

## The Regulation of Mud Flaps

### Epilogue

After nearly half a decade of effort on Capitol Hill, the Effective Spray Control Organization (ESCO) found the means of countering Danforth's 1982 mud flap amendment and, in doing so, effectively rebuffing the threat Monsanto posed to the smaller manufacturers' share of the market for mud flaps. The controversy over the federal regulation of mud flaps became a minor drama in one of the major Congressional battles of the Reagan Era, the 1987 highway bill. While public attention focused on the bill's most disputed provision—a measure allowing states to raise the speed limit to 65 mph on certain stretches of interstate highway—the existence of ESCO ensured that mud flaps, not speed limits, were the overarching concern of at least two influential legislators.

#### *ESCO's Approach*

Beginning in the summer of 1983, representatives of the nine firms comprising ESCO met every other month in the Washington offices of legal counsel Randy Stayin. Their strategy had two tacks—first to stall the Department of Transportation's rule-making process by protesting the proposed regulations and then to overturn the legal basis of those rules by introducing legislation preventing the government from mandating mud flaps.

Their primary argument to both legislators and the Department of Transportation was that the proposed regulations favoring the Monsanto "fuzzy" mud flap would eliminate competition, forcing the smaller manufacturers to lay off workers or go out of business altogether. In addition, ESCO echoed the contentions of other groups within the trucking industry that the regulations would place an undue economic burden on the industry as a whole for dubious safety benefits. ESCO and other associations backed up both arguments not only by pointing out the "misgivings" about the appropriateness of rule-making noted in DOT's own studies, but also by putting forward the results of ESCO-sponsored research that found no advantage to using the Monsanto mud flap under actual road conditions (as opposed to the simulated conditions used in the government's tests).

ESCO was joined in protesting the proposed rules by one of the principal trucking company organizations, the American Trucking Association, as well as the major railroad company lobby, the American Association of Railroads. By August 1985, the Department of Transportation had received some 120 comments opposing the rules from these and other groups out of a total of 150 submissions, which the *New York Times* called "among the highest number of comments filed in years in connection with proposed rules."<sup>1</sup>

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<sup>1</sup> *New York Times*, August 18, 1985. p. A25.

*McEwen and Mud Flaps*

Other trade associations, however, had no part in ESCO's attempts to overturn the rules through legislation. Due to the reluctance of railroad and trucking companies to be portrayed as "anti-safety", ESCO could not count on the support of these groups when approaching members of Congress. For several years, whenever the association convened its meetings, representatives from the mud flap manufacturers made the rounds of members of congress whose districts held their factories. As five of the nine manufacturers were based in Ohio, that state's delegation was the most heavily lobbied by the association. Their footwork finally paid off in late 1985 when the association gained the allegiance of Robert McEwen, Republican member of the House from a district surrounding Hillsborough, Ohio, home to a large candle manufacturing plant owned by Koneta's parent company.

McEwen, who was planning a bid for a Senate seat in 1988, saw an opportunity to help ESCO in the massive highway bill wending its way through Congress in 1986. McEwen placed a provision in the bill prohibiting federal regulation of mud flaps unless the government was certain that a device would "result in protecting the public from unreasonable risk of death or injury due to accidents resulting from splash and spray."<sup>2</sup> McEwen's measure also mandated that such devices would have to be manufactured by at least three companies.

*McEwen and Danforth*

The amendment drew fire from the originator of the 1982 provision, Republican Senator John Danforth. Still convinced of the benefits of mandatory "fuzzy" mud flaps and with backing from the American Automobile Association and the Center for Auto Safety, Danforth ensured that the Senate version of the highway bill made no mention of mud flaps, and he urged the DOT to issue rules as soon as possible. "[The Department of Transportation has] been at this for five years. Now the House wants to gut this whole thing, and I don't understand it," Danforth told a reporter.<sup>3</sup>

The House and the Senate came to an impasse over their differing versions of the highway bill for reasons of greater public concern than mud flaps; yet, as members of each chamber convened to work on a compromise in early 1987, mud flaps were still much on the minds of McEwen and Danforth. An unidentified congressional aide told the Associated Press, "This issue is a 0.5 on a scale of 10 for the bill overall. But for [McEwen and Danforth], it's an eight or nine."<sup>4</sup>

According to James Lockwood, McEwen caught up with Danforth on a Washington street corner in mid-March, as the final version of the compromise bill was nearing completion. In a brief chat, McEwen was able to convince Danforth to take another look at the issue. Danforth, who insisted that public safety was his sole interest, finally agreed to a version of McEwen's measure calling on the government to issue rules within a year requiring mud flaps on trucks, but only if government tests proved conclusively that mud flaps did indeed improve the visibility of drivers following trucks. However, if the government had no firm evidence of improved visibility from mud flaps alone, then

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<sup>2</sup> Associated Press, March 16, 1987, AM cycle, "Congressional Fight Over Highway Bill Includes a Mud Flap Flap," by Alan Fram.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

the measure stipulated that no rules could be issued. Government research already showed that isolating the effect of mud flaps from other variables—including the structure of the truck itself—was impossible. Thus, the language of the compromise mud flap measure went almost as far as McEwen's original proposal to block the government from issuing rules.

#### *Monsanto's Retreat*

Monsanto apparently read as much into the highway bill. Several months after the bill became law in April 1987, Monsanto sold its mud flap patents and its manufacturing plant to a Canadian firm. Through the mid- 1990s, the smaller, US-based manufacturers continued to dominate the mud flap market with greater than 80 percent of sales, the same proportion they held before Monsanto's bid. With over 50 percent of the market, the company Lockwood represented, Koneta, remained far ahead of its competitors.

Monsanto's brief venture into mud flaps had a silver lining for the smaller manufacturers, according to Lockwood. As a result of the millions Monsanto spent in promoting its so-called improved mud flap, Koneta and other manufacturers have been pressed by their clients to sell "fuzzy" versions of their own. By 1994, Monsanto look-alikes accounted for nearly one quarter of Koneta's sales. Lockwood comments wryly, "All the millions Monsanto poured into advertising and publicity have finally paid off."