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Return to Vermont Yankee and the Foreclosure of Judicial Review of the NRC's Generic Rulemaking: Baltimore Gas & Electric Co. v. Natural Resources Defense Council

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Return to *Vermont Yankee* And the Foreclosure of Judicial Review of the NRC's Generic Rulemaking: *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*

I. Introduction

In an unanimous decision[1] the Supreme Court upheld the Nuclear Regulatory Commission's (NRC) Table S-3 Rule, overruling the lower court's substantive review of the Rule[2] based on the guidelines of the Administrative Procedure Act (APA).[3] The Table S-3 Rule, a generic rule which dictates how nuclear power plant licensing boards are to consider the environmental effects associated with the nuclear fuel cycle, was also the subject of a previous litigation.[4] In *Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council*[5] the Court invalidated the procedural review by the same lower court, holding that NRC has the discretion to formulate its own rulemaking process.[6] The issue raised in this note is whether the Supreme Court has placed NRC's generic rule beyond the reach of the reviewing court.

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1. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 103 S. Ct. 2246 (1983).
2. Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 685 F.2d 459 (D.C. Cir. 1982) [hereinafter cited as NRDC (II)].
3. 5 U.S.C. § 706 (1982).
4. Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) [hereinafter cited as NRDC (I)].
5. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) [hereinafter cited as Vermont Yankee].
6. Id.

This note discusses the series of *Vermont Yankee* cases that were combined to form the single case *Baltimore Gas & Electric Co. v. Natural Resources Defense Council.* The relevant requirements of the National Environmental Policy Act (NEPA)[7] and the formulation of the three distinct Table S-3 Rules are explained. The main emphasis however, is on the holdings of the courts and their rationales which were based on the APA and associated cases. This note concludes that the combined effect of these decisions may lead to foreclosure of judicial review of NRC's generic rulemaking.

II. Background

A. *NEPA's Requirement*

Section 102(2)(c) of NEPA requires federal agencies to consider the environmental impact of any major federal action.[8] It has been established that the licensing of a nuclear power plant constitutes a major federal action[9] and must, therefore, comply with the requirements of NEPA.[10]

The initial controversy arose when the Natural Resources Defense Council (NRDC) sought to have the environmental effects of solid nuclear wastes considered in the operating license proceeding for the Vermont Yankee Nuclear Power Station.[11] NRDC maintained that these effects should be encompassed in the environmental impact statement (EIS) required by NEPA. This request was denied by the Atomic Safety and Licensing Board (ASLB)[12] which stated that it was not necessary tc consider the effects of disposal of solid nuclear wastes at the licensing decision level. On appeal by

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7. 42 U.S.C. §§ 4321-4370 (1976 & Supp. V 1981).
8. 42 U.S.C. § 4332(2)(c) (1976 & Supp. V 1981).
9. *Vermont Yankee,* 435 U.S. 519, 538-39 (1978).
10. *NRDC (I), supra* note 4, at 640.
11. *NRDC (II), supra* note 2, at 468.
12. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), 4 A.E.C. 930 (1972).

NRDC to the Atomic Safety and Licensing Appeal Board, the decision of ASLB was upheld.[13]

B. *The Original Table S-3 Rule*

In response to NRDC's challenge, NRC initiated rulemaking proceedings to reconsider whether the environmental effects of the uranium fuel cycle should be included in the cost-benefit analysis involved in the licensing decision for individual reactors.[14] NRC adopted an alternative which allowed for the consideration of these effects by including a Table S-3 in the EIS for each light water nuclear reactor.[15]

First adopted in 1974, the Table S-3 was a generic rule promulgated after extensive informal rulemaking proceedings.[16] The Table S-3 consisted of a "numerical compilation of the estimated resources used and effluents released by fuel activities supporting a year's operation of a typical light-water reactor."[17] This original version of the Table S-3 Rule declared that in environmental impact statements for individual licensing proceedings the environmental costs of the fuel cycle "shall be as set forth" in Table S-3 and that "[n]o further discussion of such environmental effects shall be required."[18]

However, no numerical entry for the environmental effects of storing solid nuclear wastes were contained in the original Table S-3.[19] Despite existing uncertainties,[20] NRC

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13. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), 6 A.E.C. 130 (1973) (approving Vermont Yankee Nuclear Power Station's license).

14. 37 Fed. Reg. 24,191 (1972).

15. 39 Fed. Reg. 14,188-91 (1974).

16. Id.

17. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 103 S. Ct. 2246, 2249 (1983).

18. 39 Fed. Reg. 14,188, 14,191 n.15(a) (1974).

19. *NRDC (II), supra* note 2, at 466 n.11.

20. Two major uncertainties are excluded from the zero-release assumption: "1) uncertainty concerning the integrity of the permanent repository, if such repository is ever built; and 2) uncertainty over whether and when such a repository, or

staff believed that the technology would be developed to isolate the wastes from the environment by burial in deep-bedded salt repositories.[21] The assumption that the integrity of these repositories would not be breached and that they would therefore completely contain these wastes indefinitely is termed the "zero-release" assumption.[22]

Because of the uncertainties surrounding the zero-release assumption, NRDC challenged both the adoption of the original Table S-3 Rule and the approval of Vermont Yankee Nuclear Power Station's operating license.[23] The Court of Appeals of the District of Columbia (D.C. Circuit) held that the rulemaking was based on a cursory development of the facts and was therefore arbitrary and capricious.[24] The Supreme Court granted certiorari.[25]

C. *Formulation of the Interim and Final Table S-3 Rules*

While *Vermont Yankee* was pending in the Supreme Court, NRC conducted additional proceedings to review the waste management and disposal aspects of the Table S-3 Rule and to develop a revised and adequately supported fuel cycle rule.[26] The result was the adoption of an interim Table

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equivalent system of disposal, will be developed." These uncertainties create the environmental risk (cost) "that [the] wastes created by the plant will eventually damage the environment by emitting radiological effluents from a faulty permanent repository" and "that [the] waste created by the plant will have to remain in another type of repository—possibly on site—and emit radiological effluents prior to permanent disposal." *NRDC (II), supra* note 2, at 483. Id., nn. 109 & 123 (uncertainties of storage of nuclear wastes in a Retrievable Surface Storage Facility).

21. *NRDC (II), supra* note 2, at 469 n.26, *citing* Environmental Survey of the Uranium Fuel Cycle (WASH-1248, April, 1974) at S-23 ("the facility will be designed to prevent the release of significant amounts of radioactive material to the environment under all credible environmental conditions and human actions").

22. *Baltimore Gas*, 103 S. Ct. 2246, 2250 (1983).

23. The consolidation of these actions resulted in *NRDC (I), supra* note 4.

24. *NRDC (I), supra* note 4, at 655.

25. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 429 U.S. 1090 (1977).

26. 41 Fed. Reg. 45,849 (1976).

S-3 Rule which NRDC immediately challenged. NRC reopened the hearings to determine whether the interim rule should be finalized or altered.[27] This resulted in minor adjustments to the table's numerical values.[28] The final Table S-3 was also challenged by the NRDC.[29] This action was stayed pending the Supreme Court's decision in *Vermont Yankee.*

D. *Consolidation of Vermont Yankee and NRDC (II)*

Following the initiation of this second action by NRDC, the Supreme Court decided *Vermont Yankee.* Holding that the D.C. Circuit's procedural review was improper and intrusive into the agency's decisionmaking process[30] the Supreme Court remanded the case. It directed the D.C. Circuit to review the rule "as the APA provides."[31] This remand of the challenge to the original rule was consolidated with NRDC's subsequent challenge of both the interim and final rules.[32]

Following the mandate of the Supreme Court, the D.C. Circuit reviewed the Table S-3 Rule according to the applicable provisions of the APA.[33] Analyzing the rule as either a finding of fact or as an agency decisionmaking device, the D.C. Circuit determined that the rule was arbitrary and capricious in the light of the surrounding uncertainties.[34] Thus the rule was invalidated for the second time.

Baltimore Gas & Electric Co., intervenors in the original action, petitioned the Supreme Court for certiorari to review

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27. 42 Fed. Reg. 26,987 (1977).
28. *NRDC (II), supra* note 2, at 474.
29. Id.
30. *Vermont Yankee,* 435 U.S. 519, 535 (1978).
31. Id. at 549.
32. *NRDC (II), supra* note 2.
33. 5 U.S.C. § 706 (2)(A)(1982) provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of [agency] discretion, or otherwise not in accordance with law."
34. *NRDC (II), supra* note 2, at 483.

the D.C. Circuit's decision. Although the question brought before the Court concerned all three versions of the Table S-3 Rule,[35] the underlying issue was whether the D.C. Circuit had exceeded its judicial limits by impermissibly ruling on the substance of NRC's decision.[36]

III. Decision of the D.C. Circuit

A. *Review of Vermont Yankee*

The decision of the D.C. Circuit[37] is best understood in the context of the *Vermont Yankee*[38] rationale. In *Vermont Yankee* the question before the Court was whether the Table S-3 Rules, by inadequately disclosing and failing to allow for proper consideration of the uncertainties underlying the environmental impacts embodied in the final Table, violated NEPA and where therefore invalid.[39] More specifically, the question turned on the decision of NRC that, despite substantial and significant uncertainties, the effect of the disposal of solid nuclear wastes need not be considered in licensing decisions because the probabilities favor that these effects would be zero.[40] In *NRDC (I)*,[41] the D.C. Circuit found that this assumption was unsubstantiated and inadequately supported by the record.[42] Although the D.C. Circuit was cautious not to prescribe additional rulemaking procedures to NRC,[43] the

35. Many licensing proceedings were challenged on the basis of the original and interim rules and were still pending on the issue of validity. *See NRDC (II), supra* note 2, at 463 n.7.

36. *See, e.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (the court is not allowed to substitute its judgment for that of the agency).

37. *NRDC (II), supra* note 2.

38. *Vermont Yankee*, 435 U.S. 519 (1978).

39. *NRDC (II), supra* note 2, at 475.

40. This is the "zero-release" assumption. *See supra* note 22.

41. *NRDC (I), supra* note 4.

42. Id. at 653.

43. The court was aware that it could not require additional agency procedures: "We do not presume to intrude on the agency's province by dictating to it which, if any, of these devices it must adopt . . . ." Id. The court, therefore, only suggested that the procedures were inadequate.

Supreme Court ruled that it had dictated procedures to the extent that it had substituted its judgment for that of NRC.[44]

B. *NRDC(II)*

On remand from the Supreme Court, the D.C. Circuit was directed to apply the "appropriate standard of review"[45] but not to "stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are best."[46] Foreclosed from the procedural review of its prior decision[47] and lacking more specific guidance from the Court,[48] the D.C. Circuit was limited to deciding the case on narrow substantive grounds.[49] The D.C. Circuit reached these questions: 1) whether the Table S-3 Rule was "not in accordance with the law"[50] because it violated NEPA as applied to individual licensing decisions,[51] 2) whether the decision was arbitrary and capricious based on a consideration of the relevant factors, and 3) whether there was clear error in judgment.[52]

The D.C. Circuit scrutinized the key issue of the zero-release assumption both as a factual finding and as an agency decisionmaking device. In its analysis of this assumption as a factual finding, the court relied on *Izaak Walton League of America v. Marsh*[53] and *Alaska v.*

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44. *Vermont Yankee,* 435 U.S. 519, 555 (1978), *citing* Kleppe v. Sierra Club, 427 U.S. 390,410 n.21 (1976).

45. Id. at 549.

46. Id.

47. *NRDC (I), supra* note 4.

48. *See Vermont Yankee,* 435 U.S. 519, 549 (1978). The Court gave only general direction to APA for review on remand, and did not state any specific format.

49. It is generally recognized that there are basically two types of review: procedural and substantive. In the present case, foreclosure of review by one standard left the other for subsequent review. *See* Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1310-14 (1975).

50. 5 U.S.C. § 706(2)(A) (1982).

51. *NRDC (II), supra* note 2, at 475.

52. Id.

53. Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir. 1981), *cert. denied sub nom.* Atchinson, Topeka & Santa Fe Ry. Co. v. Marsh, 454 U.S. 1092 (1981).

Andrus[54] to interpret that the risk of an environmental event is the overriding relevant factor[55] that NEPA requires to be considered. The D.C. Circuit ruled that a court must interpret a finding of no environmental effect as a finding that there is no significant risk of an environmental effect.[56] Therefore, because of the uncertainty of repository integrity, the conclusion that nuclear wastes sealed in a permanent repository will have no impact on the environment, as a factual finding, represents a clear error in judgment.[57]

However, the D.C. Circuit contended that the zero-release assumption is better characterized as a decisionmaking device.[58] It maintained that NRC is free to implement NEPA through generic rulemaking[59] provided that the rulemaking is based on the agency's reasoned judgment concerning the relative weights of generic costs and benefits.[60] Relying heavily on the foundation case of *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission,*[61] the D.C. Circuit required that the agency consider and disclose the actual environmental effects it has assessed in a manner that will bear directly on the decisionmaking process.[62] The zero-release assumption excludes uncertainties from consideration.[63] Although NRC did consider these uncertainties, it did not do so in a manner that would either directly or indirectly affect

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54. Alaska v. Andrus, 580 F.2d 465 (D.C. Cir. 1978), *vacated on other grounds sub nom.* Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978).

55. *NRDC (II), supra* note 2, at 479.

56. Id. at 480.

57. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

58. *NRDC (II), supra* note 2, at 481.

59. Id. at 482.

60. *See* 10 C.F.R. § 51.20(b) (1983) and Note, *Judicial Review of Federal Environmental Decisionmaking: NRC Regulation of Nuclear Waste Management and Disposal,* 58 Tex. L. Rev. 355, 360 (1980) [hereinafter cited as Note, *Waste Management*] (traditional use of cost-benefit analysis that balances environmental effects, the costs, of the facility with economic and other benefits).

61. 449 F.2d 1109 (D.C. Cir. 1971).

62. *NRDC (II), supra* note 2, at 482-83.

63. Id. at 483.

licensing decisions.[64] Thus NRC determined that: 1) for the limited purpose of the fuel cycle rule, it was not necessary to reflect explicitly the uncertainties in the rule, and 2) it was reasonable to base any impacts on the assumption which NRC believed the probabilities favored.[65] The D.C. Circuit found that these determinations constituted a violation of NEPA[66] and were "not in accordance with law."[67]

The D.C. Circuit reached the same result under the arbitrary and capricious standard.[68] It concluded that an agency rule stating that an effect will not occur in the "face of significant uncertainty indicates either a failure to consider a relevant factor or is a clear error in judgment."[69] Because this is precisely what NRC did in promulgating the Table S-3 Rule, the court concluded that the action was arbitrary and capricious.

IV. *Baltimore Gas & Electric Co. v. NRDC*

A. *D.C. Circuit Overruled*

In reviewing the decision of the lower court, the Supreme Court stated that "[a]dministrative decisions should be set aside . . . only for substantial procedural or substantive reasons as mandated by statute."[70] The role of the courts in reviewing agency action[71] was thus limited to determining

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64. Id. (NRC held that licensing decisions should be made on the basis of cost-benefit analysis that omitted the cost represented by the uncertainties).

65. 44 Fed. Reg. 45,362, 45,369 (1979).

66. *NRDC (II)*, *supra* note 2, at 484-85.

67. Id.

68. Id. at 485.

69. Id.

70. *Baltimore Gas*, 103 S. Ct. 2246, 2252 (1983), *quoting Vermont Yankee*, 435 U.S. 519, 558 (1978).

71. APA generally prescribes two standards for judicial review of agency decisionmaking. The first standard, arbitrary and capricious, is applied to informal rulemaking and is regarded as procedural review. 5 U.S.C. § 706(2)(A) (1982). The reviewing court determines whether the rule was promulgated using adequate procedure and whether there was a rational basis in the record to support the rule. This standard does not appear to challenge the substance of the rule and allows maximum deference to agency decisions. The second standard, substantial

whether the agency conformed with controlling statutes.[72] An unanimous Court concluded that NRC had complied with NEPA in formulating the zero-release assumption and the Table S-3 Rule. The decision of NRC[73] was therefore not arbitrary or capricious within the meaning of the APA.[74]

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evidence on the record, applies to formal rulemaking and is considered a substantive review. 5 U.S.C. § 706(2)(E) (1982). The courts closely scrutinize the record to determine whether all relevant factors were considered and whether proper weight was given to each factor. Little deference is given to agency discretion and the court may substitute its judgment for that of the agency if the court finds that the rule, as a matter of law, is incorrect. K. Davis, Administrative Law of the Seventies, §§ 29.01, 30.05 (1976); *See also* Note, *Waste Management, supra* note 60.

Generic rulemaking is technically informal notice and comment rulemaking as prescribed by APA. 5 U.S.C. §§ 551(4), (5), 553 (1982); *See also* Note, *The Use of Generic Rulemaking to Resolve Environmental Issues In Nuclear Power Plant Licensing*, 61 Va. L. Rev. 869, 894 (1975) [hereinafter cited as Note, *Use of Generic Rulemaking*]. However, due to the technical complexities of most environmental rules, and that issues of fact and law are often inextricably interwoven, the courts of appeals have developed a body of common law to review generic rules that is a combination of the two standards previously described. *See* Note, *Judicial Review of Generic Rulemaking: The Experience of the Nuclear Regulatory Commission*, 65 Geo. L. J. 1295, 1315 (1977) [hereinafter cited as Note, *Review of Generic Rulemaking*].

Basically, the courts have attempted to achieve a flexible standard of review that balances the need for judicial review of highly technical and complex generic rules with the need for deference to an agency's experience and expertise. *See* Note, *Review of Generic Rulemaking, supra.* This approach is often regarded as the balance between procedural and substantive review and one easily sees that a court would become frustrated in attempting to define its decision based on either of the two labels. *See* Note, *Waste Management, supra* at 383. The standard that the D.C. Circuit created is a composite in which both forms of review appear to merge. *See* Note, *Review of Generic Rulemaking, supra* at 1298 n.22. This standard allows for maximum flexibility for judicial review and results in common law standards such as the "hard look," *see NRDC (I), supra* note 4, "thorough ventilation," *see* Id., or a "reasoned decisionmaking" approach, *see* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973).

72. *Baltimore Gas*, 103 S. Ct. 2246, 2252-53 (1983).

73. "[NRC] decided that licensing boards should assume, for the purposes of NEPA, that the permanent storage of certain nuclear wastes would have no significant environmental impact and thus should not affect the decision whether to license a particular nuclear power plant." Id. at 2248.

74. 5 U.S.C. § 706(2)(A) (1982).

B. *Supreme Court's Analysis*

Emphasizing the dual aims of NEPA,[75] the Court relied on *Vermont Yankee*[76] and *Weinberger v. Catholic Action of Hawaii*[77] to determine that the role of the courts is to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious.[78] The Supreme Court found from the record that NRC had considered all the data on long-term storage of solid nuclear wastes[79] and disclosed the substantial uncertainty related to the zero-release assumption.[80] The decision to consider these effects in a generic rule was held to be within the discretion of the agency[81] to which the Court gave deference.

The Supreme Court disagreed with the D.C. Circuit's opinion that NRC violated NEPA by failing to factor the uncertainties surrounding long-term storage into Table S-3 and by precluding individual licensing boards from considering them.[82] The Supreme Court reasoned that the zero-release assumption would violate NEPA only if NRC acted arbitrarily and capriciously in deciding generically that the uncertainty was insufficient to affect any individual licensing decision.[83] In analyzing this issue, the

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75. *Baltimore Gas*, 103 S. Ct. 2246, 2252-53 (1983).

76. The first aim of NEPA is to place "upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." *Vermont Yankee*, 435 U.S. 519, 553 (1978).

77. 454 U.S. 139, 143 (1981). "The second aim [of NEPA] is to inform the public that the agency has considered environmental concerns in its decisionmaking process." Id.

78. *See also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

79. NRC's adoption of the final Table S-3 Rule shows that it has considered this material. 44 Fed. Reg. 45,362, 45,367-69 (1979). *See also* 10 C.F.R. § 51.20 (1983).

80. *Baltimore Gas*, 103 S. Ct. 2246, 2251 (1983). "[NRC] acknowledged that this assumption was uncertain because of the remote possibility that water might enter the repository, dissolve the radioactive materials, and transport them to the biosphere."

81. Id. at 2254-55.

82. Id.

83. Id. at 2255. In this instance, the Court was not questioning whether the zero-release assumption itself was arbitrary and capricious. NRC had decided that the uncertainties were insufficient to affect any individual licensing decision, and

zero-release assumption was scrutinized in the context of the Table S-3 Rule.[84] The Court found that the Table S-3 Rule was made for a limited purpose.[85] Therefore, the zero-release assumption, as a single value in the entire table, was offset by conservative assumptions reflected in the other values in the table.[86] In upholding the validity of the Table S-3 Rule, the Court relied on the doctrine that greater deference should be afforded an agency's decisions in complex determinations.[87]

The opinion characterized the development, despite substantial uncertainties, of nuclear generation facilities as a fundamental policy issue to be decided or delegated by Congress.[88] The Court thus validated the zero-release assumption as a policy judgment that was within the bounds of reasoned decisionmaking and was outside the limits of judicial review.[89]

V. Discussion: Foreclosure of Judicial Review

The *Baltimore Gas* Court, in reversing the D.C. Circuit and in upholding the Table S-3 Rule, apparently disregarded the effect of its former holding[90] and instructions on remand.[91] Had the Supreme Court

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that this decision should have been incorporated into a generic rule. If these decisions were enacted in an arbitrary and capricious manner, only then would the zero-release assumption have violated NEPA.

84. Id. at 2256.

85. Id.

86. Id. at 2256-57.

87. *See, e.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 656,705-06 (1980). When a commission is making predictions within its area of expertise at the frontiers of science, as opposed to simple findings of fact, the reviewing court must be most deferential to the agency's discretion.

88. *Baltimore Gas*, 103 S. Ct. 2246, 2252 (1983).

89. Id. at 2257. "It is not our task to determine what decision we, as Commissioners, would have reached." Id.

90. *See* infra pp. 208-09, the Court in *Vermont Yankee*, in effect, foreclosed the court of appeals from procedural review.

91. Id. The D.C. Circuit was directed to apply the "appropriate standard of review" in accordance with APA, but no specific guidelines were given as to what standards were intended. However, as previously noted, *supra* note 49, the only avenue remaining was substantive review.

acknowledged the invalidation of the procedural review of the Table S-3 Rule in *Vermont Yankee,* it might have decided *Baltimore Gas* by a different rationale.[92] Instead, the *Baltimore Gas* opinion suggested that the D.C.Ciruit had improperly substituted its judgment for that of the agency. The effect was to disallow substantive review of the Table S-3 Rule. Thus, both procedural and substantive review have been precluded.

This result is unsatisfactory. It fails to give purpose and effect to sections 702 and 704 of the APA,[93] which manifest the intent of Congress that agency actions be reviewable. It also disregards the Atomic Energy Act[94] which provides for review of NRC actions, including technically complex generic rulemaking.[95]

In holding that the Table S-3 Rule is a policy decision,[96] requiring that maximum deference be given to the agency's discretion, the Supreme Court effectively placed the generic rule beyond the reach of the courts.[97] Thus the Court failed to seize the opportunity to clarify the standard of review of generic rulemaking[98] and to provide guidance to the lower courts in subsequent cases. The Court may in fact have created a means for agencies to circumvent judicial review by labeling rules as policy decisions. *Baltimore Gas* may therefore signal the demise of judicial review in similar cases of generic rulemaking.

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92. As an alternative, the Supreme Court might have argued that the D.C. Circuit had erred in its application of the substantive review standard. This would have achieved the same result, yet maintained the integrity of judicial review of agency decisionmaking under, at least, a substantive approach.

93. 5 U.S.C. § 702 (1982) provides that "a person . . . adversely affected . . . by agency action . . . is entitled to judicial review." 5 U.S.C. § 704 (1982) provides that "final agency action for which there is no adequate remedy in a court [is] subject to judicial review."

94. 42 U.S.C. §§ 2011-2996(j) (1976 & Supp. V 1981).

95. 42 U.S.C. § 2239(b) (1976 & Supp. V 1981).

96. *Baltimore Gas,* 103 S. Ct. 2246, 2257 (1983).

97. 5 U.S.C. § 701(a)(2) states, "[t]his chapter applies . . . except to the extent that . . . agency action is committed to agency discretion by law."

98. *See* Note, *Review of Generic Rulemaking, supra* note 71, at 1299.

VI. Conclusion

The series of cases leading to the decision in *Baltimore Gas* demonstrates the difficulties faced by courts when they review generic rulemaking.[99] These difficulties are due largely to the lack of a specific standard of review[100] or to inadequate guidance by the courts or Congress.

Baltimore Gas marks a definite halt in the developing standard of judicial review[101] as the Court attempts to retreat to the plain meaning and rigid interpretation of NEPA[102] and APA.[103] The rule developed by the Court would limit the scope of review to the minimum standards of procedural adequacy and rational basis which are required by the APA.[104] In addition, the Court seemingly applied the "reasoned decisionmaking" approach.[105] This may result in confusion for the lower courts since the Table S-3 Rule was actually validated as an agency policy decision.[106] Because policy decisions allow for maximum deference to agency discretion, this conclusion is inconsistent with the balance sought by the rationale of the "reasoned decisionmaking" standard.

Thus, *Baltimore Gas* does not provide the specific guidance required by the lower courts in deciding cases of generic rulemaking. More significantly, the invalidation of substantive review in this case where procedural review had already been foreclosed has placed the generic rule of NRC beyond the reach of the reviewing courts and may signal the demise of judicial review of NRC's generic rulemaking.

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99. *See* Note, *Review of Generic Rulemaking, supra* note 71.

100. *See* K. Davis, Administrative Law of the Seventies, § 29.01 (1976) (the standard or scope of judicial review of agency rulemaking is ambiguous).

101. *See supra* note 71.

102. Brief for Baltimore Gas & Electric Co., at 29-34, Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 103 S. Ct. 2246 (1983).

103. *Baltimore Gas*, 103 S. Ct. 2246, 2257 (1983).

104. "Our only task is to determine whether [NRC] has considered the relevant factors and articulated a rational connection between the facts found and the choices made." Id.

105. Id. at 2256.

106. Id. at 2256-57.