Perspectives
on current developments

Snail Darters: Illustrating a Lawmakers' Dilemma

If a previously unknown species of fish were discovered in a river where a $100 million dam was nearing completion, and if operating the dam would condemn the species to extinction, would it be worth more to the public to save the dam or save the fish? In June 1978, the Supreme Court ruled on such a case, holding in *Tennessee Valley Authority* v. *Hill* that the Endangered Species Act of 1973 required the TVA to sacrifice the Tellico Dam in order to save the snail darter, a three-inch-long species of perch put on the Department of the Interior's "endangered species" list in 1975. In its subsequent efforts to devise a mechanism for making exceptions to the Endangered Species Act, Congress addressed a common regulatory conundrum: the problem of making rules both "reasonably flexible" and "free of loopholes."

Congress first appropriated funds for the Tellico Dam in 1967. Located on the lower section of the Little Tennessee River (near Knoxville, Tennessee), the dam is part of a larger development project designed to generate electricity, to control floods, and to promote economic development in the surrounding area. When in operation, the dam would create a thirty-mile-long reservoir covering about 16,500 acres, including some valuable farmland.

The Supreme Court's ruling in *TVA* v. *Hill* capped a decade of stop-the-dam efforts by local citizens (whose property would be flooded) and by environmentalists. In late 1973, when the Environmental Defense Fund lost a suit it had brought against the TVA in the U.S. District Court for Eastern Tennessee, the last legal barrier to the dam's completion seemed to have been cleared. But at about the same time, two events gave new leverage to opponents of the dam. One was the discovery of the snail darter in the Little Tennessee, and the other the passage of the Endangered Species Act of 1973. That act, among other things, directs the secretary of the interior to identify species "in danger of extinction" and to ensure that actions authorized, funded, or carried out by federal agencies do not "jeopardize the continued existence of such endangered species."

In January 1975, opponents of the Tellico Dam petitioned to have the snail darter classified as an endangered species. Secretary Thomas Kleppe did so in November and then, in April 1976, he formally declared those portions of the river inhabited by the snail darter to constitute the fish's "critical habitat" (an area critical for the species' survival). Clearly aiming to stop the dam, he also declared that all federal agencies must see to it that their actions do not result in the destruction or modification of this critical habitat area.

Meanwhile, even before the secretary issued these rulings, TVA began trying to end the Little Tennessee's status as a "critical habitat" by transplanting snail darters to the nearby Hiwassee River. Though snail darters have begun reproducing in the Hiwassee (TVA estimates that their numbers had tripled by 1978), the Department of the Interior has not been convinced that snail darters have established themselves securely enough in the Hiwassee to justify operation of the dam.

Despite the secretary's rulings, work on the dam continued, and in February 1976 opponents filed suit to stop it. In court, TVA argued (1) that the Tellico Dam was more than half completed when the Endangered Species Act became effective and 70 to 80 percent completed when the snail darter was officially listed as endangered, and (2) that Congress had approved new appropriations for the dam every year since 1967. Under these circumstances, TVA asserted, Congress could not possibly have wanted the act to block the dam. To substantiate this contention, TVA quoted from a June 1977 report of the Appropriations Committee of the House of Representatives: "It is the Com-

In Brief–

No Red at Mars. The Mars Candy Company, makers of M&Ms, is now making only green, yellow, and brown candies. The red M&Ms have gone the way of the nickel candy bar—victims, however, not of inflation but of "regulatory spillover." The FDA banned Red Dye No. 2 and raised questions about its substitute, Red Dye No. 40—and Mars decided the publicity on the red dyes might lead candy eaters to assume that red M&Ms were dangerous. So shoppers wanting red and green candies for Christmas had to go to Mars Candy's competitors, who apparently decided regulation would not spill over on them.

Insulate with What? Energy conservation is hailed as a wave of the future, and insulation is seen as a major way of conserving energy and helping make the nation self-sufficient. But a funny thing happened on the way to the millennium. In fall 1978, with insulation sales in many areas down 30 to 70 percent from the previous year, insulation company officials were thinking that the federal government was speaking with a forked tongue—or at least a confusing one. There are eleven separate agencies that regulate, test, or advise on insulation—which makes it difficult for the companies to know what standards apply in particular cases and for consumers to obtain coherent information. Thus, while the President urges the country to insulate, CPSC is studying whether fiberglass—the most widely used product—is carcinogenic and is requiring that cellulose—the next leading insulator—be chemically treated to reduce its corrosiveness. Since, of the other two leading materials, rock wool is chemically similar to fiberglass and urea formaldehyde foam will sometimes shrink, stink, and make people sick if light reaches it (as it may with improper installation), this part of the energy-conservation program seems not to have much energy left. The agencies may be quite right, of course, but something seems quite wrong.

Update on Foreign Environmental Impact Statements. On January 4, President Carter issued an executive order requiring federal agencies to prepare environmental analyses before they approve "major actions significantly affecting" the environment outside the United States. The order followed a similar but stronger January 1978 proposal by the Council on Environmental Quality (see *Regulation*, May/June 1978). While it may resolve some questions on how the National Environmental Policy Act's requirement for environmental impact statements should be applied to foreign projects, it leaves plenty of room for disputes: agencies are to devise their own procedures for carrying out the order and, "where necessary," may modify their use of foreign environmental analyses for the sake of promptness, good relations, or "appropriate reflection" of such factors as export promotion, confidentiality, and national security.

Complaints and Kudos. The U.S. Office of Consumer Affairs is paying for a five-year study on how federal agencies are handling citizens' complaints, the study being carried out by Technical Assistance Research Programs, Inc. But TARP's December 1978 report attacks the Office of Consumer Affairs—as well as the Department of Labor, Department of Energy, and HEW—for lack of effective complaint-handling procedures. TARP charged that OCA, which is headed by Presidential Adviser on Consumer Affairs Esther Peterson, has failed to provide other agencies and departments with needed guidance on handling complaints, preferring to spend its time on communications received directly from disgruntled consumers. TARP also criticized some agencies for excessive reliance on the kind of handy form letters that rarely have enough specific information to be helpful, and for failing to adjust policies in response to citizen complaints. But the report commended three regulatory agencies—the FDA, FTC, and FCC—along with the Department of Housing and Urban Development for "dramatic improvements" and the CAB, CPSC, and Postal Service (which gets a lot of practice) for having good complaint-handling systems all along.

mittee's view that the Endangered Species Act was not intended to halt projects such as these in their advanced stage of completion and [the Committee] strongly recommends that these projects not be stopped because of misuse of the Act."

The Supreme Court's decision of June 1978 held, in a 6–3 vote, that operation of the dam would indeed violate the act. In an opinion by Chief Justice Burger, the Court emphasized that, aside from a few "limited 'hardship exemptions'" that clearly did not apply to the dam, the act "admits of no exception" in barring actions that could threaten endangered species. Furthermore, the Court held that Congress's repeated appropriations for the dam in no way reduced the force of the Endangered Species Act, because they represented "relatively minor components" of the TVA budget and because legislators are entitled to assume that appropriations will be devoted to lawful purposes. The Court also held that the House and Senate appropriations committees' stated beliefs that the act did not apply to projects like the Tellico were inconsequential, because only Congress as a whole can alter a statute.

In response to a dissent by Justice Powell, who insisted that Congress could not possibly have intended that a $100 million dam and its associated public benefits be sacrificed for a species discovered long after construction had begun, the Court concluded that Congress plainly intended to "halt and reverse the trend toward species extinction, *whatever the cost*" (emphasis added). "Congress," the Court observed, "was concerned about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet" (emphasis in original). Moreover, although previous statutes on preserving endangered species left substantial room for discretionary exceptions and although "every bill introduced in 1973 contained a qualification similar to that found in the earlier statutes," the 1973 act "carefully omitted" any such qualifications.

In handing down its decision, the Court was mindful of the costs:

> One might . . . [say] that in this case the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter. But neither the Endangered Species Act nor . . . the Constitution provides federal courts with authority to make such fine utilitarian calculations. On the contrary, the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as "incalculable."

Following the Court's decision, Congress amended the Endangered Species Act so that a project that threatens an endangered species can be granted an exemption if it is proven to offer greater benefits to the public than would be gained by preserving the threatened species. The amendment provides for a two-tier review process, whereby exemptions are allowed if approved by a three-person ad hoc review board and then by the Endangered Species Committee (which consists of the secretaries of the Departments of Agriculture, the Army, and the Interior, the administrators of the Environmental Protection Agency and of the National Oceanic and Atmospheric Administration, the chairman of the Council on Environmental Quality, and a presidential appointee from the state where the disputed project is located). As for the Tellico Dam, the amendment provides that its case for an exemption be given special attention: Tellico (along with the Gray Rocks Dam in Wyoming) has bypassed the review board and gone directly to the Endangered Species Committee, and will *automatically* receive an exemption if the committee does not deny one within ninety days of the President's November 10 signing of the amendment. As of early January 1979, the committee was beginning to hold hearings on the dam.

It is easy to criticize Congress for drafting legislation so rigid as to preclude any weighing of costs and benefits. On the other hand, as frustrated members of Congress have often observed, to give agencies much discretion for "reasonable exceptions" is to give them latitude to ignore legislative intent. The statutes that were superseded by the Endangered Species Act of 1973 instructed federal agencies to preserve endangered species, but also granted the agencies latitude to give that goal a low priority—too low, in the view of many interested parties. Perhaps some members of Congress favored making the act rigid because they feared that anything less would not adequately protect their favorite endangered species.

In any case, it is difficult to devise general rules tight enough to save "important" animals —for example, the grizzly bear and the bald eagle—without unwittingly requiring that the public also make sacrifices to save "unimportant" ones such as the snail darter.

Battling Carcinogens Systematically: New Strategies at OSHA and CPSC

"Trying to control carcinogenic substances on a case-by-case basis is like trying to put out a forest fire one tree at a time." This attitude, voiced in October 1977 by Secretary of Labor Ray Marshall, underlies the efforts of the Occupational Safety and Health Administration and the Consumer Product Safety Commission to address cancer-causing substances in a more systematic way than they have traditionally. The policies they are moving toward would greatly increase each agency's capacity for promulgating new regulatory standards and thus for developing comprehensive and stringent programs for controlling carcinogens.

In a sense, it is impossible to achieve true comprehensiveness in regulating carcinogens. There are roughly 2,000 substances that have been identified as "suspect carcinogens" and the number is growing. (In the past ten years, the production of synthetic organic chemicals—among which new suspects are being identified all the time—has expanded by over 250 percent.) Whenever an agency promulgates a new standard limiting the use of a substance, it must give all affected parties an opportunity to contest the standard and to propose alternatives. Needless to say, rulemaking proceedings on carcinogens are controversial and time-consuming. For example, on vinyl chloride, OSHA needed a full six months to hold hearings, to solicit written comments, and to review the resulting 4,000-page record before it could publish a final rule—even though this was a top-priority matter for which OSHA borrowed resources from other projects. So far, OSHA and CPSC have completed respectively nine and four rulemakings on carcinogens, producing limits or bans on a combined total of twenty-six substances.

In such rulemakings, the controversy generally centers on two questions: (1) Is the evidence on record sufficient to prove that a substance (or product containing the substance) should be treated as a cancer-causing threat to humans? (2) If so, how strict a rule is needed to achieve an acceptable degree of safety?

In the past, OSHA and CPSC have addressed carcinogens on an ad hoc basis and thus have had to confront these questions from scratch in each case. There have been no controlling assumptions on how much weight to give to various types of evidence (for example, positive or negative results from either animal or human studies) and no established guidelines for translating a finding of carcinogenicity to a final standard (that is, no presumptions that evidence having 'X' degree of conclusiveness would lead to a regulatory remedy with the stringency of 'Y'). Thus, in each proceeding, OSHA and CPSC not only have had to examine evidence on the substance at issue but also have had to spend a great deal of time and resources reestablishing their general principles for evaluating carcinogens.

To alleviate this problem, OSHA in October 1977 proposed a rule entitled "Identification, Classification and Regulation of Toxic Substances Posing a Potential Occupational Carcinogenic Risk." If adopted, the rule will serve as the agency's fundamental guideline for promulgating new standards on carcinogens. Having completed hearings last July and having finished gathering written comments in late December, OSHA is expected to promulgate a final rule this spring.

With intent similar to OSHA's, CPSC in June 1978 issued an interim policy statement entitled "Classifying, Evaluating and Regulating Carcinogens in Consumer Products." This statement explains the policies and procedures CPSC is seeking to follow until it institutes a formal rulemaking proceeding (which has not yet been scheduled). On November 1, a U.S. district court held that CPSC's implementation of the statement on even a tentative basis before completing formal rulemaking violates the Administrative Procedure Act. CPSC has filed for reconsideration.

What makes OSHA's and CPSC's proposed new policies "systematic" is that they would establish principles and procedures applying to all of their proceedings for promulgating standards on individual carcinogens. The proposals use similar criteria for evaluating evidence on whether a suspected carcinogen actually poses a threat to humans. Both generally would consider positive results from one test on humans or from two long-term tests on other mammals to be "strong" evidence, and would consider positive results from one long-term test or from a number of short-run tests on mammals as "suggestive" evidence. Results would be considered positive if a substance significantly increased the incidence of either malignant or benign tumors in test subjects. In justifying their decisions to consider benign tumors (which are not cancerous), OSHA and CPSC noted that benign tumors can be hazardous both in their own right and because they may become malignant. In experiments with animals, both agencies also accept the validity of high-dosage testing (that is, administering larger doses for a given body weight than humans are exposed to), their reasoning being that tests using "normal" dosages may fail to detect threats to humans. Both agencies, while recognizing that risk tends to decline as dosage falls, reject the idea of a "threshold" dosage below which a carcinogen may be considered completely safe.

The agencies' heavy reliance on animal-test results stems partly from the limitations involved in epidemiological tests on humans. For moral and other reasons, it is not possible to use the tight experimental controls in human tests that can be maintained in laboratory tests of animals (thus, human "testing" is generally confined to retrospective comparisons between cancer rates in groups whose work or lifestyle exposes them to a suspected carcinogen and rates in groups without such exposure). In the absence of those controls, test results may be distorted by substances not detected by the test; tumors attributed to the substance being tested may in fact be caused in whole or part by other substances. An even more serious problem with human tests is that cancers in humans typically have a very long latency period—up to forty years. It is therefore possible for a carcinogen to put a cancer "in seed" in epidemic numbers before it could be detected by human tests. In view of this problem, mammals such as rats and mice (which have a proven susceptibility to virtually all agents known to cause cancer in humans and can be tested at much lower cost) are especially useful for testing because their cancers have much shorter latency periods—typically only one or two years.

Under OSHA's proposal, substances that are found in the workplace and that have produced either "strong" or "suggestive" evidence of carcinogenicity would automatically be subjected to rulemaking that would produce an exposure standard. In the case of the strong-evidence substances, OSHA would immediately impose an emergency temporary standard that would remain in effect until completion of the rulemaking proceeding. (A preliminary study commissioned by OSHA predicted that 116 chemicals that are produced in "significant" amounts would qualify for the strong-evidence category.) All of these standards would be based on "model" standards included in OSHA's proposal.

In promulgating standards, OSHA would set occupational exposure limits "as low as feasible." Where "suitable substitutes" are currently available or could be developed in the near future, OSHA would not permit any exposure. Although OSHA originally intended "feasible" to mean as low as technologically possible without inflicting severe financial injury on affected firms, a recent court ruling has rendered OSHA's future interpretation of "feasible" very much in doubt: last October, a U.S. court of appeals struck down OSHA's benzene standard on the grounds that OSHA lacked sufficient evidence that benefits from the standard would exceed the costs.

Under CPSC's proposal, there would be automatic evaluation of the risk attached to products containing substances for which "strong" evidence is found and discretionary evaluation in cases of substances for which lesser evidence is available. In evaluating risk, CPSC would consider, among other things, the substance's apparent potency as a carcinogen, the extent to which the product exposes the population to the substance, and the social and economic effects that would accrue from a ban on products containing the substance.

If CPSC determined that continued use of a substance in consumer products would impose a significant risk of cancer on the population, it would ban the substance—unless the ban would impose unacceptable social and economic costs (stemming from the importance of products containing the substance and the unavailability of suitable substitutes), in which case CPSC would require a reduction of the substance to the "lowest attainable level."

Both agencies' proposals have aroused tremendous controversy—and not because all of the opponents would like OSHA and CPSC to continue "fighting forest fires one tree at a time." The potential costs and benefits of the policies are in furious dispute. For example, a study commissioned by the American Industrial Health Council estimated that regulations resulting from adoption of OSHA's proposal would involve annual compliance costs of $6 to $36 billion and require capital expenditures of $9 to $88 billion, depending on how the proposal would be implemented. But defenders of OSHA's proposal contend that such figures are too high and that the implementation of the proposal would generate health benefits far exceeding actual compliance costs.

OSHA and CPSC are trying to get away from the one-tree-at-a-time approach, but even those who agree with this endeavor need not agree how to fight the fire—and it is not at all sure that the disagreement will produce more light than heat.

Dress Codes and Sports: HEW Applies Some "Common Sense" . . .

Should the federal government be telling local school authorities that they may not forbid boys from wearing their hair to their shoulders or forbid girls from wandering about in a provocatively bra-less state? Health, Education, and Welfare Secretary Joseph Califano recently announced that "most Americans feel" these questions "are handled with more common sense at the local level" and that HEW would change its regulations accordingly.

Is Ohio State spending enough to encourage women students to enter sports competition, considering all the attention and funds it gives to its famous—male—football team? While Secretary Califano has not offered his reading of what "most Americans feel" about this question, he has made it clear that it will *not* be left to "common sense at the local level."

On December 3, 1978, Secretary Califano announced his department's intention of amending its regulations against sex discrimination in educational institutions by deleting the section forbidding discrimination "in the application of any rules of appearance." But at the same time he announced a stricter, or at least a more detailed, interpretation of HEW rules on sex discrimination in college sports programs. Both decisions must be approved by the President and are technically subject to veto by a joint resolution of Congress, but—judging from past experience—HEW will be left to make them on its own. How it came to be in a position to make such decisions is probably more significant than the immediate consequences of either proposal.

Back in 1972 Congress sought to promote sex equality in government programs by enacting Title IX of that year's education amendments. In terms borrowed directly from the ban on race discrimination in Title VI of the 1964 Civil Rights Act, Title IX prohibited discrimination in "any program or activity receiving federal financial assistance"—though the ban in this case was applied only to "education" programs or activities. Title IX also includes a "pinpoint provision" specifying that any funding cutoff to enforce compliance with the statute "shall be limited in its effect to the particular program or part thereof in which such noncompliance has been so found."

HEW was widely criticized by women's groups for taking three years to draw up the implementing regulations for Title IX, but the delay is not surprising when one considers the ambitious scope of what the department produced: HEW proceeded as if Title IX's ban on sex discrimination applied not to particular programs receiving federal funds but to any program that takes place at an educational institution receiving federal assistance in some capacity—whether or not the assistance is direct or the program is strictly "education." Thus the regulations promulgated in 1975 imposed an elaborate set of requirements to prevent discrimination in employment practices, covering every position from cafeteria worker to dean; they specified the proper handling of pregnant students; and they directed the conditions under which physical education classes must be sexually integrated. They also covered, among other things, the operation of dormitories, infirmaries, sports programs, and virtually all extracurricular activities.

Is this really what Congress intended? Several district court judges have ruled in cases over the past two years that the employment section of the regulations goes beyond what Congress authorized in Title IX (since employment is not an "education" program or activity, even when the employer is a school). While HEW is appealing these decisions, other portions of the regulations may also be vulnerable to challenge on the same grounds. Whatever the courts may determine, the truth is that Congress contented itself with voicing a national consensus on the vague ideal of equal opportunity for the sexes and then left it to HEW to settle the tough questions about how this ideal ought to be interpreted in particular situations.

Secretary Califano's new proposals are a good illustration of what is disturbing about this practice. To many it has seemed a trifle absurd to have a *national* policy on whether schools and colleges—including private ones—may require dress codes, and altogether absurd to say that schools may not require boys to wear ties or girls to wear dresses without imposing the same requirement on the opposite sex. But if HEW finds reasons to leave this issue to "common sense at the local level," why does it not do the same with rules affecting dormitory use, evening curfews, or health-care facilities—to cite a few examples of what remains in

the regulations? So far, HEW has remained silent on this question.

HEW cannot even contemplate deleting all provisions on sports, however, since Congress explicitly required that intercollegiate sports be covered in the Title IX regulations "in some reasonable manner." But what is "reasonable"? In his December 3 announcement, Califano reiterated the existing policy of refusing to exempt revenue-producing sports like football from Title IX coverage, despite intense urging by college athletic associations. But he did note that the new requirement for equal per capita spending for men's and women's sports programs (with expenditures for each college based on the number of participants of each sex in its existing athletic programs) might be relaxed for institutions which show that the differences are based on "non-discriminatory factors, such as the costs of a particular sport (for example, the equipment required) or the scope of the competition (that is, national rather than regional or local)." Perhaps this is a reasonable compromise between the claims of women's rights advocates for more encouragement to women's athletics and of sports directors fearing diversion of resources from prominent or well-established men's teams. But in practice it means that HEW inspectors will be deciding on a case-by-case basis whether the adjustments arrived at by particular colleges are "reasonable."

Secretary Califano's decision to scrap the regulations on dress codes may have been intended to make the department's Title IX enforcement less controversial or obtrusive. But the tacit admission that HEW retains wide discretion to decide which areas of potential "sex discrimination" to address may fuel more future controversy than will be allayed by this precedent of deferring to "common sense at the local level."

. . . But Not Everywhere: HEW-ing at Hillsdale

The difficulties of Hillsdale College provide another example of how far HEW takes its regulatory authority under Title IX of the 1972 education amendments (see "Dress Codes and Sports," page 10, above). Not that Hillsdale was HEW's solitary target. Indeed, by December 1978 some 20,000 colleges and school districts had been asked to sign HEW's standard "assurance of compliance" with Title IX (most of them unquestionably receiving federal funds). Nor was Hillsdale the only institution that balked at signing the assurance. Initially twelve colleges and thirty-eight school districts did not sign. But all of them eventually did when HEW threatened to cut off funds, except for Hillsdale (a small liberal arts college in Michigan) and Grove City (ditto in Pennsylvania).

Hillsdale has made a point of refusing any federal aid, hoping thereby to remain free from the federal regulation that accompanies the aid. But HEW argues that the college is subject to Title IX because some of its students receive federal loans and grants. The college, while insisting that it does not practice any sex discrimination (and HEW has not charged it with practicing any), takes the position that it is only certain students, and not the institution, that are receiving aid—and, moreover, that HEW is exceeding the scope of its statutory authority. At most, the college argues, it should be held to account for administering the student aid funds in a nondiscriminatory manner.

Grove City made the same claim but was ordered by an HEW administrative law judge to sign the assurance or have its students lose their aid. The administrative law judge in the Hillsdale case, however, handed down a decision whose calculated ambiguity rivals that of the Supreme Court in *Bakke*. In August 1978 he ruled (1) that acceptance of federal aid by Hillsdale students does indeed subject the college to HEW regulations, but (2) that Hillsdale's refusal to sign the assurance does not by itself entitle HEW to suspend the student aid, even though the regulations require Hillsdale to sign. The judge held that judgment on the extent of Hillsdale's obligation to HEW—or the extent of HEW's authority to regulate areas apparently unrelated to an "education program or activity"—should be deferred until such time as HEW's Office for Civil Rights charged the college with a substantive violation.

Although both sides in the Hillsdale case have suggested that the administrative law judge's decision was "essentially" in their favor, both have pressed their objections before the HEW secretary's reviewing panel for such cases. It will be months before this panel (now being reorganized at Secretary Califano's direc-

tion) delivers its judgment and—given the likelihood of appeals to the courts (Grove City has already appealed)—quite possibly years before the underlying issues are finally resolved.

One wonders if—perhaps—this too might be an area for the exercise of "common sense," whether local or within the Office for Civil Rights at HEW.

NHTSA and the Firestone 500

One of the two largest product-related causes of U.S. auto accidents is tire failure, and the most publicized tire failure to date is that of the Firestone 500—Firestone's erstwhile top-of-the-line, steel-belted radial. On November 29, 1978, following an acrimonious public debate, the National Highway Traffic Safety Administration and the Firestone Tire & Rubber Company signed an agreement specifying the terms for recalling an estimated 13 million of these tires —the largest product recall in history.

The case against the Firestone 500 rested on evidence that the tire's failure rate and likelihood of causing serious accidents were exceptionally high. NHTSA is empowered to order recalls of motor vehicles and accessories that either fail to meet its specific standards for design and test performance or exhibit other evidence of a safety-related defect. The 500s, except for some 400,000 of them recalled in early 1977, did not violate any of NHTSA's specific standards, but they had accident and adjustment rates far greater than those of other tires. Specifically, by July 1978, NHTSA had gathered reports of sixty-four injury-producing accidents and thirty-four fatalities that involved Firestone 500s. By contrast, manufacturers' reports covering steel-belted radials sold domestically by Firestone's seven leading competitors showed only twenty-one fatalities for eight times the number of tires. Furthermore, between 1972 and March 1978, the overall adjustment rate for the 500s (percentage of tires returned by customers and accepted by manufacturers for pro-rated credit toward new tires) was 17.5 percent, against only 1.7 to 5.3 percent reported by Firestone's seven leading competitors for their steel-belted radials (and 5.5 percent for Firestone's other steel-belted radials).

Thus, in July, NHTSA announced an initial determination that the 500s contained a "safety-related defect" and might therefore be subject to recall. Firestone, however—both then and throughout the proceedings—contended that the 500s were safe, dependable, and free of fundamental defects. It argued that the chief cause of failure had been the widespread and persistent tendencies of drivers to keep their tires underinflated, thereby irreversibly damaging the tires and making them dangerously susceptible to failure. It discounted the adjustment-rate figures on the grounds that it had been unusually accommodating to customers who were dissatisfied with the 500. Finally, Firestone noted that no one had identified any specific defects in the tire and that the tire's reliability, rated in NHTSA's own tests, was the "highest . . . of any tire ever manufactured by Firestone" and "far in excess" of agency requirements.

In August 1978 the Subcommittee on Oversight and Investigations of the House Commerce Committee issued a report that rebutted many of Firestone's arguments. The report (based on subcommittee hearings in May and June 1978) contended, among other things, that manufacturers should make tires sufficiently durable to withstand—at least to a reasonable extent—such recognized common abuses as underinflation. For a company to do otherwise, the report suggested, is for it to produce tires with the expectation of having them fail.

In a supplementary opinion attached to the report, Subcommittee Chairman John Moss (Democrat, California) observed that Firestone's sales literature and ads had not, until very recently, warned consumers about the critical importance of keeping the 500s properly inflated—although (as a Firestone engineer had testified) underinflation of four pounds per square inch represented "the threshold of trouble" for the tire and six to eight pounds underinflation meant "trouble for sure."

NHTSA was stymied in ordering a recall by Firestone's refusal to provide the information requested. By withholding information, the company even enabled itself to defend the tires with arguments that were refuted in its own records. For example, Firestone insisted for many months that the overall adjustment rate of the 500s was 7.4 percent rather than the actual figure of 17.5 percent. More seriously, although Firestone claimed it had no indication of any safety problems with the 500 until

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NHTSA and the Firestone 500

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NHTSA raised the matter, hundreds of internal company documents released after the signing of the recall agreement show precisely the opposite. Thus, a November 1972 memo to a Firestone vice-president warned that "we are in danger of being cut off by Chevrolet because of separation failures," and a September 1975 report that circulated within top management presented an "hypothesis" attributing much of the tire's problem to the failure of an adhesive.

Without such evidence, NHTSA's case for ordering a recall was weaker than it would have been. Thus, NHTSA sought an agreement with Firestone for a voluntary recall that, while less stringent than NHTSA would have liked, would have the advantages of being immune to legal challenge by Firestone and of taking effect immediately. Under the terms of the agreement, the recall is only partial, though it will still cost the company between $100 million and $234 million (depending on how many tires are actually turned in). The estimated 6 million 500s sold before September 1, 1975, are eligible for replacement at half-price with Firestone's current top-of-the-line steel-belted radial (NHTSA has no statutory authority to order recalls of tires sold more than three years ago, but Firestone feared that denying compensation for these tires would anger many consumers). Also, an estimated 7.5 million 500s sold after September 1, 1975, and manufactured before January 1, 1977, are eligible for free replacement. There is to be no recall of some 500s manufactured after May 1, 1976, or of any 500s manufactured after January 1, 1977 (their adjustment rates being, so far, comparable to the norm).

The case has prompted at least two major proposals for strengthening NHTSA regulation. One is to tighten the agency's specific standards, so that tires like the 500 do not reach the market. The other is to give the agency full subpoena power to obtain company information needed to investigate possible defects, so that unsafe products can be identified and recalled as soon as possible. Whether either proposal will be carried out (and what the effects would be if it were) is not yet clear. Meanwhile, millions of old radials are rolling back to Firestone outlets across the nation.