking is reviewed under the same standard. 5 U.S.C. § 706(2)(A) (1976).

[108] 401 U.S. at 415.

[109] *Id.* at 415-16.

made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in order to uphold the agency action. To make this finding the court must again scrutinize the facts to determine whether the "decision was based on a consideration of the relevant factors" and whether there has been a "clear error of judgment."[110] In both cases, the inquiry into the facts must be "searching and careful."[111] Finally, the court must determine whether the agency followed the necessary procedural requirements.[112] In essence, this three-part analysis advocates a vigilant approach to agency review in which the court does not make the ultimate decision, but insists that the agency take a hard look at all relevant factors.

4. Application of *Overton Park* to Informal Rulemaking

No firm consensus exists for the method of applying the *Overton Park* standard of review to informal rulemaking or for the proper amount of scrutiny to be used in reviewing the factual basis of agency action.[113] The opinions presented in *Ethyl Corp. v. EPA*[114] demonstrate a continuum of views on this issue by contrasting the views of the judges of the District of Columbia Court of Appeals.[115] This case involved a petition to review an EPA order under the Clean Air Act requiring an annual reduction in the lead content of gasoline.[116]

Judge Wright, writing for the majority,[117] affirmed the Administrator's decision and rejected petitioner's objection that three notice and comment periods were procedurally defective.[118] In upholding the administrative action, Judge Wright described

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[110] *Id.* at 416.

[111] *Id.*

[112] *Id.* at 417.

[113] *See generally* Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L.J. 1750 (1975).

[114] 541 F.2d 1 (D.C. Cir. 1976).

[115] The opinions of this court have special importance for administrative law because it is an optional venue under a plethora of regulatory statutes, it has exclusive jurisdiction over the actions of EPA under the Clean Air Act, 42 U.S.C. § 1857h-5 (1970 & Supp. V 1975), and it has attracted the largest share of environmental litigation. *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1310 (1975).

[116] 42 U.S.C. § 1857f-6c(c)(1)(A) (1970).

[117] Judge Wright's majority opinion was joined in by Chief Judge Bazelon and Circuit Judges McGowan, Leventhal, and Robinson.

[118] 541 F.2d at 48.

the standard of review of informal rulemaking[119] as "a highly deferential one" which "presumes agency action to be valid," but which is not merely superfluous or a rubberstamp for the agency decision.[120] He went on to state that no inconsistency exists between a deferential standard of review and a requirement that the reviewing court involve itself in even the most complex evidentiary matters; the more technical the case, the more intensive must be the court's effort to comprehend the evidence.[121] This immersion in the evidence is designed solely to enable the court to determine whether the agency decision was rational and based on consideration of the salient factors. Judge Wright in analyzing *Overton Park* concluded that it no more than affirmed the tradition rational basis test.[122]

> [A]fter our careful study of the record, we must take a step back from the agency decision. We must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain *minimal standards of rationality*.[123]

Judge Leventhal, in his concurrence, interpreted the majority opinion as advocating no substantive review at all.[124] He stated that this type of review does not fulfill the reviewing court's mandate of ensuring that the agency outlines its objectives in a rational and nondiscriminatory manner so that its delegated power is exercised only within its statutory parameters.[125] Judge Leventhal stated that when an agency is confronted with a factually based challenge, the court must examine the evidence and findings of fact to ensure that the evidentiary fact findings are supported by the record and that they provide a rational basis for inferences of ultimate fact.[126] If the agency's decision is within a zone of reasonableness, though not the one the court would have

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[119] Judge Wright assumed that informal rulemaking under 5 U.S.C. § 553 (1976) is reviewed under 5 U.S.C. § 706(2)(A) (1976), under which agency action is upset if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* note 67 *supra*.

[120] 541 F.2d at 34.

[121] *Id.* at 34-35.

[122] *Id.* at 34-35 n.74.

[123] *Id.* at 36 (footnote omitted; emphasis added).

[124] *Id.* at 68 (Leventhal, J., concurring without reservation).

[125] *Id.* at 69.

[126] *Id.*

chosen, it must be sustained. One of the least intrusive but most effective methods of review is to have the agency comply with certain minimal procedural safeguards. These procedures will vary from problem to problem and must be fitted in an *ad hoc* fashion to the issues at hand.[127]

Judge Wilkey, in his dissenting opinion,[128] applied *Overton Park's* substantial inquiry analysis by focusing on the "clear error of judgment" language, which allows a reviewing court to overturn agency action even if there is evidence in the record supporting the agency decision.[129] After reviewing the whole record, a court may conclude that the agency erred in exercising its rulemaking power, because the evidence against the agency's conclusion is overwhelming and persuasive, the agency's approach is one-sided, the decisionmaking process is flawed, or an essential point or element is missing in the logical progression towards the agency's conclusion.[130] The court's task on review is "to explore the evidentiary record to determine whether the statements and conclusions of fact have an adequate basis in the underlying evidence" and to determine whether the agency decision is "principled and reasonable."[131] In applying this standard, the dissent concluded that the Administrator had made clear errors in his analytical and evaluative methodology and in his decisionmaking process. Several vital links in EPA's chain of reasoning were unsupported, its conclusions were thus arbitrary and capricious, and the court's proper action should have been to remand.

Judge Skelly Wright, another judge in this circuit, has stated that APA section 706 requires substantive review.[132] The arbitrary and capricious standard does not apply to the fact-finding, fact-predicting, and factual reasoning process which leads an agency to adopt a rule. A contrary interpretation of this standard would reduce judicial review to "a relatively futile exercise in formal-

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[127] *See generally* Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974).

[128] 541 F.2d at 70 (Wilkey, J., dissenting). Judge Wilkey was joined in this opinion by Circuit Judges Tamm and Robb.

[129] *Id.* at 98.

[130] *Id.*

[131] *Id.* at 100.

[132] Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974).

ism."[133] However, Judge Wright went on to state that a reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence and emphasized that a court may not substitute its judgments for the agency's.[134]

D. *Judicial Expansion of Section 553 Requirements*

Courts have begun to explore the full reach of section 553 requirements. An expanded interpretation of this section's requirements has resulted from the confluence of constraining administrative discretion, making factual determinations in informal rulemaking proceedings, and reviewing administrative action. Courts reinterpreted section 553 requirements in order to effectuate these three principles; indeed, some courts read the statutory requirements so expansively as to be accused of creating a new type of rulemaking unconnected with the APA.[135] The original decisions mandating hybrid rulemaking procedures were premised on basic considerations of fairness,[136] because the courts did not have the crucial element of *Overton Park's* aggressive technique of judicial review and were forced to rely upon their misgivings about the extent of administrative discretion and the adequacy of notice and comment procedures to answer factual questions. After *Overton Park,* the courts gained momentum in prescribing adjudicatory procedures. This momentum was completely dissipated by the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[137] The three following subsections outline the presently existing requirements of section 553.

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[133] *Id.* at 390.

[134] *Id.* at 391.

[135] *See* FitzGerald, *Mobil Oil Corp. v. Federal Power Commission and the Flexibility of the Administrative Procedure Act,* 26 AD. L. REV. 287 (1974).

[136] Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.) (en banc), *cert. denied,* 385 U.S. 843 (1966).

[137] No. 76-419 (Sup. Ct. April 3, 1978). Before explaining the present judicial interpretation of section 553, a caveat is necessary. The Supreme Court severely chastised the Court of Appeals and minced no words in its condemnation of the appellate court's interpretation of the administrative-judicial relationship. Consequently, other inroads which courts have made on the administrative process may be in jeopardy and a court may be acting *ultra vires* if it imposes any requirement in excess of the bare minimum requirements of section 553. Courts may hereafter be hesitant to broadly interpret any of the procedural requirements of section 553, but may focus more closely on the adequacy of the record. *See* slip op. at 13-14 n.14, 22.

1. Inadequate Notice

Agencies intending to promulgate rules under the auspices of section 553 must publish a general notice of proposed rulemaking in the *Federal Register*. The notice must include *inter alia*, "either the terms of substance of the proposed rule or a description of the subjects and issues involved."[138] The legislative history of the APA explains that this requirement was included because public rulemaking would be of little value either to interested parties or to the agency unless notice is promulgated in advance so that interested parties could provide input.[139]

Mobil Oil Corp. v. FPC,[140] demonstrates how agency action can be overturned for failing to comply with the notice requirement. In *Mobil Oil*, the Federal Power Commission published a notice that it was considering the adoption of a general policy statement concerning transportation rates for natural gas.[141] The notice concerned only the wisdom of establishing such a policy and comments were limited to that issue. After the agency received comments from concerned groups, meetings were held with some interested parties. At the conclusion of the meetings, further conferences were deferred, and shortly thereafter the FPC issued an order setting generally applicable rates for the transportation of hydrocarbons[142] without benefit of the requisite technical and factual data on costs ordinarily required in ratemaking.[143] The court reversed the FPC order and remanded to the Commission for further proceedings because the Commission's notice was inadequate for a proceeding fixing specific mandatory rates.[144]

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[138] 5 U.S.C. § 553(b)(3) (1976).

[139] S. Doc. No. 248, 79th Cong., 2d Sess. 18 (1946).

[140] 483 F.2d 1238 (D.C. Cir. 1973).

[141] Notice of proposed statement of general policy concerning charges for transporting liquids and liquifiable hydrocarbons. 33 Fed. Reg. 2860 (1968).

[142] Order establishing charges for transporting liquids and liquifiable hydrocarbons. 37 Fed. Reg. 2954 (1972).

[143] 483 F.2d at 1244-45.

[144] *Id.* at 1263. Another panel of the same court in American Pub. Gas Ass'n v. FPC 498 F.2d 718 (D.C. Cir. 1974), held that the FPC's use of a rulemaking format that combined written statements, public hearings to receive oral statements, and written rebuttal submission was adequate. The *Mobil* decision was distinguished on the ground that the notice had been inadequate and the FPC had relied on data obtained by informal and, to some extent, *ex parte* procedures. By contrast, the FPC in *American Public Gas* had clearly stated the issues and had given the parties an adequate opportunity to participate. *Id.* at 723.

Thus, the notice will be scrutinized on review to determine if the enacted rule is outside the scope of the proposed rulemaking notice, because one of the functions of judicial review is to determine if the agency considered all relevant comments prior to enactment of the rule.[145] If potential participants are unaware or misapprehend the scope of a proceeding, they are unable to submit comments, thus depriving the agency of their input.

The notice of proposed rulemaking must be "sufficiently descriptive of the 'subjects and issues involved' so that interested parties may offer informed criticism and comments."[146] The requirement of giving notice of the "issues involved" could be read as mandating that agencies disgorge the data and policies underlying the proposed rule.[147] Notices should contain the proposed regulation and a statement of its factual premises and methodology, including its tentative empirical findings and a description of the critical experiments and methodological techniques.[148] All significant information developed during the rulemaking must be made available to the participants prior to issuance of the final regulations. If an agency does not fully comply with these directives, its decision can be overturned for failure to observe "a procedure required by law"[149] or because objectors are denied an opportunity to participate (by probing the agency's analysis and by providing information).

The decision in *International Harvester Co. v. Ruckelshaus*[150] emphasized the importance of promulgating a complete notice which indicates the major issues to be resolved, and how notice relates to the other requirements of informal rulemaking. In this case, EPA decided not to defer for one year the effective date of the Clean Air Act's 1975 automobile emission control standards. The act provided that engines manufactured in model year 1975 should have a ninety percent reduction in the emission of carbon

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[145] *See* text accompanying notes 212-230 *infra*.

[146] Ethyl Corp. v. EPA, 541 F.2d 1, 48 (D.C. Cir. 1976) (quoting Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) and Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1251 n.39 (D.C. Cir. 1973)).

[147] *See* Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking*, 26 AD. L. REV. 999, 204 (1974).

[148] International Harvester Co. v. Ruckleshaus, 478 F.2d 615 (D.C. Cir. 1973).

[149] 5 U.S.C. § 706(D) (1976).

[150] 478 F.2d 615 (D.C. Cir. 1973).

monoxide and hydrocarbons over 1970 model engines.[151] A one year suspension from these standards could be granted by EPA if it determined after a "public hearing" that the technology to meet the 1975 standards was not available.[152] As EPA based its determination on a complex "prediction methodology" never revealed to the automobile companies, the court remanded the case to EPA for further consideration and imposed upon the agency the requirement of providing "the parties . . . [an] opportunity . . . to address themselves to matters not previously put before them."[153]

The remand was premised on the court's perception that the notice requirement of APA section 553 was not adequately complied with, because the prediction methodology should have been published prior to EPA's final decision.[154] As the automobile industry raised serious questions about EPA's methodology, it should have been provided with an opportunity to challenge the critical steps of EPA's reasoning process. The auto companies had put forth all of their available data, but EPA merely rebutted it with their prediction methodology without any supporting data. If this were allowed to be sufficient, the information adduced by the auto companies would be effectively meaningless, and they would be effectively precluded from challenging EPA's data.

In *Portland Cement Ass'n v. Ruckelshaus*,[155] EPA's regulations were rejected because the petitioner was unable to obtain critical information which formed a partial basis for the final regulations.[156] The petitioners were, thus, effectively denied an adequate opportunity to comment on the proposed standards because of EPA's failure to disclose the detailed findings and

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[151] 42 U.S.C. § 1857f-1(b)(1)(A) (Supp. V 1975).

[152] 42 U.S.C. § 1857f-1(b)(5)(D) (Supp. V 1975).

[153] 478 F.2d at 649.

[154] The necessities of judicial review also provided impetus for the court's expansive reading of the notice requirement. Neither the majority opinion by Judge Leventhal nor the concurrence by Chief Judge Bazelon attempted to describe the standard of review in traditional APA terms, *i.e.*, arbitrary or capricious or substantial evidence. However, both judges agreed that the function of judicial review is to require reasoned decisionmaking to assure that the agency procedures provide a structure for agency decisionmaking, and both evinced a growing dissatisfaction with the traditional rational basis standard. 478 F.2d at 649.

[155] 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

[156] *Id.* at 392-93.

procedures of relevant EPA-sponsored tests.[157] In referring to section 553 requirements the court states, "Obviously a prerequisite to the ability to make meaningful comment is to know the basis upon which the rule is proposed."[158] The court stated that information forming the basis of a rule should be disclosed as early as possible, generally at the time of issuance.[159]

2. Failure to Provide an Opportunity to Participate

Section 553(c) provides that after notice the agency must give "interested persons *an opportunity to participate* in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[160] Hybrid rulemaking was partially premised on and can be partially explained by this statutory requirement.

a. *The rationale of hybrid rulemaking*

Courts which mandated hybrid procedures refused to apply the *expressio unius est exclusio alterius* principle of statutory construction to section 553(c) procedural safeguards. On the contrary, they attempted to expand this requirement beyond recognition. The adjudicatory procedures imposed by some courts were designed to facilitate judicial review and to assure meaningful participation with consequent reasoned decisionmaking and analysis by the agency.[161]

The court in *Natural Resources Defense Council, Inc. v. NRC*[162] stated that participation under this section must be meaningful: "[W]e would expect that [the NRC] will endeavor to *allow meaningful participation* by the public interest groups whose limited resources often relegate them to the role of contesting the studies and conclusions of industry participants."[163] Par-

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[157] *Id.* at 402.

[158] *Id.* at 393 n.67.

[159] *Id.* at 394.

[160] 5 U.S.C. § 553(c) (1976) (emphasis added).

[161] S. Doc. No. 248, 79th Cong., 2d Sess. 19-20 (1946). Some of the hybrid rulemaking cases partially relied on the legislative history which explains that because an agency is not a representative entity, "public participation . . . in the rulemaking process is essential to inform [the agency] and to afford safeguards to private interests." *Id.*

[162] 539 F.2d 824 (2d Cir. 1976), *vacated and remanded to determine mootness*, 434 U.S. 1030 (1978). This decision was vacated as moot in light of NRC's termination of GESMO (Generic Environmental Statement Mixed Oxide Fuel). 42 Fed. Reg. 65,334 (1977).

[163] 539 F.2d at 839 (emphasis added). *Accord*, Portland Cement Ass'n v. Ruckelshaus,

tially based on such a premise, courts determined what procedures would allow participation to be meaningful and required the "hybrid modes of procedure most appropriate to the issues and circumstances."[164] Judge Wikley in *Mobil Oil Corp. v. FPC*[165] reasoned that if a court knows the degree of evidentiary support required to establish a factual predicate, the court would know the type of rulemaking procedures which must be designed to create this support and which would be required to uphold the agency's decision.[166] The required procedure is not contingent upon the classification of the activity, but depends on the importance of the issues before the agency and the kinds of questions involved.[167] Complex questions should be "resolved in the crucible of debate through the clash of informed but opposing scientific and technological viewpoints."[168] However, neither a formal hearing nor cross-examination is required if an adequate opportunity to participate in developing the relevant evidence in an "adversary setting" exists.[169] The court in *Walter Holm & Co. v. Hardin*,[170] stated that an opportunity to present an effective presentation is essential to ensure that the agency will take a hard look at the problems in light of the written submissions.[171] Judge Leventhal, summarizing what adjudicatory procedures are required, stated: "What counts is the reality *of an opportunity to submit an effective presentation,* to assure that the Secretary and his assistant will take a hard look at the problems in light of those submissions."[172]

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486 F.2d 375, 393 n.67 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631 (D.C. Cir. 1973).

[164] Appalachian Power Co. v. EPA, 477 F.2d 495, 500 (4th Cir. 1973).

[165] 483 F.2d 1238 (D.C. Cir. 1973).

[166] *Id.* at 1257.

[167] Appalachian Power Co. v. *EPA*, 477 F.2d 495, 500-01 (4th Cir. 1973). *Cf.* Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

[168] Ethyl Corp. v. EPA, 541 F.2d 1, 54 (D.C. Cir. 1976).

[169] American Pub. Gas Ass'n v. FPC, 498 F.2d 718, 722-23 (D.C. Cir. 1974).

[170] 449 F.2d 1009 (D.C. Cir. 1971).

[171] *Id.* at 1016. The court here was also concerned that the Secretary of Agriculture was abusing his discretion by circumventing the statutorily imposed hearing procedure under section 8c of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c (1976). As a means of limiting this discretion, the court of appeals directed the district court to issue a declaratory judgment that petitioners were entitled to a hearing with a limited right of cross-examination on "crucial" issues. *Id.* The court stated that where petitioners made "a not insubstantial claim that an effective showing requires oral presentation to Department officials . . . this right is available to them." *Id.*

[172] Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

The court in *Mobil Oil Corp. v. FPC*[173] explained its rationale[174] for imposing hybrid procedures by stating that the APA is not dichotomized into two mutually exclusive procedures; rather, it outlines a continuum of available hybrid procedures located between the minimum and maximum articulated in section 553 and sections 556 and 557, respectively.[175] Flexibility in fitting administrative procedures to particular functions was declared to be the touchstone in evaluating the APA.[176] This flexible attitude towards procedure is designed to assist eclectic agencies in meeting the multifarious situations arising as a result of their diverse statutory authorization. However, the court failed to recognize an unwanted ramification of this analysis, viz., administrative agencies would be placed in the quandry of choosing in advance the appropriate procedure from a limitless variety of permutations within the APA's boundaries. Once the putative dichotomy under the APA is abandoned, the type of procedures in a rulemaking proceeding becomes a litigable issue. The agency could be certain that it utilized the proper procedural devices only in an ex post facto fashion after the rendering of an appellate opinion. A similar analysis prompted the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[177] to negate any further judicial imposition of adjudicatory procedures.

b. Vermont Yankee

The Vermont Yankee Nuclear Power Corporation applied for a license to operate its nuclear plant, and, upon NRDC's objection to the granting of the license, a hearing was held on the

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[173] 483 F.2d 1238 (D.C. Cir. 1973).

[174] Another potential rationale was that the section 553(c) requirement of giving interested persons an opportunity to participate "with or without opportunity for oral presentation," grants the agency discretion to decide whether such an opportunity will be granted; but since a court is authorized to set aside agency action found to be "an abuse of discretion," denial of such a request can be held to be reversible error. *See* Chemical Leaman Tank Lines, Inc. v. United States, 368 F. Supp. 925, 946 (D. Del. 1973). Thus, whenever a rulemaking proceeding involves a contested factual issue which is crucial in determining the reasonableness of the rule and which is readily susceptible to the taking of evidence, an agency may abuse its discretion if it fails to conduct an evidentiary hearing. *See* Claggett, *Informal Action—Adjudication—Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51, 78, 86.

[175] 483 F.2d at 1251.

[176] *Id.*

[177] No. 76-419 (Sup. Ct. April 3, 1978).

application.[178] The licensing board excluded testimony involving the environmental effects of operations to reprocess and dispose of nuclear fuel as not required under NEPA and granted the operating license. Subsequently, a generic rulemaking was initiated by the Commission to specifically deal with the question of these environmental effects. Although discovery and cross-examination were not allowed, extensive background documents were publicly available, all participants were granted a reasonable opportunity to present their positions, written and oral statements were received, and all persons giving oral statements were subject to cross-examination by the hearing board.[179] After the hearing was completed, the Commission approved the rulemaking procedures, adopted a rule based on the data collected, and declared that, because the environmental effects are "insignificant," the NEPA benefit-cost analysis would not be affected and the granting of Vermont Yankee's operating license would not have to be reexamined.[180] The District of Columbia Court of Appeals reversed and remanded the portion of the order which adopted a regulation concerning nuclear waste, held that these environmental effects had to be analyzed in each licensing proceeding, and, consequently, reversed the grant of Vermont Yankee's license.[181]

After reading the lower court as invalidating the regulation because of the inadequacy of the procedures employed, the Supreme Court reversed. The Court held that in the absence of constitutional constraints or extremely compelling circumstances, "the administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' "[182] The Court left no doubt but that the agencies, not the courts, determine what extra procedural devices should be employed.[183]

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[178] Consumers Power Co. v. Aeschliman et al., No. 76-528 (1978) (concerning review of the Commission's procedures in a formal adjudicatory proceeding).

[179] No. 76-419, slip op. at 6-7 (Sup. Ct. April 3, 1978).

[180] *Id.* at 8. The Commission also vacated the Appeal Board decision in *Vermont Yankee* insofar as it differed from the rule as adopted. The Commission decided to require licensing boards to consider the environmental effects as they are enumerated in Table S-3, 10 C.F.R. 51.20(e) (1977).

[181] Natural Resources Defense Council, Inc. v. NRC, 547 F.2d at 641, 655.

[182] *Id.* at 21 (citing FCC v. Schreiber, 381 U.S. 279, 290 (1965), quoting from FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940)).

[183] No. 76-419, slip op. at 24 (Sup. Ct. April 3, 1978).

The Court held that a court cannot review and overturn a rule-making proceeding on the basis of what procedural devices were employed, so long as the agency employs at least the APA minimums.[184] The Court went on to explain that the proper scope of judicial review of agency action comprehends a determination of the adequacy of the record.[185] If the record is deemed inadequate, it will be remanded, and the agency will be allowed to "exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the

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[184] *Id.* at 26. In order to evaluate the effect of the Court's opinion, the cases relied on by it must be analyzed. The Supreme Court was interpreting the requirements of the APA, but none of the holdings relied on by the Court [for the proposition that the APA does not authorize courts to prescrive prescribe procedures] are on point. FPC v. Transcontinental Gas Pipeline Corp., 423 U.S. 326 (1976), dealt with a court of appeals order which directed the FPC how to investigate a claim and which deferred its review of the Commission's order pending the investigation. This case was based on an interpretation of section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) (1970), which stated that the Commission must have the opportunity to review its order based on the evidence it obtained after remand. The appellate court's method directly contravened the statutory procedure.

Similarly, FCC v. Schreiber, 381 U.S. 279 (1964), involved an interpretation of section 4(j) of the Communications Act of 1934, 47 U.S.C. § 154(j) (1958), which expressly grants the FCC broad discretion in how to conduct its proceedings to grant licenses. In this case, the appellate court totally usurped the Commission's function in direct contravention of the act by not only prescribing the procedures to be used, but by also making the initial decision on the evidence collected after remand. 381 U.S. at 333. FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1939), also involved an interpretation of the Communications Act and the respective roles played by the FCC and the courts under it.

Civil Aeronautics Board v. Herman, 353 U.S. 322 (1956), involved an interpretation of section 1004(b) of the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 102 1021, *as amended*, 49 U.S.C. § 644(b) (1970). The Court in Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1945) held that section 9 of the Federal Trade Comm'n Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-51 (1970)), contained no provision for judicial review of the applicability of the act to the subject company prior to judicial enforcement of a subpoena duces tecum. Wallace Corp. v. NLRB, 323 U.S. 248 (1944), involved judicial acceptance of procedures devised by the Labor Board, not the imposition of procedures by a court. Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943), construed the Walsh-Healy Act, ch. 881, 49 Stat. 2036 (1936) (current version at 41 U.S.C. §§ 35-45 (1970)), as precluding district court review of whether the act applies to the subject company when the agency authorized to administer the act applies for a subpoena duces tecum. Utah Fuel Co. v. National Bituminous Coal Comm'n, 306 U.S. 56 (1939), involved a construction of section 10(a) of the Bituminous Coal Act, ch. 127, 50 Stat. 72 (1937) (version at 15 U.S.C. § 838 (1937) eliminated), and whether a petition for an injunction stated a cause of action. Finally, Norwegian Nitrogen Co. v. United States, 288 U.S. 294 (1933), construed section 315 of the Tariff Act, ch. 356, 42 Stat. 941 (1922) (current version in scattered sections of 19,31,46 U.S.C.), which gave the Tariff Commission board authority "to adopt such reasonable procedures, rules, and regulations as it may deem necessary." Additionally, almost all of these cases preceded the APA so that they could in no way be deemed authority for a construction of it.

[185] No. 76-419, slip op. at 22 (Sup. Ct. April 3, 1978).

needed evidence and how its prior decision should be modified in light of such evidence as develops."[186] Because the Court was not certain whether the proceedings had provided a sufficient basis upon which to predicate the rule, the decision was remanded to the Court of Appeals for further review.

The Court also recognized that in exceptional circumstances, "when an agency is making a 'quasi-judicial' determination by which a very small number of persons are exceptionally affected, in each case upon individual grounds," additional procedures may be required.[187] However, this is the type of exception which would be rarely utilized in the nuclear regulatory context, because these proceedings have at least an indirect effect on many people.

3. Failure to Clarify Basis for Administrative Decision

Section 553(c) directs agencies "[a]fter consideration of the relevant matter presented" to "incorporate in the rules adopted a concise general statement of their basis and purpose." These statements must be more than mere boilerplate.[188] They should serve as detailed, substantive support for the rule by outlining crucial empirical and policy issues, pointing to support in the record for the agency decision, and responding to all significant objections to the agency's approach and methodology submitted by the participants.[189] The agency should explain its actions by articulating with reasonable clarity its reasons for decision and by identifying the significance of crucial facts.[190] If the agency does not comply with this directive, a court may refuse to approve the rule as adopted and may remand to the agency to obviate any frustration of judicial review and to ensure that the agency gave reasoned considerations to all material facts and issues.[191] This is

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[186] *Id.*

[187] *Id.* at 20. The Court failed to address how a lack of procedures would violate the APA in this context.

[188] *See* Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968), where the court warned against reading the adjectives "concise" and "general" too literally.

[189] *See, e.g.*, Pillai v. CAB, 485 F.2d 1018 (D.C. Cir. 1973); National Air Carrier Ass'n v. CAB, 436 F.2d 185, 198-99 (D.C. Cir. 1970).

[190] Greater Boston Tel. Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[191] Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

also necessary to ensure that participants are not deprived of the means to file an intelligent petition for reconsideration,[192] and that the agency retains an early opportunity to be appraised of and to correct any errors it may have committed.[193]

This requirement codifies a long line of decisions requiring agencies which issue reviewable orders to sufficiently explain their actions so that judicial review is feasible.[194] If no such requirement existed, regulations would be affirmed whenever a reviewing court could derive any reasonable rationale for their adoption.[195] Elucidation of the reasons and policies underlying an agency decision assists the judiciary in fulfilling its function of ensuring that agency action is the result of fair and reasoned decision-making.[196] A court is able to determine whether the agency gave the required consideration only if the agency articulates the basis of its decision and identifies the facts which it considered significant.[197] This aspect of the supervisory function requires more active interference with an agency if the court suspects that the agency has not taken a "hard look" at the salient problems and has not genuinely engaged in reasoned decision-making.[198] In the words of Judge Leventhal this process "combines judicial supervision with a salutory principle of judicial restraint, an awareness that agencies and courts together constitute a 'partnership' in furtherance of the public interest, and are 'collaborative instrumentalities of justice.' "[199]

The decision in *Environmental Defense Fund, Inc. v. Ruckelshaus*[200] demonstrates that agency action unaccompanied

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[192] 5 U.S.C. § 553(e) (1976) states "Each agency shall give an interested person the right to petition for the . . . repeal of a rule."

[193] Tabor v. Joint Bd. for Enrollment of Actuaries, 566 F.2d 705, 711 (D.C. Cir. 1977).

[194] *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80 (1943); American Broadcasting Co. v. FCC, 179 F.2d 437 Cir. 1949); Saginaw Broadcasting Co. v. FCC, 96 F.2d 554 (D.C. Cir. 1938).

[195] Tabor v. Joint Bd. for Enrollment of Actuaries, 566 F.2d 705, 710 (D.C. Cir. 1977).

[196] In view of this limited purpose, statements of less than ideal clarity have been held to be sufficient. *See* New York Freight Forwarders and Brokers Ass'n v. Federal Maritime Comm'n, 337 F.2d 289 (2d Cir. 1964), *cert. denied*, 380 U.S. 190 (1965).

[197] SEC v. Chenery Corp., 381 U.S. 80 (1943); City of Chicago v. FPC, 385 F.2d 629 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

[198] Pikes Peak Broadcasting Co. v. FCC, 422 F.2d 671 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 979 (1969); WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

[199] Greater Boston Tel. Corp. v. FCC, 444 F.2d 842, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[200] 439 F.2d 584 (D.C. Cir. 1971).

by an adequate explanation is not acceptable. In this case, the Secretary of Agriculture refused to suspend the federal registration for a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act.[201] Although the Secretary recognized a substantial question concerning the safety of DDT, he concluded that a summary suspension of its registration as interim relief during the administrative process was not warranted. This conclusion reflected both a factual determination and the application of a legal standard. The Secretary was required to first determine what harm may result and, based on his determination of the magnitude and probability of the anticipated harm, he must then decide whether this amounts to an "imminent hazard to the public."[202] The court of appeals remanded because the Secretary had not given "an adequate explanation for his decision to deny interim relief."[203] The Secretary should have determined whether the available information called for suspension by identifying the relevant factors and by relating the evidence to those factors in a statement of reasons.[204]

The Secretary has an obligation to limit the extent of his discretion by formulating suspension standards either by promulgating regulations or by articulating his criteria in each individual decision.[205] The reviewing court cannot assume that proper standards are implicit in every exercise of administrative discretion.[206] Chief Judge Bazelon in this decision made no attempt to designate the scope of review in traditional APA terms, but focused on the importance of providing a structure for the exercise of administrative discretion.[207] If a "framework for principled decisionmaking" is provided, the importance of judicial review will be diminished by the concomitant enhancement of the administrative process and the improvement in the quality of judicial review where judicial review is sought.[208] Judicial review can correct only the most flagrant abuses so it must operate to ensure

[201] 7 U.S.C. §§ 135-135k (1970). The statutory scheme is summarized in Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1095 nn.2-4 (D.C. Cir. 1970).

[202] 7 U.S.C. § 135b(c) (1970).

[203] 439 F.2d at 596.

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.* at 597.

[208] *Id.* at 598.

that the administrative process itself will confine and control the exercise of discretion.[209]

The court in *International Harvester Co. v. Ruckleshaus*[210] used a burden of proof analysis to reach a similar conclusion. After the automobile manufacturers established their argument for the infeasibility of the emission standards, EPA was required to sustain the "burden of adducing a reasoned presentation supporting the reliability of methodology."[211] The court remanded the case because the Administrator had failed to make such a presentation. The court thus used a burden-of-going-forward rationale as a device for controlling the risk of error. Although the court was hesitant to interfere with EPA's resolution of a scientific issue, it refused to defer blindly to whatever methodology EPA chose to support its analysis.

In *Kennecott Copper Corp. v. EPA*,[212] the court determined that the minimal requirements of section 553 were sufficient for the promulgation of national secondary ambient air quality standards under the Clean Air Act.[213] However, because EPA failed to disclose the basis of its action, the record was remanded for the Administrator to supply an implementing statement explaining his basis for the standard to aid the court's reviewing function.[214] Although the minimal requirement of incorporation of a statement of basis and purpose was complied with, the requirements of judicial review and "fairness" required additional exposition.[215] The court stated that, inherent in its reviewing responsibility is a requirement that it be given sufficient indication of the basis of the administrator's decision to enable it to consider whether the decision embodies an abuse of discretion or an error of law.[216]

Although the APA does not expressly require that agencies respond to the multifarious contentions addressed in the written comments, the necessity of providing a statement of basis and purpose has been construed to include the requirement of re-

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[209] *Id.*

[210] 478 F.2d 615 (D.C. Cir. 1973).

[211] *Id.* at 643.

[212] 462 F.2d 846 (D.C. Cir. 1972).

[213] 42 U.S.C. §§ 1857c-3, 4 (1970).

[214] 462 F.2d at 850.

[215] *Id.*

[216] *Id.* at 849.

sponding to significant adverse comments which offer specific contentions rebutting the factual foundations of the rule.[217] The court in *Rodway v. United States Department of Agriculture*[218] held that the statement of basis and purpose is designed to require the agency to prepare a reasoned response to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution culminated in the ultimate rule adopted.[219] This statement is "inextricably intertwined with the receipt of comments."[220] If a party can demonstrate that a rule was promulgated without consideration of the submitted comments, the courts will reverse the agency's action as arbitrary and capricious.[221] However, the agency can limit the extent of its response to preserve the efficiency of the rulemaking process.[222]

The proposed rule's opponent's primary method for exposing weakness or error in the agency's premises and methodology is the comments he submits. If an agency is permitted to ignore them or to denigrate their importance by providing a cursory review and no response, the agency is rendering the opponent's participation meaningless. Agencies must closely evaluate these comments to be able to prepare a response. If no response is forthcoming, the reviewing court cannot determine whether the agency took the requisite hard look, whether the decision was based on

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[217] Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973). *See* Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850 (D.C. Cir. 1972).

[218] Rodway v. United States Dept. of Agriculture, 514 F.2d 809 (D.C. Cir. 1975).

[219] *Id.* at 817; *See* Greater Boston Television Corp. v. FCC 444 F.2d 841 (D.C. Cir. 1970); *cert. denied*, 403 U.S. 923 (1971).

[220] Rodway v. United States Dept. of Agriculture, 514 F.2d 809, (D.C. Cir. 1975). In support of this statement the court reasoned:

> The APA requires the reviewing court to "review the whole record" in measuring the validity of agency action. 5 U.S.C. § 706 (1970). The whole record in an informal rule-making case is comprised of comments received, hearings held, if any, and the basis and purpose statement. In this case, there is plainly no whole record to review and the District Court could not perform its appellate function. (Footnote omitted.)

Id. at 817.

[221] *See* Consumers Union of United States, Inc. v. Consumer Prod. Safety Comm'n, 491 F.2d 810, 812 (2d Cir. 1974).

[222] *See* Owensboro On the Air, Inc. v. United States, 262 F.2d 702, 708 (D.C. Cir. 1958), where the court stated "Surely every time the [FCC] decided to take account of some additional factor it was not required to start the proceedings all over again. If such were the rule the proceeding might never be terminated." *Accord*, International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973).

a consideration of the relevant factors, or whether the agency committed a clear error of judgment.[223] When an agency decision is remanded because of failure to respond to significant comments, the remand is in aid of the judicial review function, rather than a determination that the agency order was invalid because of inadequate procedures.[224]

Cement manufacturers sought review of EPA's promulgation of stationary source standards for new or modified Portland cement plants pursuant to the Clean Air Act in *Portland Cement Ass'n v. Ruckleshaus*.[225] The court remanded because EPA failed to respond to significant adverse comments concerning legitimate problems with EPA's test methodology.[226] Agencies must demonstrate that they have given serious consideration to the submitted comments and a reviewing court may demand reasoned explanations for controversial empirical and normative agency determinations. The agency has substantial latitude over the format of the statement, but it must refer to relevant submissions by participants and should rebut or accept these submissions in an orderly fashion. The agency's duty to rationalize its decision is not met by post hoc rationalizations offered for the first time

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[223] *Cf.* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[224] The Supreme Court in Camp v. Pitts, 411 U.S. 138 (1973) (per curiam), outlined the proper procedure to be followed when a reviewing court decides that an administrative agency's stated justification for informal agency adjudication does not provide an adequate basis for judicial review. Although this case dealt with informal adjudication, the Court did not focus on the rulemaking-adjudication distinction, but rather on the appropriate method for reviewing informal agency action. *See* Tabor v. Joint Bd. For Enrollment of Actuaries, 566 F.2d 705, 710 (D.C. Cir. 1977). The appropriate standard of review was whether the Comptroller's decision was the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" as specified by APA section 706(2)(A). If the failure to explain the administrative action frustrates review, the remedy is to remand to the agency for it to provide "either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." 411 U.S. at 143.

The court in Tabor v. Joint Bd. for Enrollment of Actuaries, 566 F.2d 705 (D.C. Cir. 1977), described the procedure to be utilized when an agency involved in informal rulemaking does not incorporate a statement of basis and purpose in the adopted rules. The proper method is to vacate the rules and remand to the agency to enable it to adopt regulations accompanied by a sufficient statement. *Id.* at 711. *Accord*, Rodway v. United States Dep't of Agriculture, 514 F.2d 809 (D.C. Cir. 1975). *But cf.* National Food Ass'n v. Weinberger, 512 F.2d 688 (2d Cir. 1975) (wherein the court did not vacate the rules and remand, but allowed the agency to present the necessary statement through affidavits or testimony before the court. *Id.* at 701.)

[225] 486 F.2d 375 (D.C. Cir. 1973).

[226] *Id.* at 393.

during judicial review of the agency action.[227] Unless an adequate agency response is prepared, the court cannot determine whether the agency took the requisite "hard look" at the problem involved.

Although written comments were submitted as required,[228] this was not sufficient to develop an adequate record and fulfill the reviewing court's duty to consider whether "the decision was based on a consideration of the relevant factors and whether there had been a clear error of judgment."[229] If the record contains only ambiguous and conclusory statements about the basis of the rule, and if a participant offers precise factual contentions rebutting the factual foundation of the rule, the rule cannot be judicially approved until factual clarification is achieved.[230] If the record fosters doubt about a necessary factual predicate of an otherwise valid rule, the court is unable to affirm the rule.

Although imposing procedural requirements in excess of the APA's minimums is no longer a viable option for courts to use when reviewing informal rulemaking, it is clear that courts are no longer bowing to bland assertions of administrative discretion. Courts must still review the adequacy of the record, and agencies must recognize that broadened participation facilitates the development of an adequate record. The holdings of many hybrid rulemaking cases would not be greatly modified if the court was precluded from imposing procedures—the record would continue to be inadequate. As Judge Friendly pointed out,[231] it is ultimately of little consequence to the agency if a court invalidates the rule because the record is inadequate or if the court goes a step further and imposes *ad hoc* procedures to generate an adequate record. In both cases, the rule is invalidated and further procedures are necessary. Now that the later procedure is unavailable, the agency must devise procedures designed to rectify the record with no judicial assistance.

Increased judicial activity has encouraged agencies to modify their rulemaking procedures and decisionmaking processes, espe-

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[227] Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167-69 (1962).

[228] 486 F.2d at 393 n.67.

[229] *Id.* at 403 (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).

[230] 486 F.2d at 393-94.

[231] Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1314 (1975).

cially for rules which involve highly complex technical or scientific subject matters. Thus, if the nuclear power industry is to use rulemaking as a reform technique and as a means of self-help, it must request those procedures which are tailored to the subject matter of their proposed rule. Pure notice and comment rulemaking for important factual matters in the highly visible environmental arena, curtailed by the hybrid rulemaking cases, may not be completely revitalized, as *Vermont Yankee* merely placed the onus on each agency to determine how to devise procedures which will generate a proper record.

III. RULEMAKING AS A REFORM TECHNIQUE

In the absence of legislative reform designed to make licensing more efficient, rulemaking presents an opportunity for self-help reform. To be effective, the nuclear power industry must be willing to play the rulemaking game by proposing, rather than resisting, the appropriate degree of discovery and cross-examination in NRC rulemaking proceedings. Discovery may be used to significantly delay the proceeding, but it serves the valid purpose of providing parties with enough information to adequately advocate their interests.[232] Cross-examination contains the greatest potential for delay and it is also the most difficult device for the hearing board to control, yet it may be useful for developing an accurate and comprehensive record when complex factual issues are involved.

Prior to proposing a rule, industry proponents should select the most suitable procedural devices by considering the issues involved and the experience and capacity of the agency. One of the least intrusive, but most effective devices, is the use of interrogatories among the participants and the agency. This approach was utilized in both the GESMO[233] and the uranium fuel cycle rulemakings.[234] In both of these proceedings, written questions were more efficacious than oral ones. Unfortunately, reliance on written interrogatories is timeconsuming, the answers to technical questions are often labored and drafted by nontechnical counsel, and this device ordinarily requires followup questions to be

[232] Note, *The Use of Generic Rulemaking To Resolve Environmental Issues in Nuclear Power Plant Licensing*, 61 VA. L. REV. 869, 897 (1975).

[233] 39 Fed. Reg. 43,101 (1974).

[234] Prehearing Conference Order, Docket No. 50-3 (August 12, 1977).

effective.[235] If a second round of followup questions is required, they can be propounded at a legislative-type hearing, as occurred in the second phase of the uranium fuel cycle proceeding.[236] When there are many participants involved, the most efficient procedure is to have oral questions propounded by the hearing board.

The most intrusive procedural device, cross-examination, is extremely time consuming and should be infrequently requested. Commentators have disagreed over the effectiveness of cross-examination to resolve scientific controversies.[237] Professor Robinson has argued that cross-examination requires "the agency to explain and articulate the assumptions and the foundations on which its policies rest,[238] but he has not demonstrated that less intrusive methods would not be equally efficacious. Conversely, other commentators have stated that cross-examination frequently achieves little that could not be obtained by other devices.[239] The utility of cross-examination cannot be generalized because its utility is situation-specific, *i.e.*, it may be effective in some situations, but may be time consuming and ineffective in others.

This device may also give leverage to opponents of a proposed rule. It presents an opportunity for delay; it gives challengers a bargaining tool; and it subtly exerts pressure on the proponent to take a milder stand, so that the heavy investment of resources involved in supporting the more extreme position in

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[235] In the long run, reliance on interrogatories is much more efficient than relying on an oral hearing to obtain the information. *Compare In Re Acceptance Criteria for Emergency Core Cooling, Systems for Light Water Cooled Nuclear Power Reactors,* AEC Docket RM-50-1 (37 Fed. Reg. 288 (1972) (adjudicatory procedures adopted after initial notice of proposed rulemaking)), *with In Re Environmental Effects of the Uranium Fuel Cycle,* NRC Docket No. 50-3 (37 Fed. Reg. 24, 191 (1972) (notice of proposed rulemaking; procedures will not include cross-examination or discovery)).

[236] Prehearing Conference Order, Docket No. 50-3 (August 12, 1977).

[237] *Compare* Johnston, *AEC Rulemaking and Public Participation,* 62 GEO. L.J. 1737, 1743 (1974); (cross-examination is effective as it reveals value judgments underlying "objective" conclusions), *with* Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues,* 71 MICH. L. REV. 111, 129 (1972) (cross-examination may hamper rather than advance accurate factual resolution of complex scientific issues).

[238] Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform,* 118 U. PA. L. REV. 485, 522 (1970).

[239] *See, e.g.*, Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis,* 42 U. CHI. L. REV. 401, 430-45 (1975).

cross-examination is not required.[240] However, cross-examination may also have the beneficial effect of discouraging participation by persons who oppose a rule on general grounds, but who possess no helpful expertise, because they too will have to invest substantial resources if they desire to testify in the proceeding. Cross-examination may also play a crucial role in elucidating issues in some rulemaking contexts. Additionally, the very existence of a right to cross-examination may inhibit falsehood and shoddy analysis, or it may lead a witness to bring out information adverse to his position on direct to prevent its disclosure on cross-examination.

If NRC proposes an unsatisfactory rule, a critic of the rule may request that the agency furnish a statement of methodology prior to any final agency action in order to propagate detailed criticism.[241] Such a procedure is exemplified by EPA's process of promulgating effluent limitation guidelines under the Federal Water Pollution Control Act.[242] This is essentially a two-round process in which EPA provides interested persons a technical analysis of the issues prepared by private consultants prior to its initial notice of rulemaking. After the comments on the drafts are received, EPA promulgates its proposed rule and its own draft report attempting to substantiate the proposed rule.[243] This procedure assures EPA that it will be aware of all the complex scientific, technical, and economic issues.

There are disadvantages in using formal rulemaking to reform the nuclear licensing process, expecially in proceedings which involve anything more than the minimum requirements of section 553. Adjudicatory procedures may have the inherent proclivity of encouraging a multiplicity of litigation and propagating ponderous records which tend to frustrate organization. The rule may not be adopted at all, or it may not be adopted as proposed. Additionally, rulemaking proceedings can be very expensive and drawn out, as the ECCS proceeding demonstrated.[244] However, if adversity occurs, industry must have the resolve to finance its

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[240] *Id.* at 443.

[241] Failure to grant such a request may furnish another basis for appeal. *See* notes 67-72 *supra.*

[242] 33 U.S.C. §§ 1257-1265 (Supp. V 1975).

[243] 38 Fed. Reg. 21,202-06 (1973).

[244] *See* Freeman, *The AEC's Recent Experiment in "Evidentiary" Rule Making,* 28 BUS. LAW 663, 669-70 (1973).

commitment and to carry the matter into the courtroom.

There is also a justifiable fear that opponents of nuclear power would use the same tactics in rulemaking proceedings as they use in licensing proceedings. Some nuclear opponents have adopted a "no win" strategy in which the NRC licensing hearings are not viewed in the traditional terms of winning or losing, but are used as a means of achieving another objective—the ultimate demise of nuclear power.[245] The environmentalists may also perceive the hearing as an opportunity to debate the public policy of using nuclear power. To further this aim, proceedings are dramatized to increase media coverage.[246]

Intervenors who oppose the construction of nuclear plants frequently rest their cases entirely on delaying tactics and jurisprudential gymnastics rather than on any substantive legal or factual challenge. Rather than contest factors unique to each plant, such as the adequacy of its radiation safeguards and the expected local environmental effects, some opponents continue to raise the same fundamental questions of fact, such as the basic danger of nuclear power.[247] Such contentions are not really factual, but are policy questions which should be resolved by the NRC in a rulemaking proceeding, not in an individual licensing proceeding.[248] Delay and its consequent expense provide a potent weapon and can be used to force a utility to accept more stringent safeguards or extra equipment designed to further reduce any environmental effects of the plant.[249] Environmentalists may also seek judicial review to provide time to obtain an ultimate resolution through the political process and to engender support by focusing legislative attention on their problems.[250] In this way, benefits from lengthy administrative hearings are maximized

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[245] Like, *Multi-Media Confrontation—The Environmentalists' Strategy for a "No-Win" Agency Proceeding*, 1 ECOLOGY L.Q. 495 (1971).

[246] *Id.*

[247] *See* Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace?* 72 COLUM. L. REV. 963 (1972).

[248] *See* Note, *The Use of Generic Rulemaking To Resolve Environmental Issues in Nuclear Power Plant Licensing*, 61 VA. L. REV. 869 (1975). Indeed, Congress in enacting the Atomic Energy Act and in funding the NRC each year has determined that nuclear power is "good" and should be encouraged. Such a basic policy issue cannot ever appropriately be before the NRC.

[249] Willrich, *The Energy-Environment Conflict: Siting Electric Power Facilities*, 58 VA. L. REV. 257, 326 (1972).

[250] J. SAX, DEFENDING THE ENVIRONMENT 114 (1971).

even when the chances of an administrative victory are nonexistent. The adoption of adjudicatory procedures in rulemaking proceedings may prompt use of the same or similar tactics.[251]

Rulemaking proceedings can benefit the nuclear industry as well as the opponents. First of all, it is much better to have the NRC use adjudicatory procedures and to request them when appropriate in petitions for rulemaking, than it is to have the resulting rules overturned on appeal because of an inadequate record. For example, more preparation and analysis of the backend of the fuel cycle would have expedited the first uranium fuel cycle rulemaking[252] and, consequently, would have prevented the August, 1976, to December, 1976, nuclear licensing moratorium.[253] The industry should use their resources and do the studies and experiments required to prove the practicability and usefulness of proposed rules. It is better to invest time and resources in this type of rulemaking effort than to be constantly confronted with delay in individual licensing proceedings. If generic rules are adopted, the effectiveness of nuclear opponent's delaying tactics in individual licensing proceedings will ultimately be diminished.

Rulemaking proceedings can also be beneficial to the public.

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[251] Critics of nuclear power have substantially affected the nuclear industry. *See* Freeman, *The AEC's Recent Experiment in "Evidentiary" Rule Making*, 28 BUS. LAW 663 (1973). For example, the nuclear opponents used their writings and testimony in licensing proceedings to urge a reduction in the upper limits of radiological effluents from nuclear plants during normal operating conditions. In response to these attacks, utilities volunteered to comply with much lower limits. One utility stated that it would be willing to accept technical specifications limiting its nuclear releases to 1 percent of the existing regulatory (10 C.F.R. § 20 (1977)) levels. This challenge also focused public attention on the critics' exaggerated fears and prompted the AEC to promulgate Appendix I to X C.F.R. § 50, which requires nuclear plants to be constructed and operated so as to hold radioactive releases "as low as practicable."

[252] The NRC adopted table S-3 to quantify the environmental effects of the uranium fuel cycle in the NEPA benefit-cost ratio in individual nuclear power plant licensing proceedings. The portion of this table dealing with disposal of the radioactive wastes was struck down by the District of Columbia Court of Appeals in NRDC v. NRC, 547 F.2d 633 (D.C. Cir. 1977), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. National Defense Council, Inc., No. 76-419 (Sup. Ct. Apr. 3, 1978) because of inadequate development of the administrative record. Even the Supreme Court's reversal of this case did not end the matter, because the Court remanded to determine the adequacy of the record.

[253] Immediately after the decision, the NRC placed a moratorium on licensing of all current nuclear plant applications pending completion of a new rulemaking. 41 Fed. Reg. 34,707 & 34,408 (1976). Shortly after promulgating an interim rule, 41 Fed. Reg. 45,849 (1976), the NRC revoked the moratorium on pending applications, using the interim rule to determine the environmental impact of new plants on the uranium fuel cycle. 41 Fed. Reg. 49,898 (1976).

Broad participation by industry and public interest groups in an adversary-type setting with the consequent airing of a wide range of opinions and factual statements could minimize the possibility of inaccurate determinations in the rulemaking.[254] Such participation would test the premises upon which the proposed rule is based and would increase the chances that the NRC would be apprised of all the relevant facts.[255] This would foster the legitimate aims of the public interest groups, since they could focus their merger resources in one proceeding without resorting to using a "no win" strategy of delay in individual licensing proceedings. From industry's standpoint the more an opponent's resources are beneficially utilized in rulemaking efforts, the less these resources can be used to delay individual proceedings.[256] Additionally, if opponents perceive a fair chance of influencing NRC action, they may make less use of disruptive delaying tactics in subsequent licensing proceedings.[257]

Industry could petition for a number of rules which would make future licensing proceedings more efficient and effective. One obvious example is eliminating the necessity of considering the need for power and alternative methods of generating power at the operating license stage.[258] These matters are fully considered at the construction permit stage and it seems ludicrous to require reconsideration after construction of the plant is completed and it is ready to operate. Another example is elimination of the formal adjudicatory proceedings utilized for the issuance of construction permits and operating licenses. The Atomic Energy Act does not require adjudication;[259] this is only required by NRC regulations.[260] While legislative proposals have been intro-

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[254] *See* Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 529-30 (1972).

[255] *See* Note, *The Use of Generic Rulemaking To Resolve Environmental Issues in Nuclear Power Plant Licensing*, 61 VA. L. REV. 869, 882 (1975).

[256] *Id.*

[257] *See* Coggins, *The Environmentalist's View of AEC's "Judicial Function,"* 15 ATOM. EN. L.J. (1973).

[258] Such a proposal is contained in the President's nuclear licensing reform proposal. *See* note 3, *supra*.

[259] Bauser, *The Development of Rulemaking Within the Atomic Energy Commission: The Nuclear Regulatory Commission's Valuable Legacy*, 27 AD. L. REV. 165, 169 n.32 (1975). *Cf.* United States v. Florida E. Coast Ry., 410 U.S. 224 (1973); United States v. Allegheny-Ludlum Steel Corp., 407 U.S. 908 (1972).

duced to alter this situation,[261] no legal barrier prevents the NRC from changing the structure of its hearings and not requiring formal adjudicatory hearings in the absence of disputed facts or issues. These are but two suggestions, but many more can be devised. The industry should seriously consider utilizing rulemaking as an effective reform technique.

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[260] 10 C.F.R. § 2.761a (1977).

[261] *See, e.g.*, Regulatory Procedures Reform Act, S. 2490, 95th Cong., 2d Sess. (1978) (introduced Feb. 6, 1978, and not yet acted on).