ally the case, they were not well publicized. See (7), pp. 277–278.
25. *Time* **99**, 63 (1972); C. Callison, *Audubon* **77**, 126 (1975). It is not our purpose to imply that no one ever criticizes NEPA. Even the environmentalists find it to be less than perfect, complaining occasionally of the high costs and wasted paper. See G. Soucie, *Audubon* **75**, 125 (1973); R. Sayre, *Audubon* **74**, 116 (1972).
26. R. Gillette, *Science* **176**, 30 (1972); *Sierra Club Bulletin* **57**, 12 (1972).
27. *Sierra Club Bulletin* **57**, 17 (1972).
28. See L. Jaffee, *Buffalo Law Review* **20**, 231 (1970); R. Crampton, *Georgetown Law Journal* **60**, 527 (1972) for slightly different but supportive discussions of this theme.
29. Scenic Hudson Preservation Conference *v.* Federal Power Commission, 354 *Fed. Rep. 2nd Ser.* 608 (2nd Circuit 1965) certificate denied 384 U S. 941 (1966). Hereinafter referred to as *Scenic Hudson I*.
30. For the next but perhaps not the final rounds on *Scenic Hudson*, see Scenic Hudson Preservation Conference *v.* Federal Power Commission 453 *Fed. Rep. 2nd Ser.*, 463 (2nd Circuit 1971). See also R. DuBey and K. Zimmerman, *New England Law Review* **10**, 279 (1974).
31. C. Lindblom, *Public Administration Review* **19**, 79 (1959).
32. A. Etzioni, *ibid.* **27**, 385 (1967).
33. R. Carpenter, *Environmental Law Review* **6**, 50014 (1976), p. 50017.
34. R. Carpenter, *Science* **168**, 1316 (1970).
35. D. W. Schindler, *ibid.* **192**, 509 (1976).
36. H. M. Ingram, *Nat. Resour. J.* **13**, 150 (1973).
37. R. Gillette, *Science* **176**, 146 (1972); M. Egan, Jr., *Georgia Law Review* **9**, 417 (1975); F. Hanks and J. Hanks, *Rutgers Law Review* **24**, 230 (1970); *Science* **178**, 426 (1972); *Sierra Club Bulletin* **57**, 17 (1972).
38. D. Moynihan, *Maximum Feasible Misunderstanding* (Free Press, New York, 1970.)
39. F. E. Rourke, *Bureaucracy Politics and Public Policy*. (Little Brown, Boston, 1969), pp. 63–86.
40. L. C. Irland, Southern Forest Experiment Station, Mimeo. pp. 10–11; also A. B. Bishop, *Public Participation in Water Resources Planning* (WR Report 70-7, 1970); J. Hendee, R. Lucas, R. Tracy, Jr., T. Staed, R. Clark, G. Stankey, R. Yarnell, *Public Involvement and the Forest Service* (Forest Service, Washington, D.C., 1973.)
41. NEPA does reference 5 USC 552 in part of section 102 (c) which provides that copies of the statement and comments "shall be made available to the President, the Council on Environmental Quality and the public as provided by Section 552 of Section 5, United States Code." NEPA and its provisions alone were admittedly inadequate to provide access to agencies. But the reference to 5 USC 552 did not cure the basic inadequacies of NEPA. The teeth in The Freedom of Information Act, which put teeth into section 552, were passed in 1974 and therefore was not referenced in NEPA. To include the public and provide access by reference to 5 USC 552 in 1969 was to make motions without meaning.
42. S. Fairfax, *J. For.* **73**, 10 (1975).
43. K. C. Davis, *Administrative Law* (West Publishing, St. Paul, 1958).
44. Justices Douglas, Blackmun, and Brennan dissented (at 741, 755, and 755, respectively) in the 4 to 3 decision (Powell and Rhenquist took no part).
45. See R. Crampton and B. Boyer, *Ecology Law Review* **2**, 407 (1972), p. 427.
46. Citizens to Preserve Overton Park *v.* Volpe (401 U.S. 402, 1971).
47. Thanks go to G. L. Achterman, member, Oregon State Bar, for aid in developing and revising this paper.

NEWS AND COMMENT

Agency Drags Its Feet on Warning to Pregnant Women

As the result of some public prodding by Commissioner Donald Kennedy of the Food and Drug Administration (FDA), the Bureau of Alcohol, Tobacco, and Firearms (BATF) in the Treasury Department has begun proceedings to require a label on alcoholic beverages, warning women that drinking during pregnancy may cause birth defects. The move was spurred by recently mounting evidence of the existence of a "fetal alcohol syndrome"—a set of physical and mental abnormalities in children of mothers who drank during pregnancy.

According to evidence presented recently to a national symposium of physicians and scientists about the syndrome, and to a recent congressional hearing, the syndrome is characterized by growth deficiencies, mental retardation, diminished head size, defects in body organs, and possibly such brain dysfunctions as hyperactivity and learning difficulties. Moreover, it seems that these characteristics may be prompted by a mother's intake of as few as 3 ounces of alcohol a day or by a one-time drinking binge during pregnancy.

Despite the urgency and importance that has been attached to increasing awareness of the syndrome among health professionals and the public, there has been some concern that BATF, which has jurisdiction over the labeling of alcoholic beverages, has shown little inclination to impose the health warning requirements quickly. Two months after Kennedy publicly released a letter to Rex Davis, the BATF director, that asked him to "initiate immediately whatever procedures are necessary" to impose the labeling requirements, BATF published only a notice seeking additional public comment on the necessity for such a requirement. At a hearing on 31 January before the subcommittee on Alcoholism and Drug Abuse chaired by Senator William Hathaway (D–Maine), Davis noted that the decision on labeling was "serious and complex," and suggested that a broad-based national educational campaign may be more appropriate. He added that BATF probably would employ an outside, independent scientific consultant to evaluate evidence on the need for labeling and on the fetal alcohol syndrome presented to it by the FDA and National Institute on Alcohol Abuse and Alcoholism, which is spending a total of $3.5 million this year and next on fetal alcohol research.

Officials at the FDA are reluctant to antagonize BATF, but several pointed out, as did a congressional staff member, the difference between such an unhurried approach and the statement by Kennedy in his letter to Davis that, "Quite frankly, if the FDA retained jurisdiction over the labeling of alcoholic beverages, it would waste no time in commencing proceedings to require label warnings." According to several observers, the roots of the contrast between the two agencies may be found in the circumstances surrounding the loss of FDA jurisdiction over the labeling.

In his testimony before the Senate subcommittee and in an interview with *Science*, Kennedy explained that the jurisdiction was lost in a 1976 federal court suit, *Brown-Forman Distillers Corp.* v. *Matthews*, brought in the western district of Kentucky after the FDA tried to require makers of alcoholic beverages to list the ingredients of their products on the labels. The FDA wanted the ingredient labeling in order to facilitate potential recalls of products found to contain hazardous added ingredients—such as a clarifying agent that might be used in wine or a food coloring—and to assure that consumers who are allergic to one or more of the added ingredients would know what they are buying. "Yeast, fruit, malt, molasses, spices, preservatives, even egg whites and fish glue (which are used as clarifying agents)" are known allergens used in alcohol products, Kennedy said.

In the suit, the judge did not reject the FDA's contention that alcoholic beverages are a food and therefore subject to its authority, but he did say that Congress has implicitly exempted alcohol *labeling* authority from the Food, Drug, and Cosmetic Act, and that BATF had primary responsibility for the labeling. Because BATF earlier had turned down an FDA request to require ingredient labeling, FDA earnestly wanted to appeal the court decision. Their request to the Solicitor General to initiate the appeal was referred to the White House Office of Management and Budget (OMB), where it was rejected in a letter on 20 July from Dennis Green, the associate director for economics and government, however. "It was a political judgment,"

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according to one FDA source. The letter states, in part, "We share your strong concerns about the rights of consumers to be informed about ingredients in food and beverages, particularly hidden and potentially harmful ingredients. We also are concerned about the excessive costs and administrative burden that more traditional forms of complete ingredient labeling might place on small wineries because of the nature of the manufacturing process." Subcommittee staff member John Doyle said that OMB was referring to the fact that many winemakers "know what goes into the wine, but not what comes out"—that they would have to subject it to chemical analysis to know its composition at the time of bottling because the ingredients are transformed as they mix.

Green did request that the FDA and BATF get together to work out some form of partial ingredient labeling, which the two agencies have been fighting over ever since. Kennedy declined to reveal the points of contention that remain between the two agencies, explaining that "I don't think it's wise to air a dispute that we are attempting to resolve." Davis indicated in his testimony before the Senate subcommittee that OMB will once again be required to step in and resolve an impasse.

Kennedy has stated that allergic reactions to ingredients of alcoholic beverages are much less important than other human health problems that his agency is trying to confront. That the dispute on that issue has become intertwined with the issue of labeling to warn women of the fetal alcohol syndrome seems fairly clear, however. Kennedy is confident that the former can be settled within 4 months, but, in view of the amount of time that has already been devoted to it, it could easily take longer, making the delay in one dispute continue to contribute to delay in the other.

At his hearing, Hathaway was able to wrest from BATF the assurance that both issues will be settled before the year is over, and he went so far as to suggest that Congress will legislate the issues if BATF does not act. Given the estimate by the Department of Health, Education, and Welfare that the fetal alcohol syndrome may severely and irreversibly affect 1500 children born in 1978, however, the end of the year seems a long way off.

Moreover, even the resolution of the labeling disputes will leave unsettled the broader question of whether the Treasury Department, which as Hathaway pointed out collects substantial revenues from taxes on the sale of alcoholic beverages, properly should be the sole government agency regulating a product about which new health hazards are now being uncovered.—R. JEFFREY SMITH

Pen Registers: The "Appropriate Technology" Approach to Bugging

Picture a suitcase the size of an airplane carry-on bag. Open it, and inside you will find a reel of magnetic tape, several dials and switches, and a digital display screen. If you are a policeman or federal law official, you could probably get a court to order the telephone company to connect the device to the telephone line of someone you want to monitor. Once installed, the device will record automatically on tape and show on the display screen all the numbers called from the phone, what time the calls were made, how long they lasted, and when incoming calls were received. This device is now advertised as a "telephone number decoder" or just "telephone decoder"; but it is better known by its old name—a pen register.

And, if you happen to have the model advertised as having an "internal relay for switching on external recorder," you could plug a tape recorder on to the device and, unknown to either the court or the phone company, actually listen to conversations on the line.

Because a pen register automatically keeps a record of whom someone calls, when, and how often, and because the phone company, some businesses, law enforcement, and the intelligence community use them, pen registers are becoming the focus of a new kind of debate over a citizen's right to privacy as guaranteed by the Fourth Amendment.

It is difficult to estimate how many pen registers are in use around the country. American Telephone and Telegraphh (AT & T) spokesman H. W. William Caming, says that the phone company's use of pen registers is "minuscule." But Caming adds, carefully, that the amount of pen register use by others—law enforcement, intelligence, and the like—is "unknown" to him. Some people believe the total use of pen registers may be extensive, but no one seems really sure.

AT & T does not make pen registers itself, apparently. It buys them from small manufacturers, such as Voice Identification Inc. of Somerville, New Jersey, and Hekimian Laboratories of Rockville, Maryland. A spokesman for one of these companies says that the pen register market is not very large. Another company, Northeast Electronics of Concord, New Hampshire, found the market for pen registers so small that, a few years ago, it stopped making them altogether, a Northeast spokesman says.

But whatever the current scale of pen register use, the gathering of this kind of information on who calls whom seems likely to increase. AT & T and its subsidiaries are in the process of incorporating pen register technology into the Electronic Switching Systems (ESS) that are being installed at telephone switching stations around the country to replace the old, mechanical stations. This development will enable a telephone company, with a flick of the switch, to keep track of all the numbers called from a given phone, instead of physically attaching a device to a leased line. Thus, it will be far easier to gather pen register type information.

Traditional debates about a citizen's right to privacy have revolved around the contents of his or her communications—through the mails, over the phone, or spoken within the home or office. But the pen register raises a different privacy issue, namely, whether large-scale gathering of the fact of a person's communications, and who is communicating with whom, constitutes a violation of the expectation of privacy to which individuals are legally entitled.

The question seems to be one of growing concern. Representative John E. Moss (D-Calif.), chairman of the subcommittee on investigation and oversight of the House Interstate and Foreign Commerce Committee, is including pen registers in an investigation of the intercept device issue. The privacy issues raised by pen registers are being discussed in the House and the Senate, where new wiretap legislation is being

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