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A VERMONT YANKEE IN KING BURGER’S COURT:
CONSTRAINTS ON JUDICIAL REVIEW UNDER NEPA

James F. Raymond*

I. INTRODUCTION

In 1978, an electrical industry journal confidently stated that "the publicized nuclear power issues, such as nuclear safety, radioactive waste disposal, and nuclear proliferation, are issues that have clear technical solutions with extremely low hypothetical risks." Other industry spokesmen described the chance of a major nuclear accident as "incredible," and lobbyists pressured the government to shorten the lengthy nuclear plant licensing process. Although antinuclear groups and governmental committees did release reports questioning these safety claims, the nation seemed prepared to accept nuclear power as the most feasible energy source.

Then, in the spring of 1979, the Three Mile Island nuclear generating plant, near Harrisburg, Pennsylvania, suffered a cooling system breakdown and leaked radiation into the environment. For several days, while pregnant women and young children were evacuated from the area, the nation watched in suspense as nuclear experts tried to cope with the unforeseen threat posed by the buildup of a potentially explosive gas bubble in the reactor.

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3 E.g., Regulation, AEI J. GOV'T & SOC’Y 12 (July/August 1978).
4 See, e.g., N.Y. Times, July 12, 1978, at 13, col. 4. The White House Office of Science and Technology warned that a solution to the waste storage problem is years away. Id.
5 Id., April 10, 1979, at A1, col. 1.
6 Boston Globe, March 29, 1979, at 1, col. 3.
7 Id., March 31, 1979, at 3, col. 1.
8 Id., April 2, 1979, at 1, col. 4.
safety committee reported shortly after the accident that "serious human, mechanical, and design errors" had contributed to the incident and, alarmingly, that several items causing the accident were present in other plants then in operation. Reports also disclosed that nuclear officials, although previously aware of serious problems in similar plants, had failed to order any review of the safety procedures in the stricken Three Mile Island plant. The prior declarations by industry spokesmen on nuclear safety sounded hollow in comparison.

The possibility of nuclear accidents and the need for a cautious approach to nuclear development did not escape legislative attention when Congress created the regulatory structure for atomic power. Besides giving general regulatory power to the Nuclear Regulatory Commission, Congress established a multi-step licensing process designed to maximize safety considerations. A nuclear power plant must be licensed twice, once for a construction permit and again for a license to operate. Initially, the Nuclear Regulatory Commission's staff and the Advisory Committee on Reactor Safeguards review the utility's application for a construction permit. Then, the Commission prepares a draft environmental impact statement on the proposed plant, which, after circulating and receiving comments on the draft, it follows with a final environmental impact statement. These impact statements are necessary in order to comply with the requirements of the National Environmen-

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10 Id., at B15, col. 2.
11 Boston Globe, April 3, 1979, at 12.
14 The Advisory Committee on Reactor Safeguards is an independent board of nuclear experts that studies and reports to the Commission on the hazards and safety standards of every proposed nuclear plant. 42 U.S.C. § 2039 (1976).
16 Id. § 51.25.
17 Id. § 51.26.
Subsequently, after a public adjudicatory hearing on all construction permits and on contested operating permits, the Atomic Safety and Licensing Board (Licensing Board) decides whether to issue the necessary license. Either the applicant or an intervenor may appeal the Licensing Board’s decision to the Atomic Safety and Licensing Appeal Board (Appeal Board) and, at its discretion, to the Commission itself. Ultimately, the Commission’s decision may be appealed to the United States Court of Appeals and, by writ of certiorari, to the United States Supreme Court. These procedural steps in the plant licensing process provide many opportunities for legal challenges, which antinuclear groups have been very willing to exploit.

One such challenge began in 1971 when the Natural Resources Defense Council (NRDC) intervened in the licensing of a nuclear power plant in Vernon, Vermont. NRDC claimed that an operating license could not be granted to the Vermont Yankee Nuclear Power Corporation because the Commission had failed to consider the environmental impact of reprocessing spent fuel and disposing of the plant’s nuclear wastes. NRDC also challenged the Commission’s decision not to allow cross-examination or discovery at a later informal rulemaking proceeding that had been held to determine whether the licensing process should consider the effect of all stages of the uranium fuel cycle, including fuel reprocessing and waste disposal, and, if so, how to evaluate their environmental impact.

Meanwhile, in another suit, several plaintiffs, including the Saginaw Valley Nuclear Study Group (Saginaw), challenged the Com-
mission's issuance of a permit to the Consumers Power Company for the construction of a nuclear plant in Midland, Michigan. Saginaw contended that the environmental impact statement prepared for the Midland plant was defective because it failed to consider implementing energy conservation methods that would reduce the need for the nuclear plant. In addition, Saginaw claimed that the Commission should have permitted discovery of the findings of the Advisory Committee on Reactor Safeguards, including interrogatories of its individual members.

Both NRDC and Saginaw were unsuccessful at the Commission level, and both intervenors appealed the Commission's decisions. The Court of Appeals for the District of Columbia decided both appeals on the same day and, in opinions written by Judge Baze­lon, reversed the Commission on all issues. On the Vermont Yankee licensing, the Appeals Court decided that the Commission must consider the effects of fuel reprocessing and waste disposal when it licenses individual plants. Furthermore, although the rulemaking procedure was an acceptable method of considering those effects, the court held that the particular procedures used were inadequate because they failed to “ventilate” the issue fully. While the court did not require cross-examination or discovery, it suggested that these procedures could have cured the defects in the proceeding.

In the Midland case, the Court of Appeals found that Saginaw's energy conservation contentions were sufficient to require their consideration by the Commission. In addition, although the court did agree with the Commission’s decision not to allow the discovery of

\[\text{five other residents of Mapleton, Michigan. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 531 n.9 (1978).} \]
\[\text{30 Aeschliman v. NRC, 547 F.2d 622, 625 (D.C. Cir. 1978).} \]
\[\text{31 Id. at 630.} \]
\[\text{32 Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 527-535 (1978).} \]
\[\text{33 Aeschliman v. NRC, 547 F.2d 622 (D.C. Cir. 1976); NRDC v. NRC, 547 F.2d 633 (D.C. Cir. 1976). Both cases were decided on July 21, 1976.} \]
\[\text{34 In addition to writing the majority opinion in both cases, Judge Bazelon also responded in a separate statement to Judge Tamm's concurring opinion in NRDC v. NRC, 547 F.2d 633, 655 (D.C. Cir. 1976) (Bazelon, J., separate statement).} \]
\[\text{35 NRDC v. NRC, 547 F.2d 633, 641 (D.C. Cir. 1976).} \]
\[\text{36 Id.} \]
\[\text{37 Id. at 653.} \]
\[\text{38 Id.} \]
\[\text{39 Aeschliman v. NRC, 547 F.2d 622, 628 (D.C. Cir. 1976).} \]
individual members of the Advisory Committee on Reactor Safeguards, it found the Advisory Committee's report to be inadequate because the report merely referred to certain problems in the reactor design without explaining them fully. The court consequently ordered the Commission to return the report to the Advisory Committee for further discussion of those problems.

Combining both cases in Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, the Supreme Court, speaking through Justice Rehnquist, decided all the issues in favor of the Commission. The Court upheld the Vermont Yankee licensing, and found that the procedures used in the fuel cycle rulemaking were adequate because they met the Administrative Procedure Act's minimum requirements for informal rulemaking. On the Midland licensing issues the Court held that the Commission's failure to consider Saginaw's energy conservation contentions fell within the Commission's discretion, and that the report of the Advisory Committee on Reactor Safeguards was adequate since the Committee had no obligation to explain further its conclusions.

This article examines the impact of Vermont Yankee on environmental law, with particular emphasis on how the decision weakens the constraints imposed on agency discretion by prior cases under the National Environmental Policy Act. The first section discusses both the Commission's failure to consider the environmental impact of nuclear fuel reprocessing and waste disposal in the Vermont Yankee licensing, and the sufficiency of the procedures used at the fuel cycle rulemaking proceedings held to consider that impact. The second section addresses the Commission's refusal to consider energy conservation as an alternative in the Midland plant's environmental impact statement and the Supreme Court's interpretation of the role of the Advisory Committee on Reactor Safeguards in the licensing process.

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1 Id. at 631.
2 Id.
3 Id. The Midland case also had a fuel cycle issue similar to, and controlled by, NRDC v. NRC. Id. at 632.
5 Justices Blackmun and Powell took no part in the case. All the other Justices joined Justice Rehnquist's decision. Id. at 558.
6 Id. at 538-39.
9 Id. at 554.
10 Id. at 556.
II. THE VERMONT YANKEE PLANT ISSUES

A. The Back End of the Uranium Fuel Cycle

The National Environmental Policy Act of 1969 (NEPA) requires a federal agency to consider the environmental effects of any proposed action. Under rules adopted by the Commission in order to comply with NEPA, the Licensing Board must include environmental harm as a cost when it weighs the costs and benefits of a proposed reactor. In Vermont Yankee, the Supreme Court addressed two questions concerning these requirements. The first question involved whether the Commission could issue a nuclear plant license without considering the environmental impact of fuel reprocessing and waste disposal. The second question concerned the adequacy of the procedures used by the Commission in a rulemaking proceeding held to assess the impact of fuel reprocessing and waste disposal.

Before examining the Court’s opinion, some understanding of the uranium fuel cycle is necessary. The uranium fuel cycle includes all stages in the processing of nuclear fuel, from its mining as uranium ore until its final disposal as spent fuel. Most of the activities in the fuel cycle occur away from the reactor site. The Vermont Yankee controversy concerned the stages of the fuel cycle, including fuel reprocessing and waste disposal, that follow the removal of the spent uranium fuel from the reactor. These final stages are called the back end of the fuel cycle.

During the fission process in the reactor, the uranium fuel breaks down into several highly radioactive by-products and, therefore, must be replaced periodically. Reprocessing of the spent fuel involves the extraction of usable plutonium and uranium. While reprocessing can increase nuclear fuel efficiency, it does not eliminate the waste disposal problem because the disposal of other non-usable fission products is still necessary.

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51 Id. §§ 4331, 4332.
52 10 C.F.R. § 51.52(c)(3) (1978).
53 E. Odum, FUNDAMENTALS OF ECOLOGY 465 (1971). The uranium fuel cycle stages include: (1) mining; (2) refining of the ore; (3) fuel enrichment; (4) nuclear element fabrication; (5) fuel burnup in the reactor; (6) spent fuel reprocessing; and (7) waste disposal. Id.
56 Id. All American commercial reprocessing plants have closed because of technical and
A nuclear power plant generates several forms of nuclear waste. High level wastes are produced primarily as fission products within the reactor's fuel rods,\(^5\) while lower level wastes are created both as fission products and by the contamination of other objects, such as pipes and tools.\(^5^8\) Since there is no known method to make the nuclear end products harmless other than the passage of time, disposal of these wastes actually entails the long-term storage of the contaminated materials.\(^5^9\) The time periods required are immense: some high level wastes must be isolated from the environment for thousands of years.\(^6^0\) Proposed methods for disposing of high level wastes include depositing the material in deep salt formations or in the sea bed, shooting it into space,\(^6^1\) and placing the wastes in surface depositories.\(^6^2\) All of the proposals involve difficult technical problems\(^6^3\) and, as yet, no acceptable method of waste disposal has been found.\(^6^4\)

At present, the spent fuel rods containing the high level waste from most commercial reactors are left in "temporary" storage in cooling tanks on the reactor sites.\(^6^5\) These on-site storage facilities are rapidly filling up, and many power plants may have to suspend operations in the 1980's absent the development of other storage facilities.\(^6^6\) Consequently, the nuclear power industry has pressured the government to develop permanent storage facilities, and many people both in and out of the government have recommended that

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\(^5\) High level wastes are produced primarily as fission products within the reactor's fuel rods.

\(^5^7\) Lower level wastes are created both as fission products and by the contamination of other objects, such as pipes and tools.

\(^5^8\) Since there is no known method to make the nuclear end products harmless other than the passage of time, disposal of these wastes actually entails the long-term storage of the contaminated materials.

\(^5^9\) The time periods required are immense: some high level wastes must be isolated from the environment for thousands of years.

\(^6^0\) Proposed methods for disposing of high level wastes include depositing the material in deep salt formations or in the sea bed, shooting it into space, and placing the wastes in surface depositories.

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\(^6^4\) Consequently, the nuclear power industry has pressured the government to develop permanent storage facilities, and many people both in and out of the government have recommended that
no nuclear plants be licensed until the waste disposal problem is solved.47

B. The Vermont Yankee Licensing

The first issue presented by the Commission and the Court of Appeals to the Supreme Court concerned whether the Commission could have properly issued the Vermont Yankee nuclear plant license without considering the environmental impact of spent fuel reprocessing and waste disposal. In upholding the license, the Appeal Board had decided that the impact was too speculative,68 and could be more appropriately considered in the licensing of reprocessing and waste disposal facilities.69 The Appeals Court, however, rejected these arguments, reasoning that NEPA requires the Commission to predict future impacts70 and that, since nuclear wastes pose a serious threat to the environment, postponing consideration of their effects would only perpetuate the "incremental decisionmaking"71 that NEPA was intended to end.72 Therefore, the Appeals Court reversed the granting of the Vermont Yankee license, holding that the Commission must consider the environmental effects of the back end of the fuel cycle in a licensing proceeding.73

47 See, e.g., N.Y. Times, April 16, 1978, at 34, col. 1. An account of the consequences of the failure to consider the long term problems of nuclear waste disposal was presented in Lester & Rose, The Nuclear Wastes at West Valley, New York, TECH. REV. 20 (May 1977). The privately owned West Valley fuel reprocessing plant was closed in 1972, leaving 600,000 gallons of high level radioactive wastes stored in a buried steel tank. The authors described the situation graphically:

It is estimated that 85 percent of all the radioactivity in the carbon steel tank at West Valley is contained in about 30,000 gallons of sludge at the bottom. . . . No satisfactory way to remove the sludge has been developed; it cannot be re-dissolved in nitric acid without dissolving the tank also. Furthermore, steelwork protruding into the tank floor will interfere with attempts to remove the sludge hydraulically or mechanically; access to the tank is limited to a few small holes in the roof, and the sludge itself is, of course, highly radioactive. Yet the wastes cannot be left indefinitely in its present form because the carbon steel tank will eventually corrode.

Id. The authors characterized the mistake as the product of inadequate technological assessment and a management philosophy marked by a lack of concern for future problems. Id. at 23.

69 Id. at 936.
70 NRDC v. NRC, 547 F.2d 633, 639-40 (D.C. Cir. 1976).
71 Id. at 640.
72 Id.
73 Id. at 641. The Appeals Court did say that this consideration may be accomplished through rulemaking proceedings, rather than the Commission's considering the fuel cycle impact for each plant at the individual licensing hearing. Id.
Rather than address the question as framed by the prior proceed-
ings, the Supreme Court instead rephrased the issue. The interven-
ors had successfully convinced the Court of Appeals that the Ver-
mont Yankee license was invalid because the Commission had re-
fused to consider the back end of the fuel cycle, thereby contraven-
ing NEPA. The Supreme Court, however, dismissed this issue as no
longer present in the case. Instead, the Supreme Court decided
that the actual issue concerned whether the Commission may con-
sider the back end of the fuel cycle in a licensing proceeding.
Reasoning that radioactive wastes do create adverse environmental
effects, it held that the Commission could consider waste disposal
and fuel reprocessing in the licensing hearing. The Court justified
this analysis on two grounds. First, it explained that the issue had
changed because of the Commission's decision, after the Vermont
Yankee licensing, to consider the back end of the fuel cycle in subse-
quently plant licensings. However, the Commission's change in posi-
tion was irrelevant to the question of the validity of the Vermont
Yankee license; the agency's later announcement that it would con-
sider fuel reprocessing and waste disposal in future licensing hear-
ings certainly had no effect on its failure to comply with NEPA in
past licensing proceedings. Second, the Court rationalized its failure
to question the validity of the Vermont Yankee license by referring
to the Commission's conclusion, based on the results of the later fuel
cycle rulemaking proceedings, that the environmental impact of the
fuel cycle would be "relatively insignificant." However, since the
rulemaking itself was also challenged, and, as the Court acknowl-
edged, could be vacated on remand, its findings cannot be used
to support the upholding of the Vermont Yankee license.

Giving an agency broad discretion in determining those factors
that it may consider in a licensing proceeding, especially after the

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15 Id.
16 Id.
17 Id.
18 Id.
19 Id. at 549. If the rulemaking is vacated on remand, the Vermont Yankee license will
remain effective, and the Commission may still refuse to consider fuel reprocessing and waste
disposal in subsequent proceedings, since the Court decided only that the Commission may,
not that it must, consider the back end of the fuel cycle.
20 The Court evidently did not consider the absurdity of allowing the Commission to com-
mit itself to an action, and only afterwards to decide whether the effects of that action may
be harmful.
Court recognized that nuclear wastes create "adverse environmental effects," is clearly inconsistent with NEPA's mandate. By overlooking the Commission's failure to consider the back end of the fuel cycle at the Vermont Yankee licensing, the Court has indicated that it will accept agency procedures that are far below the "strict standards of compliance" with NEPA long required by the lower federal courts.

C. The Fuel Cycle Rulemaking

As an alternative to determining the fuel cycle effects of each plant at individual licensing proceedings, the Commission held an informal rulemaking proceeding over a year after the Vermont Yankee licensing in order to assess the environmental impact of the fuel cycle of a model light water reactor. The Commission intended that the analysis produced at the rulemaking would be incorporated into the cost-benefit study conducted for all similar reactors. The Commission published notice of the rulemaking proceeding and allowed interested parties an opportunity to present comments, fulfilling the requirements for informal rulemaking established by the Administrative Procedure Act (APA). It did not permit the use of cross-examination and discovery.

NRDC appealed the Commission's refusal to use trial-like procedures at the rulemaking hearing, contending that the decision denied them an opportunity to participate meaningfully in the proceedings. Since the Court of Appeals had upheld NRDC's position, the issue before the Supreme Court, therefore, was whether a court may demand procedures beyond those specified in the APA for an informal rulemaking proceeding. The Supreme Court held that a court may not require additional procedures, reasoning that the possibility of such judicial action would infringe upon the agency's

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81 Id. at 539.
82 Calvert Cliffs Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971).
86 Id.
89 NRDC v. NRC, 547 F.2d 633, 643 (D.C. Cir. 1976).
discretion to choose its own procedures. Under the Court's holding, a reviewing court may determine only whether the administrative proceedings provided a sufficient substantive basis for the rule and may not investigate whether additional procedures beyond the APA minimum are necessary.

In this analysis, the Supreme Court followed the traditional administrative law distinction between rulemaking and adjudication, as set forth in the Administrative Procedure Act. Rulemaking is the process whereby an agency establishes a policy having a future effect. It closely resembles legislative decisionmaking. For example, in rulemaking an agency, like a legislature, is not limited by due process requirements for a hearing or adherence to the rules of evidence. Furthermore, absent a specific statutory provision to the contrary, evidence need not be presented on the record. Rulemaking hearings seek only to permit public input into the agency's decisionmaking, and not to provide a forum for parties to resolve factual disputes. Therefore, the agency may rule on the basis of information other than that presented by the parties. In order to provide uniform and streamlined rulemaking procedures, the APA requires only that the agency give notice of a proposed rulemaking, allow for interested parties to comment on the proposal, and generally explain the basis and purpose of any rule adopted. On the other hand, in adjudication the agency applies existing rules to past or present facts. An agency holding an adjudicatory proceeding acts

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96 Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 544 (1978). The Court stated that the only exceptions to this principle might arise where the rulemaking affected a small number of people individually, so that the effect of the proceedings is essentially judicial rather than legislative, or where the procedures represent an unjustified change from the agency's established practices. Id. at 542.


99 NRDC v. NRC, 547 F.2d 633, 656 (D.C. Cir. 1976) (Bazelon, J., concurring).


13 Id. § 553(c). The agency does not have to allow oral comments at public hearings. Id.

14 Id.

15 Schwartz, supra note 94, at 144. The APA defines adjudication to include any agency disposition other than rulemaking, and to include licensing proceedings. 5 U.S.C. §§ 551(6), (7) (1976).
in a judicial role and, therefore, is subject to procedural due process requirements. In addition, because of the importance of accurate fact finding in adjudication, such adversarial procedures as cross-examination are used.

The APA requires different standards of judicial review for adjudication and rulemaking. To uphold the result of an adjudicatory proceeding, a court must have substantial evidence on the hearing record supporting the agency’s decision. Review of informal rulemaking, however, cannot use the same standard, since the agency does not have to hold a hearing. Instead, the court looks outside of the hearing record to determine if the agency rule is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Nevertheless, in both situations, the court must review the agency’s action on its merits.

In Vermont Yankee, the Supreme Court adhered strictly to the APA scheme, ruling that the statutorily mandated review was exclusive. Consequently, a court could not reverse the fuel cycle rulemaking because of its perceived inadequate procedures, since the APA demanded no more procedures than those in fact provided. Such an analysis sharply contrasts with that used by the lower court.

The Court of Appeals rejected the “bright line” distinction that the APA draws between rule making and adjudication. According to Judge Bazelon, the distinction between rulemaking and adjudication has broken down because agencies have expanded the use of rulemaking into fact-intensive areas previously reserved for adjudication. For example, the fuel cycle rulemaking proceeding focused on technical fact finding and concerned an issue that the agency could have considered in an adjudicatory licensing hearing contain-

100 Londoner v. Denver, 210 U.S. 373, 386 (1908).
103 Id. § 706(2)(A). The Appeals Court named three areas to which the reviewing court must look for support of the fuel cycle rule: the EIS, its backup documentation, and the testimony offered at the hearing. NRDC v. NRC, 547 F.2d 633, 646 (D.C. Cir. 1976).
106 NRDC v. NRC, 547 F.2d 633, 655 (D.C. Cir. 1976) (Bazelon, J., separate statement).
107 Id. See also Duquesne Light Co. v. EPA, 481 F.2d 1, 5-6 (3rd Cir. 1973).
108 NRDC v. NRC, 547 F.2d 633, 656 (D.C. Cir. 1976) (Bazelon, J., separate statement).
109 Id. at 656 n.3.
ing adequate procedural safeguards. Since such an issue does not fit neatly into either the adjudicatory or rulemaking category, Judge Bazelon argues that a new “hybrid” procedure has evolved. This hybrid procedure involves rules suitable for rulemaking, but also requires accurate fact finding more appropriate for adjudicatory proceedings.

The Court of Appeals remanded that part of the fuel cycle rule concerning waste disposal and reprocessing to the Commission, holding that the agency’s procedures at the rulemaking proceeding were insufficient to “ventilate” those issues. The Court of Appeals perceived its role as insuring that the agency had provided the parties “genuine opportunities to participate in a meaningful way,” and that the agency had taken a “hard look” at the major questions. The Commission failed to do this on the waste disposal issue, basing the part of the rule dealing with waste disposal on the vague,

110 Brief for Appellees at 48, Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). NRDC argued that the agency should allow in the rulemaking hearing many of the adjudicatory procedures that would have been used if the issue were considered in a licensing hearing.

111 NRDC v. NRC, 547 F.2d 633, 656 (D.C. Cir. 1976) (Bazelon, J., separate statement).

112 It is on this point that Judge Bazelon differs from Judge Wright. Judge Wright does not recognize hybrid rulemaking as differing from traditional rulemaking. Rather, he sees rulemaking as involving policy decisions, where the reviewing court should not question the accuracy of the agency’s conclusions as long as it gave a good faith consideration to all the factors. Therefore, he does not consider additional procedures to be necessary. Wright, supra note 101, at 391-94.

113 NRDC v. NRC, 547 F.2d 633, 643 (D.C. Cir. 1976). Some of the parties disagreed with the Court’s interpretation of the Appeals Court’s holding, and the Supreme Court even expressed some doubt whether it was interpreting the holding correctly. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 541 (1978). The alternative interpretation — that the Appeals Court reversed the rulemaking on the basis of an inadequate record, rather than for insufficient procedures — was argued by the United States initially, Brief for the Federal Respondents in Opposition to the Grant of Certiorari at 9, and by NRDC, NRDC Brief in Opposition to a Petition for the Writ of Certiorari at 4. Several of the Appeals Court’s comments support this alternate interpretation, as when it referred to the vague testimony of the Commission’s main witness as providing “an insufficient record to sustain a rule limiting consideration of the environmental effects of nuclear waste disposal . . . .” NRDC v. NRC, 547 F.2d 633, 653 (D.C. Cir. 1976). The Supreme Court acknowledged that the Appeals Court may have considered the rulemaking record to be inadequate when it remanded the issue to the lower court. Vermont Yankee Nuclear Power Corp. v. NRDC, 485 U.S. 519, 549 (1978). The Court of Appeals, however, labelled the major question to be “whether the procedures provided by the agency were sufficient to ventilate the issues,” NRDC v. NRC, 547 F.2d 633, 643 (D.C. Cir. 1976), and Judge Bazelon in his separate statement discussed why a focus on agency procedures was necessary. Id. at 655-57.

114 NRDC v. NRC, 547 F.2d 633, 644 (D.C. Cir. 1976).

115 Id.
unsubstantiated testimony of a Commission scientist\textsuperscript{116} without giving the intervenors any opportunity to challenge that testimony.\textsuperscript{117} To remedy these deficiencies, the Appeals Court ordered the Commission to provide procedures giving intervenors greater participation in the rulemaking proceeding, in order to create a “genuine dialogue”\textsuperscript{118} that could develop the issues.\textsuperscript{119}

Judge Bazelon’s procedural review of “hybrid rulemaking” does not conform to the APA’s standard for review of agency rulemaking, and rests instead on his conclusion that judges are “institutionally incompetent”\textsuperscript{120} to weigh evidence, even to make an “arbitrary and capricious” determination, in rulemaking proceedings involving highly technical and complex areas.\textsuperscript{121} Consequently, since a court does not possess sufficient knowledge to evaluate the merits of agency decisions involving technical subjects, it must rely on a review of the agency’s procedures.\textsuperscript{122} The court needs the flexibility to require additional rule making procedures in order to insure that the participants in the proceedings have sufficient opportunities to challenge the agency’s findings.\textsuperscript{123} Only in this way can the reviewing court guarantee that the issues are fully developed.\textsuperscript{124} The APA, with its minimum notice and comment procedures and limited review, does not provide that flexibility. Therefore, rather than remaining constrained by the APA, the reviewing court must be free to modify judicially the outmoded standards.

Environmental cases especially warrant this judicial revision, both because of the nature of the subject and the reaction of many agencies to environmental concerns. As one judge commented, the

\textsuperscript{114} Id. at 647-51, 653.
\textsuperscript{115} Id. at 653-54.
\textsuperscript{116} Id. at 653. The Court of Appeals suggested several procedures that the Commission could use to create a “genuine dialogue,” including formal conferences between intervenors and staff, discovery, funding independent research by the intervenors, surveys of existing literature, memoranda explaining the Commission’s methodology, as well as cross-examination. Id.
\textsuperscript{117} Id. at 654.
\textsuperscript{118} Id. at 657 (Bazelon, J., separate statement).
\textsuperscript{119} Id. at 656-57. In International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973), Judge Bazelon explained why he did not consider himself qualified to review the merits of the agency’s decisions: “I recognize that I do not know enough about dynamometer extrapolations, deterioration factor adjustments, and the like to decide whether or not the government’s approach to these matters was statistically valid.” Id. at 651 (Bazelon, J., concurring).
\textsuperscript{120} NRDC v. NRC, 547 F.2d 633, 657 (D.C. Cir. 1976) (Bazelon, J., separate statement).
\textsuperscript{121} Id. at 644.
\textsuperscript{122} Id. at 655-57 (Bazelon, J., separate statement).
structure of the agency decisionmaking process works against environmental interests.\textsuperscript{125} Agency bias against environmental protection, or at least agency inertia or shortsightedness, as reflected in agency procedures making intervenor participation unnecessarily difficult,\textsuperscript{126} have prevented environmental matters from receiving the consideration that NEPA demands.\textsuperscript{127} In addition, the limited resources of most public interest groups, as compared to those of parties having an economic stake in the agency proceedings,\textsuperscript{128} often limits their role to contesting the presentations of industrial participants.\textsuperscript{129} Consequently, in a proceeding like the fuel cycle rulemaking, where the parties cannot cross-examine or otherwise directly challenge the testimony of other parties, public interest groups may have little input. Since a reviewing court considers the hearing record, among other things, in determining whether an agency decision meets the APA's arbitrary and capricious standard,\textsuperscript{130} the inability of a party opposing the agency to present its arguments effectively in the rulemaking proceeding creates a one-sided picture on review. In contrast, by imposing additional procedures providing for greater participation in the rulemaking, a court can better insure that the agency will respond to the public interest group's views,\textsuperscript{131} and that a more complete picture of the positions on the issue is available on review.

The APA's "arbitrary and capricious" standard of review does not assure accurate fact finding, because it requires only a finding of reasonableness and not an assessment of the accuracy of the rule-

\textsuperscript{125} Oakes, Developments in Environmental Law, 3 ENV'TL. L. REP. 50001, 50008 (1973).
\textsuperscript{126} See, e.g., Greene County Planning Bd. v. FPC, 455 F.2d 412, 417 n.12 (2d Cir. 1972); Davis, Citizens' Guide to Intervention in Nuclear Power Plant Siting: A Blueprint for Alice in Nuclear Wonderland, 6 ENV'TL. L. 621, 655-70 (1976).
\textsuperscript{128} Stoel, Environmental Decision-Making by Federal Agencies, 4 ENV'TL. L. REP. 50128, 50129 (1974).
\textsuperscript{129} NRDC v. NRC, 539 F.2d 824, 834 (2d Cir. 1976).
\textsuperscript{131} The NRC and its predecessor, the AEC, have not always been noted for their willingness to disclose information or to respond to outside comments. See Scientists Inst. for Pub. Information v. AEC, 481 F.2d 1079, 1098 n.78 (D.C. Cir. 1973); Lester & Rose, The Nuclear Wastes at West Valley, New York, TECH. REV. 20 (May 1977). Of the AEC's role in the West Valley fiasco, the authors commented, "the AEC generally responded to queries as briefly as possible, and volunteered even less," even though the AEC knew of the potential problems. Id. at 23.
making conclusions. Although this standard of review may be appropriate for traditional rulemaking, where the agency decides policy questions by balancing competing interests, environmental cases, where the subject matter is complex and the results of the agency decision can greatly affect the public health, require a more demanding form of review. Lower federal courts have long subjected agency procedures under NEPA to especially strict scrutiny. The Court of Appeals' decision that the traditional method was not sufficient to insure the appropriate scrutiny, and that additional procedures may be required in rulemaking, was a logical development from that strict standard.

The result from the point of view of the agency officials may be the same whether the court reverses the agency's decision for an inadequate record or for inadequate procedures. Either way, the administrator knows that the agency's procedures were not sufficient to produce an adequate record. By adding procedural review to its arsenal, however, the court gains the flexibility of an additional method for reviewing complex materials.

Hybrid procedural review, however, has not gone uncriticized. One criticism asserts that the use of procedural review will disrupt the rulemaking process by requiring the agency to graft trial-type procedures onto the rulemaking proceeding. While the Appeals Court suggested several nonadversarial techniques the Commission could use on remand, and avoided specifying any that the Commission must use, most writers have interpreted procedural review as requiring the use of cross-examination. Prior opinions by Judge Bazelon lend support to this interpretation. If the Commission does allow cross-examination, the resulting emphasis on adversarial

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132 B. SCHWARTZ, ADMINISTRATIVE LAW 152 (1976).
133 NRDC v. NRC, 547 F.2d 633, 657 (D.C. Cir. 1976) (Bazelon, J., separate statement).
134 E.g., Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1249 (10th Cir. 1973).
137 NRDC v. NRC, 547 F.2d 633, 653 (D.C. Cir. 1976). See note 118, supra.
140 E.g., Friends of the Earth v. AEC, 485 F.2d 1031, 1033 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, J., concurring).
tactics may not promote the exchange of information that the Appeals Court envisioned. 141

A second criticism of allowing a court to require additional procedures contends that judicial review would become totally unpredictable because the agency could not know what procedures a reviewing court might require. 142 Consequently, the agency would have to anticipate possible judicial review by using full adjudicatory procedures in all hearings, since that constitutes the only way an agency could guarantee enough opportunities for participation and thereby avoid reversal by the court. Such a result would force the agency away from what, in its expertise, it considers to be the best procedure and would result in costly delays. 143

Third, some lower federal court judges have disputed Judge Baze­lon's conclusion that procedural review is necessary in order to compensate for a judge's inability to understand complex, technical material. Judge Oakes, of the Second Circuit Court of Appeals, views the judge's lack of technical expertise as an advantage. 144 Because a judge cannot understand the technical language, agency experts are forced to explain their decisions in layman's terms. Consequently, not only the judge but the public, which must ultimately pay the costs, can understand the agency's decision. 145 On the other hand, Judges Leventhal and Wright, of the Court of Appeals for the District of Columbia, consider judges capable of mastering technical information, 146 at least to the extent necessary to determine whether an agency decision was arbitrary or capricious. 147 In either event, procedural review is not needed to compensate for judicial inexpertise. However, although all the named judges are exceptionally capable and have demonstrated a knowledge of and sensitivity

141 Williams, supra note 139, at 443-45.

142 Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 546 (1978); Wright, supra note 136, at 207.


145 Id.

146 Wright, supra note 136, at 199-200.

147 Ethyl Corp. v. EPA, 541 F.2d 1, 68-69 (D.C. Cir. 1976) (Leventhal, J., concurring); Friends of the Earth v. AEC, 485 F.2d 1031, 1034-35 (D.C. Cir. 1973) (Leventhal, J., concurring).
towards environmental problems, other federal judges may not share their ability or concern. Yet even that added fact does not necessarily warrant the use of procedural review. As Judge Wright suggested, such judges would probably be no more competent to evaluate agency procedures in order to determine whether an issue is fully "ventilated" than they are to weigh the substantive merits of a decision.\(^\text{148}\) If that conclusion is true, procedural review will be no more effective than the substantive review under the APA's arbitrary and capricious standard.

In sum, the Court of Appeals for the District of Columbia and the Supreme Court treated the fuel cycle rulemaking problem in completely different manners. The Appeals Court wanted to insure that the Commission gave the full consideration to the environmental impact of the fuel cycle that NEPA required. The court reasoned that this result could be reached by granting the parties greater opportunities for participating in the rulemaking proceedings than those required by the APA for informal rulemaking.\(^\text{149}\) In ordering the Commission to change its procedures, the Appeals Court refused to conform the procedures it required to the traditional rulemaking and adjudication "cubbyholes"\(^\text{150}\) of the APA. Rather, it adopted a flexible approach, permitting the modification of its review according to the nature of the proceedings. Because the fuel cycle rulemaking was a "hybrid" proceeding, the court required procedures beyond mere notice and comment in order to insure a full exploration of the fuel cycle impact.\(^\text{151}\)

Failing to show the same concern for the environmental hazards of nuclear power, the Supreme Court denied that NEPA had any effect on the standard of review.\(^\text{152}\) Instead, the Court rejected the flexible approach of the lower court, remanding the case to the Appeals Court to conduct a review of the rulemaking according to the "arbitrary and capricious" standard set forth in the APA.\(^\text{153}\) The Supreme Court sought to insure that a reviewing court would not interfere with either the legislative scheme for judicial review or


\(^{149}\) NRDC v. NRC, 547 F.2d 633, 653 (D.C. Cir. 1976).

\(^{150}\) Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1252 (D.C. Cir. 1973).

\(^{151}\) NRDC v. NRC, 547 F.2d 633, 644 (D.C. Cir. 1976).


\(^{153}\) Id. at 548-49.
with the agency's discretion to establish its own procedures. That the Court should view the issue this way is not surprising. Justice Rehnquist in particular has argued that courts should not question the wisdom of congressional decisions.

The Supreme Court's reliance on the APA and the traditional analysis of rulemaking, though, is unfortunate. The distinction between adjudication and rulemaking was never clearcut, and it becomes increasingly blurred when an agency uses rulemaking to make technical decisions when facts rather than policy judgments are controlling. As a result, especially in NEPA cases, judicial review may be ineffective in insuring the accuracy of the agency's results. The Supreme Court had an opportunity to consider whether the APA distinction is outmoded and, by fashioning a flexible remedy, to bring congressional attention to the problem. The Court's failure even to acknowledge any problem makes legislative consideration unlikely.

III. THE MIDLAND LICENSING

A. The Midland Environmental Impact Statement and the Threshold Test

The next issue faced by the Court resulted from a protracted dispute over the Commission's exclusion of energy conservation from the environmental impact statement (EIS) written for Consumers Power Company's Midland plant. Saginaw, the intervenors in the licensing, argued that the Midland EIS was defective because it did not include an examination of energy conservation as an alternative to the proposed plant. The Licensing Board dismissed Saginaw's energy conservation contentions as beyond the scope of its authority. The Appeal Board upheld the Licensing Board, reasoning that the proposed energy conservation alternatives did not meet a "rule of reason" used by the courts as the standard for determining the scope of alternatives to be considered in an EIS.

154 Id. at 544.
156 For another detailed criticism of the rulemaking analysis in this case see 1 K. Davis, Administrative Law 605-16 (1978).
157 Aeschliman v. NRC, 547 F.2d 622, 625 (D.C. Cir. 1976).
160 See, e.g., Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1975); NRDC v. Morton,
months later, the Commission ruled that the Licensing Board should not automatically bar evidence in support of energy conservation from licensing proceedings. In light of this decision, Saginaw moved to reopen the Consumers Power proceedings. The Commission, however, denied Saginaw's motion and set out a “threshold test” that a proposed alternative must meet in order to merit consideration. Under this test, the intervenors must make an “affirmative showing” in support of their contention and the proposed alternative must pass a three-pronged test for reasonableness. Since the Commission decided that the intervenors had failed to meet the affirmative showing requirement, it found that their contentions were properly excluded by the Licensing Board. The Court of Appeals, however, disagreed, holding that the Commission's rejection of energy conservation on the basis of the threshold test was arbitrary and capricious.

The Commission's proceedings present two questions. The first question concerns whether the Commission had independently to consider energy conservation in the Midland EIS. If so, the reviewing court should have held the EIS to be defective, returned it to the agency for further development, and nullified the plant's license. If the Commission did not have to consider the alternative independently, a second question arises: could the Commission still have excluded the alternative from the EIS when the intervenors specifically requested the agency to consider the issue. The Supreme Court answered both questions in favor of the Commission. In doing so, the Court departed significantly from the standards used by the lower courts in reviewing environmental impact statements.

1. The Midland EIS

The Supreme Court held that the Midland environmental impact statement did not have to discuss energy conservation. The Court

458 F.2d 827, 834 (D.C. Cir. 1972).
13 Id.
14 Id. at 23.
15 Id. at 32.
16 Id. at 24.
17 Id. at 24.
18 Aeschliman v. NRC, 547 F.2d 622, 629 (D.C. Cir. 1976).
19 See, e.g., NRDC v. Calloway, 524 F.2d 79, 94-95 (2d Cir. 1975).
reasoned that the scope of required alternatives was an "evolving" one, so that alternatives that might have to be considered when a court reviews the case may not have been required at the time of the plant licensing. Because energy conservation was not generally considered to be necessary in the early 1970's, and since the Commission had no evidence to indicate that conservation could lower the need for the new plant, the licensing board did not have to consider energy conservation as an alternative to the Midland plant.

a. Prior Judicial Standards Governing Agency Consideration of Alternatives

NEPA requires that responsible federal officials contemplating "any major federal action significantly affecting the human environment" prepare an EIS on the proposed action and include in it a discussion of possible alternatives to the action. Under Commission regulations, the Commission's staff prepares a draft EIS for a proposed plant based on the information available both in the utility's license application and from its own research. The staff must make this draft EIS available to interested parties before the licensing hearing. In addition, the Commission must invite comments on the draft EIS, although it does not have to hold a separate hearing to receive those comments, and it must acknowledge responsible opposing views in the final impact statement. After the Commission staff prepares the final EIS, the presiding officer reviews it to determine whether the Commission's NEPA review was adequate. Whether the EIS for a project is sufficient and whether the agency action is supported by the record are separate questions. Consequently, a court may reverse the agency's decision on the basis

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170 Id. at 552.
171 Id. at 553.
172 Id. at 552-53.
174 Id. § 4332(2)(C).
175 Id.
176 Id. § 4332(2)(C)(iii).
177 10 C.F.R. § 51.23 (1978).
178 Id. § 51.24.
179 Id. § 51.25.
180 Id. § 51.26(b).
181 Id. § 51.52.
of an inadequate EIS without reaching the merits of the final action.182

NEPA does not define the scope of the alternatives that the agency must consider, beyond requiring that all “appropriate” alternatives be studied.183 However, in Calvert Cliffs Coordinating Committee v. AEC,184 a case that has been called “the definitive judicial gloss on NEPA,”188 the Court of Appeals for the District of Columbia ruled that NEPA must be complied with “to the fullest extent possible.”188 Other courts have applied this strict standard of compliance in determining what alternatives an agency must consider. For example, the discussion of alternatives need not be exhaustive, but it must provide sufficient information to permit a “reasoned choice” of alternatives.187 In addition, the agency’s consideration cannot be limited to alternatives within the scope of the agency’s authority188 or to alternatives that would provide a complete solution to or replacement for the proposed project.189 The agency must also consider the alternative of taking no action.191 A case involving a coal fired generating plant shows the breadth of alternatives that can be required for a powerplant.191 There, the court found the EIS sufficient where it discussed the alternatives of providing no additional power, building on other sites, using such other fuels as nuclear power or gas, sharing other utilities’ output, and implementing energy conservation measures.192

Nevertheless, the scope of the agency’s consideration of alternatives is not indefinite, but is limited by a “rule of reason.”193 The agency does not have to discuss “remote and speculative” alterna-

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182 Sierra Club v. Morton, 510 F.2d 813, 829 (5th Cir. 1975).
184 449 F.2d 1109 (D.C. Cir. 1971).
186 Calvert Cliffs Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971).
189 Id. at 836. The appeals court in NRDC v. Morton explained: “If an alternative would result in supplying only part of the energy that the lease [of offshore drilling sites] would yield, then its use might possibly reduce the scope of the lease sale program and thus alleviate a significant portion of the environmental harm . . . .” Id.
190 Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1084 n.37 (D.C. Cir. 1974); Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 297 (8th Cir. 1972).
191 Mason County Medical Ass’n. v. Knebel, 563 F.2d 256 (6th Cir. 1977).
192 Id. at 263.
tives,\cite{197} such as alternatives that would not be available to meet the need for which the proposal is designed.\cite{198} For example, a court has said that an EIS for the sale of offshore oil leases should have considered the alternatives of substituting nuclear power or changing oil import quotas, but that it did not have to consider the use of oil shale or tar sands, geothermal energy or coal gasification.\cite{199} In addition, an agency does not have to consider alternatives that the record does not indicate would be effective.\cite{200} Consequently, a court determined that the EIS for an airport runway extension was sufficient where it discussed as alternatives only three different runway configurations and the no action alternative,\cite{201} but did not discuss methods of reducing traffic, such as increased landing fees or changed landing schedules, that might eliminate the need for the extension.\cite{202} Moreover, although the agency has the obligation to consider alternatives and cannot rely on parties to propose them, the parties' comments do have a bearing on how detailed the analysis of a specific alternative must be.\cite{203} Therefore, in a case involving a challenge to an agency's consideration of energy conservation, the court indicated that the agency's general discussion of energy conservation, without analyzing specific conservation techniques, was sufficient since the parties never brought specific techniques, such as peak pricing, to the agency's attention.\cite{204}

b. The Effect of Vermont Yankee on the Scope of Alternatives

The Supreme Court's analysis of the Commission's duty in preparing the Midland EIS could restrict future compliance with the

\cite{197} NRDC v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972).
\cite{198} Id.
\cite{199} Id. at 837.
\cite{200} Life of the Land v. Brinegar, 485 F.2d 460, 471 (9th Cir. 1973).
\cite{201} Id. at 470-71.
\cite{202} Id. But see Sax, The (Unhappy) Truth About NEPA, 26 OKLA. L. REV. 239 (1973). Sax analyzed why EIS's prepared for airport runway expansions usually address only a limited scope of alternatives. He observed that the typical airport EIS includes the alternatives of building a new airport elsewhere, building the proposed runway, or doing nothing, id. at 245, without considering less environmentally damaging and less costly alternatives such as using better scheduling and air traffic control techniques or limiting general aviation, even though these alternate methods have been shown to be effective, id. at 244. Sax concluded that bureaucratic inertia and agency self-interest prevented the agency from looking beyond the traditionally considered alternatives. Id. at 246-48.
\cite{203} See, e.g., Aeschliman v. NRC, 547 F.2d 622, 625 n.6 (D.C. Cir. 1976); North Carolina v. FPC, 533 F.2d 702, 707 (D.C. Cir. 1976).
\cite{204} North Carolina v. FPC, 533 F.2d 702, 707 (D.C. Cir. 1976).
spirit of NEPA. For example, the Vermont Yankee Court considered energy conservation to have been an unfeasible alternative in the early 1970’s and, therefore, beyond the scope of the Commission’s required analysis.\(^{202}\) The Court pointed out that before the 1973-74 oil shortage the subject received “little serious thought in most government circles.”\(^{203}\) However, the issue is not whether “most government circles” were considering energy conservation, but whether the Commission should have considered it. In effect, the agency was allowed to avoid its obligation under NEPA because other agencies, which were under no similar obligation, also did not consider energy conservation. Only as an afterthought did the opinion indicate that after the oil shortage of 1973 and 1974 the agency would have to include energy conservation in an EIS.\(^{204}\) The Court’s analysis seriously limits the scope of alternatives discussed in an impact statement, especially because the Court implied that agencies need not utilize foresight in preparing an EIS, as indicated by NEPA, but rather need only react to crises after they arise.

Vermont Yankee also narrowed the Commission’s scope of concern under NEPA in another way. The Calvert Cliffs court ruled that “NEPA establishes environmental protection as an integral part of the Atomic Energy Commission’s basic mandate.”\(^{205}\) This interpretation of the Commission’s role reflected Congress’s belief that federal agencies must be forced out of their narrow mission-orientation if federal environmental protection measures are to succeed.\(^{206}\) The Supreme Court, in contrast, took a step backwards.


\(^{203}\) Id. Contrary to the Court’s remarks, energy conservation was discussed before then. See, e.g., Remarks by President Nixon, 117 Cong. Rec. 18049, 18052 (1971), and response by Senator Robison: “Lastly, I am especially pleased at the attention the President gave in his message to the developing need for energy conservation.” Id. at 18054.

The Court also reported that the Council on Environmental Quality (CEQ) did not promulgate its regulations specifying consideration of energy conservation in an EIS, 38 Fed. Reg. 20,554 (1973), until over a year after the Commission prepared the Midland EIS. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 552 (1978). The CEQ, however, proposed those regulations in May of 1973, before the severe oil shortages were felt. 38 Fed. Reg. 10,856, 10,859 (1973). Furthermore, the CEQ described the regulations as incorporating “much of NEPA’s legal evolution in the courts over the last 2 years . . . .” The Council on Environmental Quality, Environmental Quality 234 (1973). The CEQ guidelines, therefore, should not have been used as a justification for the Commission’s failure to consider energy conservation.


\(^{205}\) Calvert Cliffs Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1119 (D.C. Cir. 1971).

Rather than accepting the Commission’s dual mandate of nuclear regulation and environmental protection, the Court instead looked to the Commission’s initial statutory role and found that “the Commission’s prime area of concern in the licensing context . . . is national security, public health, and safety.”\textsuperscript{207} The Court did acknowledge that “NEPA, of course, has altered slightly the statutory balance . . . ”;\textsuperscript{208} however, its discussion indicates that future emphasis will be on the word “slightly.”

Perhaps most importantly, the \textit{Vermont Yankee} decision could permit the Commission to abdicate its factfinding function to other agencies. Although NEPA does require that the agency preparing an EIS consult with other agencies with expertise in the area,\textsuperscript{209} it does not say that the agency should uncritically accept the opinions of others. Instead, NEPA clearly orders that the “responsible Federal official” study the environmental consequences and draft the environmental impact statement.\textsuperscript{210} By limiting the Commission’s area of concern, however, the \textit{Vermont Yankee} decision indicates that the agency does not have to make as wide ranging an inquiry of alternatives as prior lower court cases have held to be necessary. In the litigation, the intervenors challenged the projections of demand for power that the Midland plant was designed to meet. The need for power, though, is determined by the state public utility commissions,\textsuperscript{211} and therefore falls outside of the Commission’s prime area of concern.\textsuperscript{212} Because NEPA only “slightly”\textsuperscript{213} alters that concern, the Court suggested that the Commission can accept the demand figures from the state agencies without making the rigorous evaluation of them that the lower courts have required. Such deference to the findings of other agencies, in the place of independent analysis, defeats NEPA’s purpose in having the responsible agency study the alternatives to a project. Other agencies to which the Commission would defer are unlikely to question whether the projected demand could be decreased by energy conservation, since their institutional focus centers on conventional uses of power. Furthermore, since

\textsuperscript{208} \textit{Id.} at 551.
\textsuperscript{209} \textit{Id.} at 551.
\textsuperscript{210} \textit{Id.} at 551.
\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{Id.} at 551.
they are not the federal agency primarily responsible for the project, these other agencies do not have the same obligation under NEPA to consider alternatives.\footnote{NEPA does require that all agencies in the federal government consider the environmental consequences and study alternatives to their proposed actions. 42 U.S.C. § 4332(2) (1976). However, only the "responsible official" must prepare an EIS. Id. at § 4332(2)(C).} As a consequence, the Commission should not be allowed to use the findings of other agencies as a reason for failing to explore fully the entire range of alternatives.

The Court of Appeals for the District of Columbia had responded to a similar problem in \textit{Calvert Cliffs}.\footnote{Calvert Cliffs Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).} There, the plaintiffs challenged a Commission rule preventing a hearing board from considering an environmental issue, such as a project's effect on water quality, if the proposal satisfied the standards of the agency directly responsible for that issue,\footnote{Id. at 1122-27.} which, in the case of water quality, was a state agency.\footnote{The Water Quality Improvement Act of 1970, 33 U.S.C. § 1171(b) (1970).} Thus, under the rule, the Commission could defer to the determination of the other agency, even though that agency's concern was limited to whether the project complied with its standards and did not address either how the particular problem affected the total cost-benefit analysis for the project or whether alternatives were available that could decrease the harm.\footnote{Calvert Cliffs Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1123 (D.C. Cir. 1971).} In its decision, the Appeals Court rejected the rule as an abdication of the Commission's responsibility under NEPA.\footnote{Id.} By allowing the Commission to rely on the determination of need made by other agencies, \textit{Vermont Yankee} has overturned that part of \textit{Calvert Cliffs}, thereby emasculating NEPA's requirement that the agency responsible for a project study all relevant alternatives.

Although the Supreme Court recognized that an EIS is not invalid because it fails to discuss all possible alternatives "regardless of how uncommon or unknown,"\footnote{Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978).} the Court's use of this limitation further undermined the purpose of NEPA's requirement that alternatives be considered. In explaining why the Commission did not have to question the need for the Midland plant's power, the Court pointed out that the parties at the hearing thoroughly investigated the need "as that term is conventionally used."\footnote{Id. at 550.} Saginaw's energy conservation contentions, however, were especially intended to show...
that the Commission should look beyond the conventional measure of need toward alternatives involving "uncommon" approaches. NEPA, as interpreted by the lower courts, requires that an agency look outside of its traditional area of expertise in exploring less environmentally damaging alternatives.222 These courts have considered the requirement for a study of alternatives in an EIS to be important for NEPA's effectiveness because it both insures that the decisionmakers actually consider other methods of achieving the goals of a proposed action and permits outsiders to evaluate independently other options to an action.223 Yet this requirement of considering alternatives can only be effective if the agency actually makes a rigorous and independent study; the EIS loses its effect when the agency simply excludes alternatives that it has not previously considered as "uncommon," and then looks for support to other agencies that are unlikely to question its approach. By allowing the Commission to rely on a conventional analysis of need, the Court condoned a catch-22 situation: a proposed "uncommon" alternative that, if utilized, might reduce the demand for power need not be considered simply because it is uncommon. As a result, instead of a rigorous independent study, the agency will merely produce self-serving statements that do not seriously question the agency's proposal.224

2. The Threshold Test

The Supreme Court found energy conservation to be an unconventional alternative not meriting independent consideration in the Midland EIS.225 The Court then had to decide whether the Commission could still exclude an unconventional alternative when the intervenors requested that it be considered by the agency. The Commission had upheld the Licensing Board's exclusion of Saginaw's energy conservation proposals because they failed to meet the agency's "threshold test."226 On appeal, the Supreme Court affirmed that decision, holding that the agency acted within its discretion in excluding the proposed alternative,227 notwithstanding the

223 See, e.g., NRDC v. Morton, 510 F.2d 813, 825 (5th Cir. 1975).
224 See, e.g., NRDC v. Calloway, 524 F.2d 79, 94 (2d Cir. 1975).
226 Id. at 554.
227 Id.
Commission’s NEPA responsibilities.\textsuperscript{228}

The Commission stated a two-part test that a “novel”\textsuperscript{229} alternative raised by the intervenors must meet in order to warrant agency consideration. First, the intervenors must make an “affirmative showing”\textsuperscript{230} when raising the unconventional alternative.\textsuperscript{231} Second, the proposed alternative itself must “relate to some action, methods or developments” that would make the proposed facility unnecessary,\textsuperscript{232} be “reasonably available,”\textsuperscript{233} and have an impact “susceptible to a reasonable degree of proof.”\textsuperscript{234} Since the Supreme Court found that the intervenors had failed the “affirmative showing” requirement, the Court never reached the second part of the test. By not distinguishing between the two parts of the test, however, the Court indicated approval of the entire threshold test.\textsuperscript{235}

The Supreme Court endorsed the Commission’s demand that the intervenors’ showing in support of a proposed unconventional alternative be sufficient to require reasonable minds to inquire further.\textsuperscript{236} The Commission defined the requirements of this vague standard by its treatment of Saginaw’s proposals. While the Commission acknowledged the presence of a “legitimate” energy conservation issue in Saginaw’s contention that the utility’s advertising stimulated demand,\textsuperscript{237} it nevertheless ruled that the Licensing Board could exclude the issue because the intervenors offered no evidence supporting their contention.\textsuperscript{238}

The Court’s approval of the Commission’s demand for evidence to support a proposal shifts to the intervenors the burden of ascertaining whether a proposed alternative merits further agency consideration. The Court of Appeals, following the traditional “rule of

\textsuperscript{228} Id. at 553.
\textsuperscript{229} Consumers Power Co., 7 AEC 19, 31 (1974).
\textsuperscript{230} Id. at 32.
\textsuperscript{231} Id.
\textsuperscript{232} Id. at 24.
\textsuperscript{233} Id.
\textsuperscript{234} Id.

\textsuperscript{235} Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 554 (1978). The opinion emphasizes the intervenors’ failure to present evidence supporting their proposals, \textit{id.}, suggesting that the Court focused only on the affirmative showing requirement, without necessarily approving of the second part of the threshold test. But the Court’s general deference to the agency’s procedures throughout \textit{Vermont Yankee} and its failure to discuss specifically the elements of the threshold test indicate that the Court approved the entire test.

\textsuperscript{236} Id.
\textsuperscript{238} Id.
reason” analysis, ruled that once the intervenors’ comments “stimulate” the Commission’s interest the Commission must investigate the alternative in order to determine whether it should be included in the EIS.\textsuperscript{238} Under this criterion, Saginaw’s comments were sufficient because they identified “in a general way”\textsuperscript{240} the areas that it wanted explored.\textsuperscript{241} To emphasize that the agency, and not the intervenors, must investigate the alternative, the Appeals Court also required that the Commission explain its decision to give an alternative no additional consideration.\textsuperscript{242} This approach complies with the \textit{Calvert Cliffs} mandate that the agency take the initiative in investigating the environmental costs of its actions.\textsuperscript{243} In contrast, the Supreme Court in \textit{Vermont Yankee} turned the \textit{Calvert Cliffs} command on its head. Instead of putting the burden on the agency to show that an alternative can be omitted from the EIS, the Supreme Court allowed the Commission to shift onto the intervenors the obligation of showing that an alternative meets the rule of reason before the agency need consider it.

Requiring intervenors to produce an affirmative showing for a proposed alternative defeats the purpose of NEPA’s mandate that the agency consider all appropriate alternatives.\textsuperscript{244} Intervenors’ comments are important because they force the agency to question its policies.\textsuperscript{245} Since the intervenors often lack the resources necessary to develop and present findings of fact,\textsuperscript{246} placing the burden of presenting evidence on them makes challenges to agency action difficult or impossible. The court in \textit{Calvert Cliffs} sought to avoid this result, pointing out that “it is . . . unrealistic to assume that there will always be an intervenor with the information, energy and money required to challenge a staff recommendation which ignores environmental costs.”\textsuperscript{247} Recognizing this, courts have traditionally placed the burden of producing evidence on the agency, which has the resources to investigate alternatives. Such a procedure is espe-
cially appropriate because the agency can then transfer the cost, through the license application process, to the applicant,\textsuperscript{24} the party directly benefiting from the action and therefore the one that logically should pay for the NEPA investigation. Instead, in \textit{Vermont Yankee} the Supreme Court effectively shifted the investigatory expense to the intervenor, a party having little or no hope of financial gain in the outcome and least able to bear the cost.

The Commission used the second part of the threshold test to limit further the alternatives that it must consider. This part of the test contains a three-pronged requirement. However, the elements of this requirement are inconsistent with the standards concerning the scope of alternatives developed by earlier cases. Their affirmance continues the erosion of NEPA's constraints on agency discretion begun in the previous sections of the \textit{Vermont Yankee} decision.

The first element of the three-pronged test requires that a proposed conservation alternative "relate to some action, methods or developments that would, in their aggregate effect, curtail demand for electricity to a level at which the proposed facility would not be needed."\textsuperscript{249} Such a "complete alternative" requirement conflicts with the holding in \textit{Natural Resources Defense Council v. Morton},\textsuperscript{25} where the Court of Appeals for the District of Columbia specifically rejected an agency's rule that a proposed alternative must provide a complete solution.\textsuperscript{251} There the court reasoned that an agency normally has more choices than going through with a project as planned or eliminating it completely; rather, the agency must also consider the alternative of conducting the project on a reduced scale and thereby satisfying part of the need while at the same time reducing the environmental harm.\textsuperscript{252} In the case of a nuclear power plant, reducing demand by energy conservation might allow the substitution of a smaller nuclear or fossil fuel plant. The Commission, however, rejected that analysis and forced the intervenors to demonstrate that energy conservation would be able to lower demand to a level where existing facilities would be sufficient. If the intervenors failed that monumental task, it would not consider the alternative.

\textsuperscript{24} See 10 C.F.R. § 51.20 (1978), which requires an applicant to file a report substantially similar to an EIS.
\textsuperscript{24} Consumers Power Co., 7 AEC 19, 24 (1974).
\textsuperscript{246} 458 F.2d 827 (D.C. Cir. 1972).
\textsuperscript{25} Id. at 836.
\textsuperscript{252} Id.
The second and third elements of the test require that the proposed alternative be "reasonably available" and "susceptible to a reasonable degree of proof."253 Although the Commission's use of the qualifiers "reasonably" and "reasonable" suggests that its test conforms to the Natural Resources Defense Council v. Morton scope of alternatives standard, in reality the test is much stricter. According to the Commission, once the utility has established a "convincing" projection of energy demand, those alternatives that are "largely speculative" need not be considered.254 Moreover, once the Commission accepts the projected demand as valid or "convincing," it can exclude alternatives not totally meeting that demand as unreasonable. In the Midland case, the Licensing Board decided that projected power demands were "convincing" and therefore that it did not have to consider energy conservation. In response to Saginaw's suggestion that limits be put on certain uses of electricity, the Licensing Board asserted that the estimated demand consisted of "normal industrial and residential use and it is . . . beyond our province to inquire into whether the customary uses being made of electricity in our society are 'proper' or 'improper.'"255 By using this analysis, the Licensing Board evaded the point of the intervenors' energy conservation contentions and therefore declined to consider whether the Commission could in fact decrease demand by reducing the "normal use" of electricity through conservation measures.256 Since the utility had shown a "convincing" estimate of demand, and since the intervenors' energy conservation contentions aimed at reducing that projected normal demand, the Commission held that it could properly exclude energy conservation from consideration. Therefore, in effect, the Licensing Board only had to consider con-

254 Id.
256 The Licensing Board explained its reasoning:

[T]he Board is satisfied that the benefits outweigh the costs. The real question comes with respect to alternatives. Assuming that the power needs are to be met, are there better alternatives? The evidence demonstrates that there are not hydro sites available, that a pumped storage facility would not meet the local needs, that gas is not a viable alternative for the power use, and that outside sources are unavailable . . . . The question of alternatives is then boiled down to a choice between nuclear and fossil (either oil or coal fuel) at the proposed location or at some other location.

Id. at 226-27. Although it appears logical if the focus is on the agency's ability to meet the demand, the Licensing Board's analysis must be evaluated in light of the prior cases ordering agencies to consider alternatives outside of their authority to implement. See text at note 188, supra.
ventional supply-oriented alternatives, an unprecedented result under NEPA.

By holding that the threshold test fell within the Commission’s discretion, the Supreme Court extended the deference to agency procedures shown in its consideration of the fuel cycle rulemaking issue.\(^{257}\) In contrast, rather than deferring to agency discretion, the lower courts had uniformly demanded strict agency compliance with NEPA’s procedural requirements in order to implement fully its mandate that federal agencies give environmental values full consideration.\(^{258}\) In the threshold test issue, by deferring to the agency’s procedures, the Supreme Court has allowed the agency to determine its own standard of compliance with NEPA. Such a result justifies the concern of the lower courts. Where an agency can limit its consideration of alternatives by a test favoring the conventional methods it has already employed, its NEPA responsibilities are greatly decreased.

B. The Advisory Committee on Reactor Safeguards Report

The Supreme Court held that the report issued by the Advisory Committee on Reactor Safeguards on the Midland plant was adequate even though the report’s coverage of certain problems in the plant’s design was vague and may not have been understandable by the public.\(^{259}\) The Advisory Committee on Reactor Safeguards consists of experts appointed by the Commission to study and report on the hazards and safety standards of all proposed reactors.\(^{260}\) The report issued on the Midland plant contained five single-spaced pages written “in language accessible to a determined layman.”\(^{261}\) It discussed several problems in the design of the plant, concluding with a vague reference to certain “other problems” that the Advisory Committee wanted resolved, but which it failed to identify other than by noting that they were cited in prior unidentified Advisory Committee reports.\(^{262}\) Despite the vague reference, the Court


\(^{258}\) See, e.g., Greene County Planning Bd. v. FPC, 455 F.2d 412, 422(2d Cir. 1972).


\(^{260}\) 42 U.S.C. § 2039 (1976). The Commission can issue a license over the Advisory Committee’s disapproval, although it is unlikely to do so. Aeschliman v. NRC, 547 F.2d 622, 630 n.17 (D.C. Cir. 1976).

\(^{261}\) Aeschliman v. NRC, 547 F.2d 622, 630 (D.C. Cir. 1976).

\(^{262}\) The report stated: “Other problems related to large water reactors have been identified
held that the report satisfied the Advisory Committee’s responsibility to report on the plant hazards.\textsuperscript{263}

In order to determine the Advisory Committee’s responsibility, the Supreme Court looked to the legislative history of the act creating the Committee.\textsuperscript{284} Although the Advisory Committee has the dual role of providing technical advice to the Commission and informing the public on reactor hazards, the Court concluded that its public informational role is secondary to its technical advisory role.\textsuperscript{265} Since the Commission would have understood the reference to the “other problems,” the report satisfied this advisory role. Thus, rather than describing all the reactor problems to the public, the report need only have given the reasons for the Committee’s position on the proposed reactor.\textsuperscript{266} Consequently, even though the last paragraph was vague, it did not make the report fatally defective.\textsuperscript{287}

The Appeals Court did not share this interpretation of the role of the Advisory Committee. The lower court concluded that the Advisory Committee’s public informational and advisory roles were equal.\textsuperscript{268} Therefore, the report had to go beyond merely providing the public with the Advisory Committee’s position on the adequacy of the reactor safety standards, and instead also had to inform the public of the hazards of the plant so that concerned citizens could find out what problems might be “lurking” in a proposed reactor.\textsuperscript{269} The reference to the “other problems,” while perhaps intelligible to the Commission, did not meet the requirement of informing the public. Consequently, the Appeals Court ordered the Commission
to return the report to the Advisory Committee in order to add a short explanation of those problems in layman’s language and to cross-reference its discussion to the prior reports referring to the problems.270

The Supreme Court’s conclusion on the position of the Advisory Committee’s public informational role is questionable.271 Although the Advisory Committee’s enabling statute272 is silent on how the Committee must balance its roles, a congressional committee report cited by both courts273 does indicate that Congress intended the Advisory Committee to provide the public with more than just the reason for its position on a reactor:

The report of the committee is to be made public so that all concerned may be apprised of the safety or possible hazards of the facility. It is the belief of the Joint Committee [on Atomic Energy] that when the public is adequately and accurately informed that it will be in a better position to accept the construction of any reactors.274

It is true that the congressional report does not require that the Committee’s report include either short explanations of problems in layman’s language or cross-references to other reports, as ordered by the Appeals Court.275 Neither does it indicate that the Committee must deal “with every facet of nuclear energy in every report it issues,”276 which the Supreme Court, in a bit of hyperbole, suggests is the only alternative to its lower standard. The report does indicate, however, that the Advisory Committee should issue its reports with the goal of fully informing the public of the hazards of a reactor. The Appeals Court logically concluded that a report vaguely remarking on certain “other problems” of a reactor, without further explanation, was not written with enough regard towards furnishing the public with that information.

The differences in the conclusions reached by the two courts on

270 Id. at 631-32.
271 The Court has been similarly criticized for “taking lightly” the public informational purpose of NEPA. See McGarity, The Courts, The Agencies, and NEPA Threshold Issues, 55 Texas L. Rev. 801, 807 (1977).
275 Aeschliman v. NRC, 547 F.2d 622, 631 (D.C. Cir. 1976).
the role of the Advisory Committee reflect their different attitudes towards the role of the public in the licensing process. The Court of Appeals,277 and Judge Bazelon in particular,278 have clearly indicated concern that public participation in agency proceedings be encouraged. Only if the licensing process is made accessible and understandable to the citizen can he be sure that his safety is adequately protected.279 Unfortunately, the Supreme Court has not shown the same concern. Instead, Vermont Yankee indicates that the Court sees the intervenors as obstructing the administrative process280 and so will uphold agency procedures limiting their participation.

IV. Conclusion

Vermont Yankee presented several issues relating to the licensure of nuclear power plants. By upholding the Vermont Yankee plant license despite the Commission's refusal to consider waste disposal and fuel reprocessing in the licensing hearing, the Supreme Court indicated that it will not require an agency to comply strictly with NEPA. This result represents a large step backwards from the position taken by the lower courts regarding NEPA compliance. Moreover, in deciding that the Commission cannot be required to provide procedures beyond the APA notice and comment minimum for an informal rulemaking, the Court failed to confront the problems that hybrid rulemaking creates for effective judicial review. This decision may encourage agencies to substitute rulemaking for adjudicatory proceedings, thereby making judicial review of environmentally related administrative decisions more difficult.

The resolution of both issues involving the Midland plant decreased the role of the public in the licensing proceedings. The Court deferred to the Commission's discretion in upholding the threshold test, enabling the agency to limit the alternatives it must consider. As a consequence, public interest groups may have greater difficulty challenging agency decisions. In addition, the Court interpreted the Advisory Committee's legislative history as giving its role of inform-

277 NRDC v. NRC, 547 F.2d 633, 655 (D.C. Cir. 1976).
278 Id. See, e.g., Citizens for Safe Power, Inc. v. NRC, 524 F.2d 1291, 1303 (D.C. Cir. 1975) (Bazelon, J., concurring); American Public Power Ass'n. v. FPC, 522 F.2d 142, 147 (D.C. Cir. 1975) (Bazelon, J., concurring).
279 Aeschliman v. NRC, 547 F.2d 622, 631 (D.C. Cir. 1976).
ing the public a secondary position to its duty to advise the Commission. By allowing the agency to issue reports not readily understood by the public, the decision allows the Commission to put one more barrier in the way of effective public scrutiny of the agency's actions.

Vermont Yankee represents a reversal in the trend of environmental law. Until Vermont Yankee, cases in this area have generally followed the lower court rulings of the early 1970's strictly enforcing the mandate that federal agencies comply with NEPA procedures "to the fullest extent possible." In contrast, the Supreme Court has now deferred to agency procedural discretion, sacrificed environmental considerations and instructed the lower courts not to disturb an agency's decisions unless there are "substantial procedural or substantive reasons." By minimizing NEPA's role in restraining agencies, and by holding sacrosanct agency discretion, the Court has dealt environmental law a severe blow.

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283 Throughout its opinion, the Supreme Court freely criticized the intervenors and the Court of Appeals for delaying the licensing process. E.g., id. at 554, 558. These comments unnecessarily confuse the issues and indicate that the Court overcompensated in its decision. The Court railed at the intervenors' "unjustified obstructionism." Id. at 553. This criticism is aimed at the wrong target. A survey of 23 nuclear plants scheduled for operation in 1973 showed that legal challenges affected only four plants for a total of nine plant/months. In contrast, equipment failures affected six plants, causing delays of 15 plant/months, late delivery delayed nine plants for 68 plant/months, and poor labor productivity delayed 16 plants for 84 plant/months. Davis, Citizen's Guide to Intervention in Nuclear Power Plant Siting: A Blueprint for Alice in Nuclear Wonderland, 6 ENV'T'L L. 621, 652-53 n.171 (1976), quoting Hearings on Nuclear Plant Siting and Licensing Before the Joint Comm. on Atomic Energy, 93rd Cong., 2nd. Ses. v. II, 1147 (1974).

The Court castigated the Court of Appeals for interfering with the congressional policy to "try nuclear energy." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978). Apparently the Court reads congressional policy selectively. Congress may have decided to try nuclear energy, but in NEPA it also committed itself to a policy of environmental protection. The Court's failure to see the conflict between the two acts is at least as disturbing as the legal direction taken by the opinion.