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TOWARD CORPORATE ENVIRONMENTAL DISCLOSURE: *NRDC V. SEC*

*Fern L. Frolin**

INTRODUCTION

Corporate accountability to shareholders and the public was originally established by the Securities Act of 1933 (Securities Act)¹ and the Securities Exchange Act of 1934 (Exchange Act).² Congress intended this legislation to improve the conduct of public corporations, at least in relation to the persons who invested in them.³ This goal is accomplished through corporate disclosure under regulations promulgated and enforced by the Securities Exchange Commission (SEC).⁴ Traditionally, regulated disclosure affected only financial information, but in recent years the SEC has also required limited non-financial policy disclosure.⁵ Increased social policy disclosure would enable socially-concerned investors to utilize policy information in investment decisionmaking. Simultaneously, publicity would have an important prophylactic effect on corporate behavior.⁶

Like the securities laws, the National Environmental Policy Act (NEPA)⁷ uses disclosure to achieve both informational and behavioral goals. NEPA, which Congress enacted to restore and maintain environmental quality,⁸ is a broad policy statement rather than a

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¹ 15 U.S.C. §§ 77a *et seq.* (1970).

² 15 U.S.C. §§ 78a *et seq.* (1970).

³ See L. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933).

⁴ 15 U.S.C. § 77s(a) (1970).

⁵ Cf. Hetherington, *Fact and Legal Theory: Shareholders, Managers, and Corporate Responsibility*, 21 *STAN. L. REV.* 248, 262 (1969).

⁶ Knauss, *Disclosure Requirements—Changing Concepts of Liability*, 24 *BUS. LAW.* 43, 44 (1968).

⁷ 42 U.S.C. §§ 4331 *et seq.* (1970).

⁸ *Id.*

regulatory enabling act.⁹ It establishes environmental protection as a major national priority¹⁰ and requires each federal agency to carry out the NEPA policies "to the fullest extent possible."¹¹ It imposes on the agencies the obligation to "use all practicable means, consistent with other essential considerations of national policy" to achieve the optimum range of environmental benefits.¹² To this end, NEPA specifically requires that "major federal actions significantly affecting the quality of the human environment" be accompanied by a detailed environmental impact statement (EIS) disclosing the potential effects of the proposed activity.¹³ These requirements may mean that the SEC must give special attention to corporate environmental impact; *i.e.*, promulgate substantive regulations requiring environmental disclosure by publicly owned corporations.

Although the courts have definitively construed NEPA's disclosure requirements for agencies whose licensing or construction activities clearly affect the environment,¹⁴ NEPA's bearing on SEC activities is still unsettled. In *National Resource Defense Council (NRDC) v. SEC*¹⁵ the federal courts will ultimately determine the relationship between NEPA and the securities laws. The NRDC seeks a conclusive judicial ruling that the public information functions of the Acts overlap, thereby mandating the SEC to require comprehensive corporate environmental impact disclosure.¹⁶ The impact of such a ruling would be substantial. First, NEPA would be construed, at least in this instance, as reaching beyond federal agency disclosure and into the area of private action.¹⁷ Second, SEC

⁹ NEPA does establish the Council on Economic Quality (CEQ), which reviews environmental matters and advises the President and administrative agencies. However, the CEQ has no regulatory powers to set or enforce standards. 42 U.S.C. § 4341 (1970).

¹⁰ 42 U.S.C. § 4331 (1970).

¹¹ *Id.* § 4332.

¹² *Id.* § 4331(b)(3).

¹³ *Id.* § 4332(c).

¹⁴ *See, e.g., Calvert Cliff's Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

¹⁵ *National Resource Defense Council, Inc. v. SEC*, Civ. No. 409-73 (D.D.C. 1973); *see also* 10 E.R.C. 1001 (D.D.C. 1977) and 389 F. Supp. 689 (D.D.C. 1974).

¹⁶ For discussion of the disclosure rules suggested by the NRDC, *see* text at notes 89-92, *infra*.

¹⁷ Disclosure under NEPA has been confined thus far to the agency issued EIS. The EIS may report on private activity in cases of joint federal and private projects. However, *NRDC v. SEC* is unique in that it would require environmental disclosure of completely private activity. Since government regulation of corporate disclosure involves rulemaking and enforcement, the basis for the suit is the agency's obligation to further environmental goals wherever practicable. 42 U.S.C. § 4331 (1970). The EIS requirement, which depends on a finding of major federal action, has not been asserted. *Id.* § 4332.

jurisdiction would be conclusively extended into corporate social policy disclosure.¹⁸

This article will examine the effect of NEPA on the SEC's jurisdiction over corporate disclosure. It will consider the desirability of corporate environmental disclosure and evaluate some of the available disclosure devices. Additionally, the article will analyze the degree to which NEPA requires the Commission to demand environmental accountability from registrant companies, attempting to differentiate the SEC's discretion to promulgate corporate disclosure rules from its obligation under NEPA to further environmental goals.

I. BREADTH OF SEC JURISDICTION

The Commission derives its authority to require corporate disclosure from its administrative jurisdiction over securities which corporations issue. The Securities Act and the Exchange Act were originally intended to curb abuses in the issuing and trading of corporate stocks and bonds.¹⁹ Full and fair disclosure of salient information about the securities and the companies issuing them was considered more desirable than a direct grant of governmental authority to pass on the investment merits of the securities.²⁰ Thus, the resulting statutory provisions are aimed at protecting investors by providing them with information useful in investment decisionmaking.²¹

A. *Mechanics of Corporate Disclosure: The Financial Aspect*

The framework of securities regulation should be understood before an analysis of environmental accountability under SEC auspices can be considered. This framework is essentially financial.

Under the Securities Act a corporation within SEC jurisdiction²² must provide a registration statement before publicly issuing securi-

¹⁸ To date, social policy disclosure has been required only on a case-by-case basis. See the discussion of anti-fraud rules in text at notes 133-147, *infra*. The Commission has not promulgated specific rules requiring social impact reporting.

¹⁹ See President Roosevelt's Message to Congress Proposing Enactment of Securities Disclosure Legislation, 77 CONG. REC. 937 (1933).

²⁰ Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 30-34 (1959).

²¹ See Schoenbaum, *The Relationship Between Corporate Disclosure and Corporate Responsibility*, 40 FORDHAM L. REV. 565, 566 (1972) [hereinafter cited as *Disclosure and Responsibility*].

²² Generally, corporations offering securities for public sale are within SEC jurisdiction. 15 U.S.C. § 77d (1970).

ties.²³ Although the Act concerns the integrity of publicly sold stocks and bonds, most of the information which must be provided in the registration statement pertains to the issuing corporation rather than to the security itself.²⁴ In addition to various technical financial information, including a complete financial statement by an independent certified public accountant,²⁵ the corporation must include in the registration statement "such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading."²⁶

Since the securities may not be issued until the registration statement becomes effective, the Commission enforces disclosure requirements by delaying or suspending registration effectiveness.²⁷ Additionally, the corporate management may be subject to civil or criminal liability if the statement contains a material misstatement or omission of a material fact as defined by the Commission.²⁸

After issuance, a security issued by a company having at least \$1 million in total assets and a class of equity securities held of record by 500 or more persons²⁹ becomes subject to the disclosure requirements of the Exchange Act.³⁰ This Act requires periodic update of the disclosure reports.³¹ Affected registrant companies must file annual reports updating the registration statement³² and quarterly

²³ *Id.* § 77e.

²⁴ *Disclosure and Responsibility*, *supra* note 21, at 567.

²⁵ See Form 8-A, 3 FED. SEC. L. REP. (CCH) ¶ 30601 (1975).

²⁶ Securities Act Rule 408(1), 17 C.F.R. § 230.408(1). The Exchange Act contains an identical provision in its disclosure requirements. Exchange Act Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b). "Material information" is defined by the Commission as "those matters as to which an average prudent investor ought reasonably to be informed before purchasing the security registered." Securities Act Rule 405, 17 C.F.R. § 230.405. Recently the Commission has expanded its view of "materiality" to include non-financial information, especially with regard to proxy statement disclosure. See the discussion of the proxy rules in text at notes 117-18, *infra*.

²⁷ See 1 L. LOSS, SECURITIES REGULATION 265-316 (2d ed. 1961) [hereinafter cited as Loss]; 15 U.S.C. §§ 77h(b), (d) (1970).

²⁸ 15 U.S.C. § 77q (1970).

²⁹ 15 U.S.C. § 78l(g)(i) (1970). Securities listed on the national exchanges are technically exempt from this requirement, but the exemption is in name only as the exchanges are required to obtain registration from the issuing corporations, the same information is required, and duplicates are sent to the SEC. *Id.* § 78l(g)(2)(A).

³⁰ *Id.* §§ 78a *et seq.*

³¹ *Id.* § 78m.

³² Form 10-K, 34 RELEASE 9000 [1970-71 Transfer Binder] FED. SEC. L. REP. (CCH), ¶ 77919.

reports,³³ consisting primarily of profit and loss figures. In addition, current reports must be filed within ten days of the close of any month in which one of several specified events takes place.³⁴

The Exchange Act also requires that information similar to that filed with the SEC must be sent to the company's stockholders whenever proxies are solicited.³⁵ Disclosure through the proxy rules is potentially the most significant source for public information concerning corporate behavior.³⁶ Distribution of corporate data to all the stockholders of a large company is tantamount to public disclosure. Further, the proxy machinery affects shareholder participation in decisionmaking in two significant ways. First, it provides a factual basis on which the shareholder can determine whether to give a proxy and how to mark it.³⁷ Second, the proxy machinery publicizes shareholders' proposals.³⁸ SEC proxy rule 14a-8 entitles any

³³ Form 10-Q, 34 RELEASE 9004 [1970-71 Transfer Binder] FED. SEC. L. REP. (CCH), ¶ 77920.

³⁴ Form 8-K, 3 FED. SEC. L. REP. (CCH), ¶ 31001. The events which must be immediately reported are all financial in nature, *e.g.*, change in control, acquisition or disposition of assets, legal proceedings, change in securities, increase or decrease in the amount of securities outstanding, revaluation of assets, and submission of matters to a shareholder vote.

³⁵ 15 U.S.C. § 78n(c) (1970). The Commission has broad rulemaking authority to prescribe disclosure requirements which management must make when it solicits proxies. The proxy rules are intended to further the exercise of corporate democracy, one of the major objectives of the Exchange Act. *See* H.R. REP. NO. 1383, 73d Cong., 2d Sess. 13 (1934): "Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange. Management of properties owned by the investing public should not be permitted to perpetuate themselves by the misuse of corporate proxies." *Id.*

Even if proxies are not solicited the Act provides that substantially equivalent information must be sent. 15 U.S.C. § 78n(c) (1970). If the proxy solicitation is on behalf of management regarding an annual meeting at which directors are to be elected, the proxy statement must usually be either accompanied or preceded by an annual report. 17 C.F.R. § 240.14a-3 (1976). For the most part, content of the annual report to the shareholders may be determined by the management. It is not filed with the SEC and usually includes a great deal of public relations information about the company. *Disclosure and Responsibility*, *supra* note 21, at 589.

³⁶ Professor Loss has written on the importance of the proxy rules:

The proxy rules are very likely the most effective disclosure device in the SEC scheme of things. The proxy literature, unlike the application for registration gets into the hands of investors. Unlike the Securities Act prospectus it gets there in time. It is more readable than any of those other documents. And it gets to a great many people who *never* see a prospectus. (emphasis in original.)

2 Loss, *supra* note 27, at 1027.

³⁷ The proxy materials, which notify each shareholder of record as to the matters to be acted on at the shareholder's meeting, also advise the shareholder of shareholder rights and make certain disclosures about the proposals under consideration, including information about the directors or director nominees. 17 C.F.R. § 240.14a-3 (1976).

³⁸ 17 C.F.R. § 240.14a-8 (1976).

voting stockholder to present a proposal for action at the shareholder meeting. The stockholder may require management to include the proposal in its proxy statement.³⁹

Until 1970, the shareholder proposal rule was severely restricted. The proxy rules permitted management to exclude a shareholder proposal from the proxy statement if the proposal was deemed not a proper subject for action by the shareholders,⁴⁰ was related to ordinary business operations of the corporation,⁴¹ or was submitted primarily for the purpose of promoting general economic, political, racial, religious, or social causes.⁴² The Court of Appeals for the District of Columbia decision in *Medical Committee for Human Rights v. SEC*⁴³ narrowed the application of this rule considerably. The decision overruled a Commission determination that the management of Dow Chemical could properly exclude from the proxy statement a shareholder proposal urging a resolution to prohibit the company from manufacturing napalm. In holding that the resolution was both a proper subject for shareholder action and that it was not subject to political exclusion, the court found that Dow was financially harmed by public ill-will created by napalm manufacturing. Hence the activity was within the shareholder sphere of concern.⁴⁴ However, the court strongly suggested that, even if the shareholder proposal had not involved financial advantage, shareholders have an interest in the social consequences of their com-

³⁹ SEC RELEASE No. 34-12999 (Nov. 26, 1976), SEC. REG. & L. REP. (BNA) No. 380 at E-8. The shareholder is also permitted to include a 200 word supporting statement.

⁴⁰ "Improper subject for shareholder action," identifying a matter reserved for the discretion of the Board of Directors, is still a reason for excluding a shareholder proposal from the proxy statement. Proper subjects are determined according to the law of the issuer's domicile. 2 Loss, *supra* note 27, at 902. See also *Dyer v. SEC*, 266 F.2d 33, 43 (8th Cir. 1959), *cert. denied*, 361 U.S. 835 (1959).

⁴¹ 17 C.F.R. 240.14a-8(c)(7) (1976). The Commission concedes that this limitation has permitted proposals of considerable importance to security holders to be excluded. Nevertheless, the Commission has retained the limitation in order to avoid shareholder consideration of complex business matters on which "shareholders, as a group, would not be qualified to make an informed judgment." SEC RELEASE No. 34-12999 (Nov. 26, 1976), SEC. REG. & L. REP. (BNA) No. 380 at E-5. However, in lieu of liberalization of the rule, the Commission announced a flexible interpretation of the rule. Under the newest interpretation, "ordinary business operations" will not exclude matters significantly related to policy or economic considerations, such as a proposal that a utility company not construct a nuclear power plant. *Id.*

⁴² 17 C.F.R. § 240.14a-8(c)(2)(ii). See note 46, *infra*, and accompanying text; SEC RELEASE No. 34-12999 (Nov. 26, 1976), SEC. REG. & L. REP. (BNA) No. 380 at E-5.

⁴³ 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

⁴⁴ *Id.* at 681.

pany's activity.⁴⁵

In the wake of the *Medical Committee* decision the SEC qualified the social cause exclusion so that a shareholder proposal relating to social policy decisionmaking is now excludable from the proxy statement only if it is "not significantly related to the business of the issuer."⁴⁶ The Commission has specifically declined to incorporate a test of economic significance for determining degree of relation to the company's business. Further, the Commission has stated that matters "relating to ethical issues such as political contributions" may fall within the "significantly related to business" standard.⁴⁷

B. Disclosure's Broader Role: The Social Aspect

Increasing shareholder influence on corporate decisionmaking through the proxy mechanism, especially for non-economic policies, reflects growing acceptance of the doctrine that many corporations are quasi-public entities.⁴⁸ The theory is rooted in the enormous concentration of economic power in the corporate sector. The burgeoning number of shareholders who participate in the market through investment funds and institutions further supports the thesis.⁴⁹ The doctrine that corporations are quasi-public institutions strongly suggests that the public should have power to scrutinize corporate activity.⁵⁰

The arguments favoring broader corporate disclosure under SEC rules require extending the theoretical basis of disclosure.⁵¹ A shareholder's interest in security investment must be viewed as more than an interest in deriving profit, and disclosure must be viewed as an inducement to responsible corporate behavior. Traditionally, inducement to socially responsible decisionmaking has been viewed as a secondary benefit of disclosure rather than a primary goal⁵² and

⁴⁵ For analysis of the socially motivated proposal exclusion under *Medical Committee*, see Chisulm, *Napalm, Proxy Proposals and the SEC*, 12 ARIZ. L. REV. 463 (1970).

⁴⁶ SEC RELEASE No. 34-12999 (Nov. 26, 1976), SEC. REG. & L. REP. (BNA) No. 380 at E-8.

⁴⁷ *Id.* at E-4.

⁴⁸ Drucker, *Big Business and the National Purpose*, 40 HARV. BUS. REV. 48, 59 (1962). This is not a new idea. Felix Frankfurter, one of the drafters of the 1933 Act, wrote in that year that the Securities Act "proceeds on the principle that when a corporation seeks funds from the public it becomes in every true sense a public corporation." Frankfurter, *The Securities Act: Social Consequences*, FORTUNE, Aug., 1933, at 55.

⁴⁹ Drucker, *supra* note 48, at 59.

⁵⁰ See *Disclosure and Responsibility*, *supra* note 21, at 587.

⁵¹ See text at notes 19-21, *supra*.

⁵² Some writers continue to reject vigorously the notion that corporations have any function other than to make as much money for the shareholders as possible. See *Corporate Responsi-*

the foremost justification for disclosure has been protection of investors' pecuniary interests.⁵³ Nevertheless, disclosure's effect on corporate conduct, at least in an economic, if not social, sense was certainly a major expectation of the 1933 and 1934 enactments.⁵⁴ Recently the financial and legal communities have recognized disclosure's tendency to induce socially responsible corporate decisions as a legitimate independent function.⁵⁵

The language of the Securities Act supplies adequate authority for SEC regulation of social policy disclosure. The Act provides that the Commission may require disclosure of such "other information" as the Commission determines is "necessary or appropriate *in the public interest* or for the protection of investors."⁵⁶ One fair reading of this section implies that Congress did not intend to limit the application of the securities laws to investors and the investment community. This section also implies that the jurisdiction of the Commission is broad enough to reflect changing economic and social climates. The Court of Appeals for the District of Columbia Circuit has recognized that social policy affects corporate profits⁵⁷ which in turn affects the value of corporate securities. This relationship suggests that social policy disclosure is well within the Commission's jurisdiction.

However, the SEC's own view of its role in this area limits further development of disclosure as an instrument of corporate responsibil-

bility Panel: The Role of the SEC, 28 BUS. LAW. 215, 223 (March 1973) (1973 special issue). However, many commentators advocate mandatory disclosure in areas such as minority hiring practices, product safety, foreign and domestic political contributions, and environmental impact. See e.g. Cary, *Corporate Standards and Legal Rules*, 50 CALIF. L. REV. 408, 417-18 (1962); Knauss, *A Reappraisal of the Role of Disclosure*, 62 MICH. L. REV. 607, 647 (1964). During the comment period on environmental impact rules, the SEC received suggestions for over 100 areas of social disclosure. SEC. REG. & L. REP. (BNA) No. 324 at E-1 [hereinafter cited as COMMISSION RELEASE]. The only areas which are being litigated in *NRDC v. SEC* are environmental impact disclosure and minority hiring practices disclosure. The claim for environmental disclosure is based on NEPA. See text at notes 75-81, *infra*. The minority hiring practices claim is based on a more general duty to implement national policy objectives.

⁵³ See text at notes 19-21, *supra*.

⁵⁴ Frankfurter, *supra* note 48.

⁵⁵ See Disclosure to Investors—A Reappraisal of the Administrative Policies Under the '33 and '34 Acts (1969) [hereinafter cited as The Wheat Report].

⁵⁶ 15 U.S.C. § 77(g) (1970) (emphasis added).

⁵⁷ See *Medical Committee for Human Rights v. SEC*, 432 F.2d 659, 681 (1970). Products liability lawsuits, governmental and private damage actions for environmental degradation, and public boycotts of a company's products are examples of financial ramifications which may result from irresponsible corporate activities.

ity.⁵⁸ The SEC has rejected numerous suggestions that it expand disclosure of information on socially significant corporate activities.⁵⁹ This is possible because the Commission's power to require corporate social disclosure is apparently discretionary.⁶⁰ The issue in *NRDC v. SEC* is whether NEPA overrides that discretion regarding environmental impact, creating a judicially enforceable obligation to promulgate substantive environmental disclosure regulations.

II. NEPA: PROCEDURE V. SUBSTANCE

The National Environmental Policy Act became effective on January 1, 1970.⁶¹ The general policy statement which establishes environmental protection as a national priority is contained in section 101 of the Act.⁶² This may be regarded as the substantive section.⁶³ Section 102 of NEPA, the "action forcing" section,⁶⁴ requires that a detailed EIS must accompany every "major Federal action significantly affecting the quality of the human environment."⁶⁵

In 1971, the Court of Appeals for the District of Columbia Circuit in *Calvert Cliff's Coordinating Committee, Inc. v. Atomic Energy Commission (AEC)*⁶⁶ established NEPA as a full disclosure act. In holding that the AEC's rules precluding agency consideration of environmental issues violated NEPA, the court articulated the standard for compliance with the Act—a case-by-case analysis of every major federal agency action weighing environmental impact against the countervailing benefits of the proposed activity.⁶⁷

Calvert Cliff's specifically rejected the AEC's argument that com-

⁵⁸ See generally SEC RELEASE No. 33-5704, (May 6, 1976), SEC. REG. & L. REP. (BNA) No. 352, explaining why environmental disclosure is beyond the purview of securities regulation.

⁵⁹ See, e.g., *Disclosure and Responsibility*, *supra* note 21; Sonde & Pitt, *Utilizing the Federal Securities Laws to "Clear the Air! Clean the Sky! Wash the Wind!"*, 16 HOWARD L.J. 831 (1971) [hereinafter cited as *Clear the Air!*]. The SEC has appointed an Advisory Committee on Corporate Disclosure to undertake a comprehensive study of the current system of disclosure, its goals and effectiveness, and to recommend changes in the objectives and application of the disclosure rules where appropriate. This is the first study of such breadth since The Wheat Report, *supra* note 55.

⁶⁰ See text at note 56, *supra*.

⁶¹ Pub. L. No. 91-190, 83 Stat. 853 (1970).

⁶² 42 U.S.C. § 4331 (1970).

⁶³ *Calvert Cliff's Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1112 (1971).

⁶⁴ Deutsch, *The National Environmental Policy Act's First Five Years*, 4 ENV. AFF. 3, 6 (1975).

⁶⁵ 42 U.S.C. § 4332(c) (1970).

⁶⁶ 449 F.2d 1109 (D.C. Cir. 1971).

⁶⁷ *Id.* at 1123.

pliance with the EIS requirement was a matter of administrative discretion.⁶⁸ The opinion stressed a comparison between the qualifying language of NEPA's substantive policy section (§ 101) and the language of the action forcing procedural section (§ 102).⁶⁹ The language of the policy section mandates the protection of the environment by all "*practicable means and measures*,"⁷⁰ while the procedural section states that the duties prescribed therein shall be executed "to the fullest extent *possible*."⁷¹ The court concluded that the difference in language between the two sections illustrated congressional intent that the procedural duties established by section 102 (preparation and consideration of the EIS) were less flexible than the section 101 substantive duties (choosing environmentally beneficial alternatives).⁷²

In addition to establishing the harm-benefit balancing standard for NEPA's EIS requirement, *Calvert Cliff's* established the court's jurisdiction to review administrative action under NEPA.⁷³ Again the opinion distinguished the procedural and substantive aspects of NEPA, holding procedural review to be more rigorous and expansive. The court said:

Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. The reviewing court probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse.⁷⁴

Like section 102, NEPA's section 103 provided procedure for agency execution of the substantive policies of the Act. Section 103 required all federal agencies to review their policies, regulations and procedures and "propose to the President by July 1, 1971 such measures as may be necessary to bring their authority and policies into conformity with the Act."⁷⁵ This section was further supplemented

⁶⁸ *Id.* at 1114.

⁶⁹ *Id.* at 1113-14.

⁷⁰ 42 U.S.C. § 4331(a) (1970) (emphasis added).

⁷¹ *Id.* § 4332 (emphasis added).

⁷² 449 F.2d at 1115.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ 42 U.S.C. § 4333 (1970).

by an Executive Order of March, 1970, requiring agencies to "initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals," and directed agencies "to develop programs and measures to protect and enhance the environmental quality."⁷⁶

In June, 1971, over a year after the Executive Order was issued and only one month before the response deadline, the SEC had still not begun to formally consider its NEPA responsibilities.⁷⁷ At that time the NRDC asserted that NEPA and the supplementary Executive Order required the SEC to revise its securities registration forms.⁷⁸ The proposed revisions would add disclosure rules concerning corporate environmental impact.⁷⁹ Thus, asserts NRDC, the SEC would bring its "authority and policies into conformity" with NEPA, as required by section 103 of the Act.⁸⁰

Judicial support for the NRDC's position may very well depend upon the federal courts' willingness to go beyond the *Calvert Cliff's* requirement to fully "consider" environmental goals, for the NRDC is asking the court to override the SEC's determinations following an extensive procedural analysis. In seeking judicially compelled corporate environmental disclosure regulations, the NRDC is ultimately asking for a substantive response to NEPA.

III. NRDC v. SEC: CAN THE COURTS COMPEL CORPORATE ENVIRONMENTAL DISCLOSURE?

A. Background

Initially, the NRDC pursued corporate environmental disclosure by filing a rulemaking petition requesting the SEC to promulgate

⁷⁶ Exec. Order No. 11514, 35 Fed. Reg. 4247 (1970).

⁷⁷ See *NRDC v. SEC*, 389 F. Supp. 684, 689 (D.C. Cir. 1974). The Commission probably assumed that, as a non-licensing agency, it had no responsibility under the Act. The Commission has since stated that its existing general rule requiring disclosure of "any other material information" complied with NEPA insofar as environmental compliance laws and legal proceedings affecting a registrant's business would be deemed material. SEC RELEASE NO. 33-5170 (July 19, 1971) [1970-71 Transfer Binder]. See note 28, *supra*.

⁷⁸ The NRDC was acting in its capacity as a public interest association, whose members are potential stock market investors. *National Resource Defense Council v. SEC*, 389 F. Supp. 689, 697 (D.D.C. 1973). NRDC asserts standing on the basis that some members are interested in investing their funds in environmentally responsible corporations. The district court upheld NRDC's standing on the ground that lack of the desired information provided the requisite "injury in fact." *Id.*; *United States v. SCRAP*, 412 U.S. 669 (1973).

⁷⁹ See text at notes 89-92, *infra*.

⁸⁰ 42 U.S.C. § 4333 (1970).

special rules in response to NEPA.⁸¹ When the petition was denied, the NRDC filed for review in the United States Court of Appeals for the District of Columbia.⁸² The court of appeals dismissed the suit for lack of subject matter jurisdiction⁸³ and, in March, 1972, the NRDC initiated the current action, *NRDC v. SEC*,⁸⁴ in the United States District Court for the District of Columbia.

Shortly before the litigation commenced, the Commission announced that it was considering proposed amendments to some of its forms.⁸⁵ The amendments, formally adopted on April 30, 1973,⁸⁶ require corporations to disclose the effect of the corporation's environmental impact on an issuer's business. The amendments concern only the economic ramifications of environmental impact, not the impact itself. Further, disclosure is required only insofar as environmental impact relates to compliance with governmental standards.⁸⁷ Even before NEPA this type of information was probably required to be disclosed under the "materiality" catchall provision of the Securities Act.⁸⁸

The NRDC proposals, on the other hand, require specified registrants⁸⁹ to disclose their current environmental impact, quantified

⁸¹ As provided by the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1970), any interested person may file a petition requesting rule consideration. The petition also included a request that the SEC promulgate certain disclosure rules regarding registrants' minority hiring practices. See note 56, *supra*.

⁸² *NRDC v. SEC*, Civ. No. 72-1148 (D.C. Cir. 1973).

⁸³ Direct review by the court of appeals is available only where the agency action is "final." 5 U.S.C. § 704 (1970). The SEC's action was deemed not final because it had not yet promulgated its official response to NEPA. See SEC RELEASE No. 33-5170 (July 19, 1971) [1970-71 Transfer Binder], FED. SEC. L. REP. (CCH) ¶78150.

⁸⁴ Civ. No. 409-73 (D.D.C. 1973). The action has already been heard twice in the district court. The first time it was remanded on procedural grounds. 389 F. Supp. 689 (D.D.C. 1974). See text at notes 94-101, *infra*. After the SEC complied with its duty to conduct full hearings in light of NEPA, the district court found the Commission's response to these hearings arbitrary and capricious and remanded again. 10 E.R.C. 1001 (D.D.C. 1977). See text at notes 138-40, *infra*.

⁸⁵ SEC RELEASE No. 33-5325 (Feb. 16, 1972) [1971-72 Transfer Binder], FED. SEC. L. REP. (CCH) ¶78524.

⁸⁶ SEC RELEASE No. 33-5386 (Apr. 20, 1973), SEC. REG. & L. REP. (BNA) No. 199.

⁸⁷ These regulations, which are now in effect, require disclosure of the effect on business of: (1) compliance with government standards; (2) administrative or judicial proceedings arising under government standards; and (3) major private litigation arising under government standards. Form S-1 and Form 10, 17 C.F.R. §§ 239.11, 249.310 (1976).

⁸⁸ See note 26 and accompanying text, *supra*.

⁸⁹ The NRDC proposes mandatory environmental impact disclosure by the 15 largest firms in 12 industrial categories. [1976] 7 ENVIR. REP. (BNA) 575. Presumably this limitation is aimed at meeting an SEC argument that environmental data for all registrants would be unmanageable.

to the extent possible.⁹⁰ The proposed rules also require the registrant to disclose the feasibility of curbing the pollution the registrant causes, and any pending or imminent environmental litigation, and to report any plans it has for improving the registrant's environmental impact. Further, the NRDC proposals require corporations to file with the SEC copies of non-compliance reports under governmental standards. The information disclosed under these proposed rules would remain with the SEC and would be available for public inspection. It would not, however, be generally distributed to shareholders in the proxy statement.⁹¹

Unlike the rules promulgated by the Commission, the NRDC proposals require all affected companies to account for their environmental impact. The proposals do not make environmental disclosure contingent on corresponding impact on the registrant's financial condition. Rather they emphasize that a company's environmental impact may be important to shareholders whether or not the impact has secondary economic effects.

The SEC acknowledges its jurisdiction to promulgate rules such as those proposed by the NRDC.⁹² Its general mandate to require disclosure of such "other information" as it determines is appropriate in the public interest authorizes broad SEC rulemaking discretion.⁹³ However, the Commission views the NRDC's proposals as an undesirable administrative burden and not of general investor interest.⁹⁴

⁹⁰ The disclosure requirement would apply whether or not the company's impact violated government standards. *Id.*

⁹¹ *Id.*

⁹² See COMMISSION RELEASE, *supra* note 52 at E-7. The Commission's rejection of the NRDC proposals does not include jurisdictional rationale.

⁹³ See *Flint Ridge Dev. Corp. v. Scenic Rivers Assoc.*, 426 U.S. 776 (1976). In *Flint Ridge*, the Supreme Court reviewed a 10th Circuit decision holding that registration of a land developer's disclosure statement (which the Supreme Court likened to securities registration, 426 U.S. at 778) by the Department of Housing and Urban Development (HUD) constituted major federal action within section 102 of NEPA and hence required HUD to prepare an EIS. The Supreme Court reversed the circuit court, but rested its decision on the ground that preparation of an EIS was impossible within the 30 day time standard set by the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1704, 1706(a) (1970). The Court refused to rule that registration of disclosure information by a federal agency was beyond NEPA's mandate to prepare an EIS. 426 U.S. at 787. Further, the Court specifically stated that HUD could adopt a wide range of rules requiring developers to furnish environmental impact information in their prospectus if the Secretary determined that such disclosure would protect investors or be in the public interest. 426 U.S. at 792.

⁹⁴ See COMMISSION RELEASE, *supra* note 52, nn. 35, 44.

B. *The 1974 Remand*

On December 9, 1974, the United States District Court for the District of Columbia issued its first opinion in *NRDC v. SEC* and remanded the case to the SEC for further consideration of rules responding to the NEPA mandate. However, the court left the challenged regulations in effect pending the Commission's response after remand hearings.⁹⁵ The district court relied on a strict construction of the Administrative Procedure Act (APA),⁹⁶ not on the substance of the NEPA mandate. The court concluded that the Commission had violated the APA in two respects. First, the Commission had not adequately notified the public that the proposed rules were intended to satisfy the SEC's obligation under NEPA.⁹⁷ Second, the Commission had not explained the rationale and purpose of the rules in sufficient detail to permit judicial review of the consideration process.⁹⁸ The remand directed the Commission to "develop a record" which would be useful in resolving two key factual issues: the SEC was to determine the extent of "ethical investor" interest in environmental disclosure, and to consider which disclosure methods would best provide the interested investors with the necessary information and eliminate "corporate practices that are inimical to the environment."⁹⁹

The grounds for the 1974 remand were a procedural rather than substantive rejection of the Commission's response to NEPA. However, the opinion indicates the court's sympathy with the NRDC's position. For example, the court directed that the SEC not limit its factual inquiry to the areas directed in the order, but "[r]ather, it must imaginatively exercise its authority and expertise."¹⁰⁰ Commenting on the substance of the NRDC's petition, the court noted that there "appears to be merit in Plaintiffs' disclosure suggestions which the Commission should carefully consider along with other proposals by interested parties."¹⁰¹

The court's obvious preference for greater environmental disclosure was not, however, a victory for environmentalists. The district

⁹⁵ *NRDC v. SEC*, 389 F. Supp. 689 (D.D.C. 1974).

⁹⁶ 5 U.S.C. §§ 551 *et seq.* (1970).

⁹⁷ 389 F. Supp. 689, 699.

⁹⁸ *Id.* See 5 U.S.C. § 553(c) (1970); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972).

⁹⁹ 389 F. Supp. 689, 701.

¹⁰⁰ *Id.* at 702.

¹⁰¹ *Id.*

court decision caused a two year delay while the Commission held lengthy hearings on the merits of various plans for environmental disclosure.¹⁰² During the review period no new rules regarding environmental disclosure were put into effect. The Commission ultimately reaffirmed its original position that environmental disclosure rules are not desirable except insofar as the disclosure pertains to the company's financial position.¹⁰³ The NRDC therefore renewed its challenge to the promulgated rules.

Given the court's obvious sympathy for the environmentalist's position, the court would likely have decided in favor of the NRDC in 1974 on substantive grounds if possible. The procedural remand thus reflects upon the merits of the NRDC's substantive claims.¹⁰⁴ The SEC has complied with the court's procedural orders.¹⁰⁵ Now, the issue is the validity of the conclusions which the Commission reached after performing the required cost-benefit analysis.

C. *The Findings on Remand*

1) *Investor Interest:*

In 1974, the court remanded environmental disclosure authority to the SEC with two directives. The Commission was ordered to determine, first, the extent of investor interest, and, second, the best method for achieving environmental disclosure.¹⁰⁶ In response to the first directive the SEC concluded that the investor interest was difficult to quantify.¹⁰⁷

Approximately 100 participants who identified themselves as investors expressed interest in social policy disclosure.¹⁰⁸ Due to the cost of participation this number is probably but a small fraction of those investors with some degree of interest.¹⁰⁹ The Commission

¹⁰² Public hearings held in April and May of 1975 included 54 oral presentations and 353 written comments. The Commission's evaluations of the proceedings are reported in COMMISSION RELEASE, *supra* note 52.

¹⁰³ See text at notes 85-88, *supra*.

¹⁰⁴ In its most recent decision in *NRDC v. SEC*, the district court found that NEPA does not substantively require the SEC to promulgate environmental disclosure rules. *NRDC v. SEC*, 10 E.R.C. 1030 (D.D.C. 1977).

¹⁰⁵ *Id.* at E-8 as modified in SEC RELEASE No. 33-5704 (May 6, 1976), SEC. REG. & L. REP. (BNA) No. 352. See note 87, *supra*.

¹⁰⁶ See text at notes 98-99.

¹⁰⁷ See COMMISSION RELEASE, *supra* note 52, at E-9.

¹⁰⁸ *Id.*

¹⁰⁹ See generally Comment, *Federal Agency Compensation of Intervenors*, 5 ENV. AFF. 697 (1976).

characterized investor interest as "an insignificant percentage" of American shareholders.¹¹⁰ The SEC noted that many of the participating "ethical investors" did not identify their investment portfolios. However, the SEC estimated the holdings of "those who did as 2/3 of 1% of the estimated aggregate value of the stocks and bonds held in the United States as of the end of 1974."¹¹¹ This estimate, however, means little, absent data relating the ratio of participants in the SEC proceedings to the actual number of interested investors. Further confusing the quantification of investor interest, the SEC reported that the interested participants included "approximately seven foundations, 22 religious institutions, 11 educational institutions, two mutual funds, five environmental groups, 37 individuals, and one state, Minnesota. . . ."¹¹² Since these participants represent many individuals, the number of interested investors is probably many times the number of participants.

Although not specifically requested to do so, the Commission reported finding three recurring rationales for the participants' interest in environmental disclosure. Each rationale related to economic rather than social concerns.¹¹³ The SEC's report on these findings does not attempt to relate the rationales for investor interest to the rules promulgated.¹¹⁴ Analysis suggests that these rules do not provide disclosure adequate to satisfy investor interest in environmental disclosure.

First, the SEC found that investors feel that non-compliance with environmental laws could lead to extensive corporate costs or liabilities.¹¹⁵ The current rules requiring disclosure of pending or imminent litigation do not answer this concern.¹¹⁶ The rules provide no information to allow prediction of conflicts not yet matured to the point of imminent litigation. Disclosure of non-compliance with existing

¹¹⁰ COMMISSION RELEASE, *supra* note 52, at E-9.

¹¹¹ *Id.* at E-9-10 (footnotes omitted).

¹¹² *Id.* at E-9-10 n.49.

¹¹³ *Id.* at E-11.

¹¹⁴ See generally COMMISSION RELEASE, *supra* note 52.

¹¹⁵ See note 87, *supra*.

¹¹⁶ For suggested comprehensive environmental disclosure rules see *Clear the Air!*, *supra* note 59, in which the Assistant General Counsel and the Special Counsel of the SEC called for comprehensive environmental disclosure rules and made specific proposals for amendments to the registration statement, *id.* at 883, and proxy rules, *id.* at 896. In addition to reporting non-compliance with environmental standards, the authors would obligate the registrant corporation to assess any detrimental effect of its activities or extended use of the products it manufactures. *Id.* at 887.

environmental standards might be a practical solution to this information gap.

The SEC determined that the investors' second rationale for interest in environmental disclosure was that the ability to avoid environmental litigation provides an index to management's overall effectiveness.¹¹⁷ The absence of litigation might arguably indicate an absence of problems, and one might therefore infer that the interested investor could depend on the litigation disclosure rules to provide the desired information. However, the absence of litigation may be less related to the quality of management than to the fact that not every environmental violation results in litigation. Further, if the quality of management is measured by the ability to avoid lawsuits, it should also be assessed for responsible decisionmaking. Hence, this reason for investor interest in environmental information favors regulations holding corporations accountable for the impact of their activities regardless of whether the activities lead to litigation.

The third SEC rationale for investor interest in environmental disclosure was that corporate social responsibility fosters the regulatory approval and positive public relations necessary for long-run corporate profitability.¹¹⁸ The Commission apparently considers this investor concern as an important factor in its conclusion that environmental disclosure is useful only as it pertains to the economic performance of the registrant.¹¹⁹ Yet the Commission has not explained how existing regulations provide information useful in determining whether a company is socially responsible. The Commission may be correct in finding that environmental responsibility is only significant to investors because it pertains to corporate profitability. However, if investor interest is valid, for any reason whatever, then disclosure regulations which would aid the investor in evaluating corporate environmental responsibility are in order.

2) *Implementing Environmental Disclosure:*

The district court's second directive ordered the Commission to determine how to utilize disclosure for the benefit of shareholders and the environment.¹²⁰ In response, the SEC found the benefits of

¹¹⁷ COMMISSION RELEASE, *supra* note 52, at E-11.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See text at note 99, *supra*.

comprehensive environmental disclosure rules to be outweighed by the administrative costs and burdens such rules would impose.¹²¹

The SEC based its findings on evidence that disclosure through securities registration would duplicate other disclosure sources. This was supported by participants' testimony that "existing environmental statutes already provide a sufficient incentive to avoid environmental injury . . . , companies are already required to monitor many aspects of their environmental practices and to file public compliance reports with various state and federal agencies, and . . . instances of significant environmental degradation are already widely publicized."¹²² However, the Commission's summary of its findings noted that shareholders do not presently have ready access to the information provided through these sources.¹²³

The SEC also found that disclosure rules such as those suggested by the NRDC would be subjective because of lack of agreement within the scientific community as to the effect of many activities on the environment.¹²⁴ Finally, the Commission found that the amount of detail necessary for meaningful environmental data might render disclosure documents as a whole more confusing to investors.¹²⁵ Thus, the Commission maintains that the only environmental information which could be uniformly and economically reported, other than the litigation and materiality requirements, is the corporation's estimate of "material estimated capital expenditures for environmental control facilities."¹²⁶ This means, that for companies not planning any such expenditures, NEPA has virtually no effect on disclosure responsibilities.

The most important finding resulting from the hearings is that the majority of participating interested investors would use the information to vote their proxies or to make shareholder proposals.¹²⁷ In light of this and the court's second directive, that the Commission determine the most appropriate response to NEPA,¹²⁸ it is dis-

¹²¹ See text at notes 124-26, *infra*.

¹²² COMMISSION RELEASE, *supra* note 52, at E-11.

¹²³ *Id.*

¹²⁴ *Id.* at E-8.

¹²⁵ *Id.* But see, *Clear the Air!*, *supra* note 59; see also Marlin, *Accounting for Pollution*, 135 J. ACCOUNTANCY 41 (1973) (suggested model for reporting environmental impact in financial statements). The American Institute of Certified Public Accountants has appointed Committees on Environmental Accounting and Social Measurement but they have not established reporting standards for a company's environmental and social performance. *Id.* at 43 n.7.

¹²⁶ COMMISSION RELEASE, *supra* note 52, at E-5.

¹²⁷ *Id.* at E-11.

¹²⁸ See text at note 99, *supra*.

appointing that the SEC has determined not to amend the proxy rules.¹²⁹ The principle behind the proxy rules is corporate democracy, the right of shareholders to express their views on the conduct of their corporation and to select the individuals who make its day-to-day decisions.¹³⁰

Further, disclosure through the proxy rules amounts to public disclosure in cases of large public corporations. If publicity induces socially desirable behavior,¹³¹ then wider distribution of the information will result in greater behavioral benefits. Initially, the Commission's proposed amendments did include one proxy regulation—a requirement that corporations disclose in their proxy statements the existence of environmental non-compliance reports.¹³² Even this limited proposal was abandoned before promulgation.¹³³

Under current regulations, the only proxy rule which could be construed as requiring any environmental impact disclosure is the general anti-fraud provision. This rule requires inclusion of any "material information" necessary in order to make the solicitation statements not misleading.¹³⁴ The Commission has used this rule in the past as a basis for enforcing failure-to-disclose liabilities where socially questionable activities were financially detrimental to stockholders.¹³⁵ The SEC may contend that its vigorous past use of the anti-fraud rule foretells similar enforcement in the environmental area. However, the provision has three major deficiencies pre-

¹²⁹ Moreover, the NRDC has also overlooked the importance of this factor. See text at notes 90-91, *supra*.

¹³⁰ See text at notes 35-39, *supra*.

¹³¹ See text at notes 52-55, *supra*.

¹³² COMMISSION RELEASE, *supra* note 52, at E-14.

¹³³ SEC RELEASE No. 33-5704 (May 6, 1976), SEC. REG. & L. REP. (BNA) No. 352, at E-1.

¹³⁴ Rule 14a-9, 17 C.F.R. § 240.14a-9 (1976). See discussion of materiality, note 26, *supra*. Rule 10b-5(2) makes any misstatement or omission of a material fact an act of fraud and subjects the corporation and the officers involved to civil liability for losses incurred by shareholders who either buy or sell securities without the benefit of disclosure of the information. See *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971). There is also potential private enforcement of anti-fraud provisions through civil action. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

¹³⁵ The Commission has recently invoked Rule 14a-9 as a basis for suit against corporations which fail to disclose any pattern of illegal or immoral conduct that has either been authorized or permitted to continue by the directors. The Commission deems such information material to a shareholder who must decide whether to exercise management's form of proxy. Although no specific rule has been promulgated obligating companies to disclose unlawful political contributions or bribes, the Commission has made these activities a target of enforcement under the anti-fraud rule. See *e.g.*, *SEC v. United Brands Co.*, Civ. No. 75-0509 (D.D.C. 1975) [1975-76 Transfer Binder] FED. SEC. L. REP. (CCH), ¶95420; *SEC v. Kalvex*, Civ. No. 74-5643 (S.D.N.Y. 1975) [1975-76 Transfer Binder] FED. SEC. L. REP. (CCH) ¶95226.

cluding its effective use for environmental accountability.

First, use of the anti-fraud provision as the sole requirement for environmental accountability gives the corporation itself responsibility for determining what information it must disclose. This leaves the corporation vulnerable to liability for failure-to-disclose without the benefit of specific disclosure guidelines.¹³⁶ The absence of guidelines also means that the interested stockholder has no means of evaluating the completeness of the information which does appear in the statement. Shareholders cannot determine what facts have been excluded because the company deemed them not "material." From the viewpoint of both corporations and shareholders, the anti-fraud provision would thus not seem to be a satisfactory environmental disclosure device.

The second problem with the anti-fraud obligation to disclose all "material information" results from a flaw in the rule's basic hypothesis. Theoretically, the extra liability imposed by the rule provides incentive for corporations to disclose all activities which might affect financial position. In actual operation, however, the company's fear that disclosure itself may generate poor public relations or environmental litigation acts as a strong disincentive for reporting negative environmental effects. This discourages disclosure until the disadvantages are outweighed by the risk of liability. The precondition to liability, financial effect, is only likely to occur as a result of publicity. The rule, therefore, does not become a factor in disclosure decisionmaking until exposure from another source is at least foreseeable. At best, the rule is an inefficient mechanism for informing shareholders of corporate environmental impact. At worst, the added liability it imposes may even encourage companies to conceal environmental impact.

Finally, the general anti-fraud obligation has one single advantage, its inherent flexibility. It allows the Commission to review, case-by-case, corporate activities which do not lend themselves to efficient categorization. However, environmental impact is not such an untypical activity. Rather, corporate impact on the environment (unlike foreign political contributions, for instance) appertains to nearly all registrants. Certainly it relates to all industrial corporations. Specific environmental proxy rules would be easier to administer and would be more broadly enforceable than case-by-case re-

¹³⁶ See generally Mann, *Watergate to Bananagate: What Lies Beyond?* 31 *BUS. LAW.* 1663 (1976).

view under the anti-fraud rule.

The proxy rules are potentially the most effective device for implementing environmental disclosure. Proxy disclosure provides the shareholder with direct access to corporate information. Moreover, broad distribution of information through proxies ensures true public exposure of corporate activities. As now promulgated, the SEC's rules rely on the anti-fraud provision for environmental proxy disclosure. In light of the SEC's own finding that investors were interested in environmental data as a potential influence on proxy voting, the anti-fraud provision is clearly inadequate. The SEC's refusal to promulgate environmental proxy rules, and the NRDC's failure to suggest proxy disclosure to the court, indicate that neither party perceives the full utility of the proxy device.

D. The Court's Review of the SEC's Findings: Another Remand

The SEC's extensive rulemaking hearings may satisfy the court's procedural directive. However, the district court specifically instructed the SEC to determine how to best serve investors and the environment.¹³⁷ The Commission found investor interest but failed to promulgate rules in light of that interest. Dissatisfied with this result, yet unable to find a substantive mandate in NEPA requiring the SEC to promulgate environmental disclosure rules,¹³⁸ the district court, in 1977, again resorted to procedural devices to remand to the SEC, this time for a feasibility cost study.¹³⁹ Thus, the district court also retains jurisdiction over the case.

In its 1974 opinion the district court announced that it was prepared to set aside the rules if "the Court finds that the SEC rulemaking is 'arbitrary, capricious, an abuse of discretion' or otherwise not in accordance with the law."¹⁴⁰ In its 1977 review of the agency's rulemaking process the district court ruled that the SEC was "arbitrary and capricious" in failing to consider all possible disclosure alternatives, notably the proxy rules, before ruling on the non-feasibility of environmental disclosure.¹⁴¹ This is especially true in light of investor interest in utilizing environmental information for making proxy voting decisions.

¹³⁷ NRDC v. SEC, 389 F. Supp. at 701 (D.D.C. 1974).

¹³⁸ NRDC v. SEC, 10 E.R.C. at 3030 (1977).

¹³⁹ *Id.* at 1042.

¹⁴⁰ NRDC v. SEC, 389 F. Supp. at 698 (D.D.C. 1974).

¹⁴¹ NRDC v. SEC, 10 E.R.C. at 1041 (D.D.C. 1977).

Under the standards suggested by *Calvert Cliff's*, the agency has an unqualified duty to consider environmental factors before acting.¹⁴² Its duty to choose the environmentally preferable alternative depends upon the "practicability" of doing so.¹⁴³ The courts can reverse substantive agency decisions under NEPA's requirement to choose the environmentally preferable alternative consistent with other national priorities.¹⁴⁴ But *Calvert Cliff's* remains the touchstone of enforcement. It demands objective weighing of these priorities. If the SEC reached its decision in good faith, then it must on remand develop a record sufficient to justify its decision to the court.¹⁴⁵

The district court's most recent remand rested on deficient explanation of the agency's decisions, not on NEPA's substantive requirements.¹⁴⁶ This reflects the established judicial preference for procedural enforcement of NEPA.¹⁴⁷ Another procedural delay is not, however, a victory for the environment or for interested shareholders. Hopefully the court will soon review on the merits. In doing so the court will eventually have to defer to the Commission unless it finds an "arbitrary and capricious" absence of good faith.¹⁴⁸ Ultimately, the NRDC's chances to prevail seem dim.

CONCLUSION

NEPA offers the SEC an opportunity to take an imaginative and socially valuable view of its role as regulator of corporate accountability. The Commission has declined to take it. Clearly, investors and the public should have access to information useful in evaluating the environmental effects of activities of publicly owned corporations; yet, unfortunately, neither NEPA nor the Securities Acts appear to compel such a result.

¹⁴² See text at notes 73-78, *supra*.

¹⁴³ 42 U.S.C. § 4331(a) (1970).

¹⁴⁴ The leading case for substantive review of NEPA is *EDF v. Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972). For analysis of substantive review under NEPA see Comment, *The Relationship Between Substantive and Procedural Review Under NEPA: A Case Study of SCRAP v. U.S.*, 4 *ENV. AFF.* 157 (1975).

¹⁴⁵ *NRDC v. SEC*, 10 E.R.C. 1038 (D.D.C. 1977). The court did not ask the Commission to change its decision, merely to provide a fuller explanation of the Commission's rationale so that the court could then form an opinion on the sufficiency of the Commission's cost-benefit analysis.

¹⁴⁶ *Id.*

¹⁴⁷ See text at notes 95-98, *supra*.

¹⁴⁸ *Substantive and Procedural Review Under NEPA*, *supra* note 144, at 170.

NEPA, as construed in *Calvert Cliff's*, prescribes a rigorous procedural balancing of environmental and competing interests. However, once a federal agency has performed the balancing to the court's satisfaction, NEPA does not compel the agency to choose the environmentally favorable alternative.

The Securities Laws set forth specific disclosure requirements for publicly owned corporations. The emphasis of these laws is financial protection of investors. Beyond the statutory disclosure requirements, the SEC has broad discretion to promulgate disclosure rules. Environmental disclosure would certainly have some prophylactic effect on corporate behavior. Some investors have indicated that environmental impact information would influence their investment decisionmaking.

Yet the Commission has determined that it will not compel corporate environmental disclosure beyond a very limited scope. Moreover, it has decided not to extend environmental disclosure into the proxy regulations. This leaves a large gap in the dissemination of environmental information to those intended to benefit most from the securities laws—members of the investing public. Both parties involved in this litigation have apparently ignored the potential for environmental disclosure through new proxy requirements. However, regardless of the outcome of the litigation, NEPA's procedural mandate has focused attention on the needs of the socially concerned investor. Now the court's task is to determine whether the Commission has adequately balanced those needs against the competing, and as yet unclear, interests in overall administrative efficiency and simplicity in corporate reporting.