

# WATER LOG



A Legal Reporter of the  
Mississippi-Alabama Sea Grant Consortium

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## **WATER LOG**

**WATER LOG** is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its purpose is to increase public awareness and understanding of coastal problems and issues.

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## Free Trade and Ocean Governance

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by Richard McLaughlin

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### INTRODUCTION

The conflict between advocates of free trade and protection of the international environment has received extensive attention in recent years. Free trade proponents argue that unfettered international trade is a source of increased domestic wealth and technological development which enhances the ability of nations to protect their environments. Others believe that unregulated trade-based growth has resulted in the exploitation of natural resources, the transfer of environmentally damaging industries to less developed nations, and other destructive practices. The outcome of this debate will have a profound effect on how the world deals with many international environmental problems, including global climate change, tropical deforestation, and protection of biological diversity.

This article will discuss issues of free trade and ocean governance policy in light of a recent ruling handed down by a dispute resolution panel assembled under the General Agreement on Tariffs and Trade (GATT). The GATT Panel found that the United States violated GATT rules by banning imports of Mexican tuna after Mexico refused to comply fully with the dolphin protection provisions of the Marine Mammal Protection Act (MMPA), 16 U.S.C.A. §§ 1361 *et seq.* (West 1985 and Supp. 1992). Observers from the environmental community, along with some members of Congress, view the ruling as imperiling not only the nation's ability to protect marine mammals, but also its ability to use unilateral economic measures to protect other environmental interests. Emerging coalitions between environmentalists and commercial interests (including fishermen, labor unions, and industry) are compounding the problem by exerting pressure on the government to use trade restrictions as a tool for managing the environment, which could in turn trigger retaliatory trade measures by foreign countries. This article will examine the likely effect of the GATT Panel's ruling on federal and state management of the nation's coastal areas.

### EVENTS LEADING TO THE GATT PANEL RULING

On 11 April 1991, the United States Court of Appeals for the Ninth Circuit upheld a Federal District Court ruling that required the executive branch to impose an embargo on all yellowfin tuna and tuna products from nations whose fleets fish in the Eastern Tropical Pacific until such time as the Secretary of Commerce certifies that each nation's incidental kill rate of dolphins is comparable to that of the United States pursuant to the MMPA. *Earth Island Institute v. Mosbacher*, 746 F.Supp. 964 (N.D. Cal. 1990), *aff'd* 929 F.2d 1449 (9th Cir. 1991). Mexico, Venezuela, and Vanuatu were cited as being subject to embargo. Panama and Ecuador were exempted from the embargo after they demonstrated that their fleets were in compliance with U.S. law. An embargo against Mexico went into effect in February 1991 after it refused to provide evidence of its compliance. In March 1991, the National Marine Fisheries Service announced that the ban on imports would be extended to intermediary nations that imported tuna from Mexico, Venezuela, or Vanuatu for re-export to the United States.

### PANEL FINDINGS

While awaiting the appeal before the Ninth Circuit, Mexico requested that the contracting parties to GATT establish a dispute resolution panel to review the U.S. embargo. The Panel met with representatives from Mexico and the United States in May and June 1991. On 16 August 1991, the Panel issued a draft opinion finding that the U.S. embargo of Mexican tuna and tuna products violated several provisions of GATT. A final decision with very few substantive changes was issued in September 1991.

### Quantitative Restrictions Versus Point of Importation Regulations

The Panel first examined the distinction between quantitative restrictions on importation and internal measures applied at the time or point of importation and found that the embargo provisions of the Act violated Article XI of GATT. Article XI states that a contracting party may impose "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures . . . on the importation of any other contracting party."

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The Panel rejected the argument by the United States that the embargo provisions of the MMPA are not quantitative restrictions under Article XI, but are instead point of importation regulations permissible under GATT Article III. The Panel emphasized that the point of origin regulations permitted under Article III only apply directly to a product. The MMPA provisions, in contrast, do not apply directly to products because they do not affect the composition of the tuna itself or have any effect on it as a product. The Panel found that the U.S. measures regulated how Mexico harvested its tuna and that Article III does not allow a party to discriminate against another party's products on the basis of how those goods are produced.

### **The Pelly Amendment**

The Pelly Amendment, 22 U.S.C.A. § 1978(a) (West 1990), provides that if the Secretary of Commerce determines that foreign nationals are fishing in a manner which "diminishes the effectiveness of an international fishery conservation program, the Secretary shall certify such action to the President." The President, within his discretion, may then ban the importation of fish into the U.S. from that country. Because the Pelly Amendment had not been imposed against Mexico and merely provides the President with the discretionary authority to extend import prohibitions to other fish products, the Panel ruled that it was not in conflict with GATT. Although the Panel declined to speculate on the issue, there is little question that any attempt by the President to use his discretionary authority to impose sanctions under the Pelly Amendment in the future would likely be deemed a violation of GATT.

### **Exceptions for Health or Conservation Purposes**

The Panel also rejected the United States' contention that the trade restriction provisions of the MMPA qualified for exceptions for health or conservation purposes under GATT Article XX(b), which allows trade restrictions "necessary to protect human, animal or plant life or health," and Article XX(g), which exempts trade restrictions "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

In perhaps its most important finding, the Panel ruled that neither of the exceptions could be applied to give health or conservation measures extraterritorial effect. According to the Panel, if the exceptions in Article XX were interpreted as requested by the United States, "each

contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement."

Moreover, the Panel held that even if Article XX(b) allows for extraterritorial actions, the MMPA embargo conditions would still not qualify because they are not sufficiently "necessary" to meet the test set out in the provision. The United States did not demonstrate to the panel that it had exhausted all reasonably available options to protect dolphins before imposing the trade restrictions. The Panel observed that in its view the United States had not made sufficient efforts to negotiate an international agreement to protect dolphins.

### **Intermediary Nations Embargo**

The U.S. embargo against intermediary nations was viewed by the Panel as similar to the direct embargo. Since the United States domestic regulations on tuna harvesting were found to be an improper quantitative restriction under Article XI, any regulation that imposes restrictions on third countries based on those improper regulations was similarly prohibited.

### **Dolphin Protection Consumer Information Act**

Finally, the Panel found that the labelling requirements of the Dolphin Protection Consumer Information Act (DPCIA), 16 U.S.C.A. §1385 (West Supp. 1992), do not conflict with GATT. The labelling provisions do not restrict the sale of tuna products because tuna products can be sold with or without the "Dolphin Safe" label. Further, any commercial advantage that may arise from the use of the label does not depend on governmental restrictions on tuna harvesting methods, but upon the free choice of consumers.

### **Summary of the Panel's Findings and Conclusions**

In summary, the Panel first ruled that the embargo provisions of the MMPA are quantitative restrictions in violation of Article XI of GATT. The Panel rejected the U.S. argument that the restriction of Mexican tuna was a point of importation regulation permitted under Article III. It found that the U.S. embargo violated Article III because it did not regulate the product directly but discriminated against Mexican tuna based on its method of production. Second,

the Panel held that the health and conservation exceptions to the general prohibitions against trade restrictions in Articles XX(b) and XX(g) do not apply outside the jurisdictions of the contracting party adopting the measures. Third, relying on the same reasoning as applied to direct embargoes, the Panel found the embargo against intermediary nations to be a violation of GATT. Fourth, the Panel determined that the Pelly Amendment is not in conflict with GATT because it provides the President with discretionary authority to impose additional trade sanctions and that he had not yet exercised that authority. Finally, it found that the DPCIA labelling provisions are acceptable under GATT because they do not restrict the sale of tuna without the "Dolphin Safe" label or make the sale of tuna or tuna products conditional on the use of specific harvesting methods.

The Panel broadened the scope of its findings beyond a narrow technical analysis of the terms of GATT by noting that it did not call into question the conservation policies of either Mexico or the United States. However, it then addressed those policies by stating that a contracting party is free to implement whatever domestic environmental policies it chooses as long as its taxes or regulations do not discriminate against imported products or afford protection to domestic producers. It added that "a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own." The Panel closed its report by warning that if the contracting parties were to permit import restrictions in response to differences in environmental policies, they would need to impose limits on the range of policy differences justifying such responses and to develop criteria so as to prevent abuse. It then suggested that if the contracting parties wished to follow that path they should amend or supplement GATT rather than interpret Article XX broadly.

## RECENT DEVELOPMENTS

The decision of a GATT Panel Report is not binding on the parties until it is adopted by the GATT Council. On 9 September 1991, rather than requesting that the GATT Council adopt the Panel ruling, Mexico agreed not to pursue its challenge for an indefinite period pending further discussions with the United States. Mexico's restraint has been attributed to its concern that the controversy may have derailed ongoing negotiations for a free-trade agreement with the United States. Mexico also agreed to impose stricter controls on its tuna fleet but stopped short of banning the use of purse seine nets in the Eastern Pacific.

These measures include a program requiring trained observers on all fishing boats, increases in government funding for research on safer fishing methods, and criminal penalties for fishermen who illegally kill dolphins. Mexico also agreed to continue bilateral negotiations with the United States in an effort to end the dispute independent of GATT. The embargo against Vanuatu was lifted 23 January 1992, after it demonstrated that its purse seining operations were relatively small in scale.

Meanwhile, several nations that are still subject to either the direct embargo or the intermediary nation embargo expressed their discontent with the United States and Mexico for attempting to ignore the GATT Panel ruling in favor of a bilateral settlement. Venezuela and the European Community (EC) threatened to prepare their own GATT complaints if either Mexico failed to pursue the enforcement of the ruling or the United States did not cancel its embargo. In July 1992, the EC followed through on its threat and filed its own formal complaint after the GATT Council, at the behest of the United States and Mexico, refused an EC request to adopt the GATT Panel Report. Panelists are currently being selected to serve on the dispute settlement panel.

## INTERNATIONAL DOLPHIN CONVENTION ACT OF 1992

In October 1992, the United States took a large step toward resolving its dispute with Mexico and Venezuela by enacting the "International Dolphin Conservation Act of 1992" (IDCA). Under the new Act, the U.S. would lift its current embargoes against the two nations if they enter into agreements establishing a moratorium on the practice of harvesting tuna by setting purse seine nets on dolphins beginning on 1 March 1994 and lasting at least five years. After 1 June 1994, it will be unlawful for U.S. vessels to harvest tuna with purse seine nets or to sell, purchase, offer for sale, transport, or ship within the United States tuna or tuna products that are not dolphin-safe. The Act requires periodic monitoring to ensure that countries are fully adhering to the moratorium and allows additional sanctions for noncompliance. Mexico and Venezuela have indicated that they will join the moratorium.

## EFFECT OF GATT RULING ON OCEAN GOVERNANCE

While passage of the IDCA has reduced international tension concerning the harvesting of yellowfin tuna, it has

not resolved the fundamental question of how far a nation may go to protect the environment without violating its free trade obligations under GATT. The reasoning employed in the GATT Panel Ruling on tuna will likely be applied in future cases. As a consequence, many observers believe that it could undermine domestic environmental law and jeopardize existing trade provisions found in several international environmental agreements.

### **EFFECT ON DOMESTIC LAWS PROTECTING LIVING MARINE RESOURCES**

For more than 20 years, the threat of trade sanctions has been an integral part of U.S. fisheries and marine conservation policy. A number of domestic statutes incorporate trade restriction provisions, including the Marine Mammal Protection Act; the Pelly Amendment; Section 205 of the Magnuson Fisheries Conservation and Management Act (MFCMA), 16 U.S.C.A. § 1825 (West 1985 and Supp. 1992); the Packwood-Magnuson Amendment to the MFCMA, 16 U.S.C.A. §§ 1821(e)(2)(A)(i) and (B) (West 1985); the Endangered Species Act, 16 U.S.C.A. §§ 1531 *et seq.* (West 1985 and Supp. 1992); and high seas driftnet provisions in the 1990 amendments to the MMPA, 16 U.S.C.A. § 1826 (Supp. 1992).

All of these laws may conflict with the GATT Panel Ruling. Each places quantitative restrictions on the importation of fishery products based not on the composition of the product itself, which is allowed under GATT Article III, but rather on how it is produced or on other political considerations. In light of the GATT Panel finding that the U.S. embargo of tuna products from Mexico could not be treated as an Article III internal regulation because it did not regulate tuna as a product, there is good reason to believe that future GATT dispute resolution panels, if presented with the issue, would find all of the U.S. fisheries laws with trade sanctions violative of GATT.

Moreover, the exceptions under Article XX(b) and XX(g) for health or conservation purposes would probably not be available. Because the GATT Panel ruled that Article XX exceptions could not be applied to give health or conservation measures extraterritorial effect, none of the cited laws would qualify for exceptions. In the future, any nation that is threatened with trade sanctions pursuant to U.S. fisheries laws may have a valid challenge against that sanction under GATT.

### **PROTECTION OF SEA TURTLES UNDER THE ENDANGERED SPECIES ACT**

The current campaign by the United States to urge nations in the Wider Caribbean Region to adopt stricter sea turtle conservation measures for their shrimp fleets provides an excellent case study of how the GATT Tuna Panel ruling might have broader implications in other areas of ocean policy. In 1989, the Endangered Species Act was amended to require the executive branch to initiate negotiations for the development of bilateral or multilateral agreements with other nations to protect endangered sea turtles and to provide an embargo against all shrimp harvested with technology that may harm endangered sea turtles. The embargo was to be triggered unless the President certified to Congress that the harvesting nation has a regulatory program and an incidental catch rate comparable to that of the U.S. The State Department has enacted guidelines that provide foreign nations a three-year phase-in period to bring their regulations up to U.S. standards.

The ESA sea turtle amendments were enacted as a result of the combined political forces of the U.S. shrimp fishing industry and the environmental community. U.S. shrimp fishermen feel that they face unfair international competition because they are the only fishermen in the Wider-Caribbean region forced to adopt strict turtle protection measures. Environmentalists believe that the threat of an embargo on shrimp products is the best method of pressuring foreign governments to adopt stricter sea turtle protective programs.

On the other hand, foreign nations object to the impact that an embargo would have on their economies. They also resent being goaded by the U.S. into relinquishing sovereign rights to manage natural resources within their national territories.

This mixture of domestic political pressure and broader foreign policy interests has placed the State Department in a very difficult position. Some critics argue that the State Department has chosen to protect its relations with affected foreign nations rather than to implement the international sea turtle protection program.

In February 1992, The Earth Island Institute brought yet another lawsuit in federal court in reaction to alleged inaction on the part of the U.S. Government. The latest legal challenge is very similar to the Institute's successful lawsuits in 1990 and 1991 that forced the government to impose embargoes on tuna under the MMPA. The suit contends that the State and Commerce Departments have failed to carry out their statutory obligations to certify only those shrimp harvesting nations that have regulatory pro-

grams and incidental taking rates of endangered sea turtles comparable to those in the United States. It further alleges that the executive branch has failed to enter into negotiations with foreign nations to develop agreements to protect endangered species of sea turtles as required by the ESA.

During congressional negotiations on the International Dolphin Conservation Act of 1992, the Merchant Marine and Fisheries Committee introduced an amended version of the bill that would have broadened the embargo provisions to include shrimp. Only heavy lobbying by the Bush Administration prevented the controversial shrimp embargo language from being included in the final legislation.

If challenged, the shrimp embargo provisions of the ESA will probably be found illegal under GATT for the same reasons as the embargo on tuna under the MMPA. The shrimp embargo provisions may even be deemed a *prima facie* discriminatory trade measure because, unlike the case of tuna embargo, there is strong evidence that the provisions are meant to benefit American shrimp fishermen by equalizing the costs associated with environmental protection.

It is important to note that the emerging coalition of environmentalists and domestic fishing interests that successfully lobbied for the ESA Amendments of 1990 has become a powerful political force in the United States. The already considerable influence of the environmental community in the U.S. Congress has become even greater as commercial and recreational fishermen align themselves with the environmentalists to create a "level playing field" between American and foreign fishermen, with both commercial and sport fishermen eager for the U.S. government to use the trade embargo weapon more vigorously. As a result of successful efforts by the Earth Island Institute and others to push the trade sanction option, U.S. policymakers will find it increasingly difficult to keep foreign nations from responding in kind with reciprocal trade actions.

### **EFFECT ON DOMESTIC LAWS PREVENTING POLLUTION OF THE MARINE ENVIRONMENT**

In addition to its effect on domestic policy relating to the conservation of living marine resources, the GATT Panel report on tuna may also affect how the U.S. controls pollution of the marine environment. As free trade opens up domestic markets to foreign goods, American producers will increasingly be forced to compete with producers in foreign countries with less costly environmental protection requirements. If environmental laws appear to harm American competitiveness by making U.S. products more expensive

than imported products, those laws may be weakened to promote competitiveness abroad.

More specifically, the Panel's decision that importation regulations may only be imposed on the makeup of a product and not its method of production may prevent the United States from enacting market-based environmental laws. In theory, market-based laws reduce pollution more efficiently than traditional government-dictated approaches because they allow businesses to choose the most efficient method of abatement. By providing domestic industry with less costly pollution control options, more businesses will remain in the United States rather than moving their operations to other countries.

However, if market-based laws are to be effective, they must place the same environmental demands on all products in a given market. This may necessarily require that foreign products sold in the U.S. market reflect the lower costs associated with the weak environmental standards of their countries of origin. The GATT Panel Ruling takes away much of the incentive for U.S. companies to support market-based environmental protection programs.

This trend toward market-based approaches to environmental protection is also evident in the protection of the nation's ocean and coastal areas. For example, several states have begun to experiment with market-based tradeable permits for point sources of water pollution under the Clean Water Act. Some states are also investigating market-based management programs for coastal non-point source water pollution as part of their federally mandated obligation under the Coastal Zone Management Act. If innovative market-based approaches to pollution control fail as a result of prohibitions imposed by GATT, the nation's coastal areas may suffer because of their ecological fragility and because so much of the nation's population and industry is located there.

### **EFFECT ON INTERNATIONAL AGREEMENTS PROTECTING THE MARINE ENVIRONMENT**

A major theme of the GATT Panel Ruling is its view that multilateral agreements and not unilateral trade measures are the only appropriate way to protect the international environment. It is, however, unclear how the ruling may affect existing international agreements that advance environmental objectives through the use of trade sanctions. Three agreements that may be in conflict with the GATT Panel ruling are The Convention on Trade in Endangered Species (CITES); The Montreal Protocol on Substances that Deplete the Ozone Layer; and the Basel Convention on

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the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The effectiveness of all three depends on the use of trade restrictions against non-parties to protect environmental resources outside a contracting party's jurisdiction. The obvious rationale behind these provisions is to encourage states to become parties to the agreements and to prevent "free riders" from benefiting from any international environmental protection afforded by such agreements without having to bear the economic costs associated with implementing these measures.

The GATT Panel tried to soften the impact of its ruling by suggesting that the United States may have been able to demonstrate that its extraterritorial conservation measures were "necessary" as an Article XX exception if it had shown that it had attempted but failed to negotiate a dolphin conservation agreement with Mexico. This suggested approach would require future GATT Panels to evaluate global or regional environment and conservation agreements to determine whether trade sanctions against non-parties are "necessary." One commentator argues that GATT Panels are not equipped to make evaluations of this kind. As a consequence, the trade restriction provisions in agreements such as CITES, which have been in force for many years and have broad international support, still face potential challenge under GATT.

## CONCLUSION

GATT's interpretation of trade and environmental policy has come under much criticism in the United States. Despite the fact that the GATT Panel Report on tuna was never formally adopted by the organization, domestic special interest groups with varying agendas have used the ruling to gain congressional support for the continued use of trade restrictions to protect the international environment. Congress has responded by holding formal hearings and by introducing bills to change the way that GATT deals with environmental issues. The Clinton Administration has requested that the North American Free Trade Agreement (NAFTA) be renegotiated to include three additional agreements, one of which would create a joint standing commission on environmental protection.

The prospects for GATT's being amended to the satisfaction of opposing sides of the free trade versus environment dispute are not promising. The legal and political complexities associated with amending GATT are formidable. Moreover, there is a growing political constituency in the United States that strongly believes that economic incentives are the best method of protecting the nation's environmental and economic interests and of convincing

our trading partners to respect those interests. Those in the ocean and coastal policymaking community will serve on the front lines of the upcoming battle. In view of the differences between those in the free trade and environmental camps, finding an acceptable compromise may be an exceedingly difficult task. □

*Richard McLaughlin is Director of the Mississippi-Alabama Sea Grant Legal Program and Editor of WATER LOG. This article is adapted from a longer footnoted paper presented at the National Governance Study Group Conference held at Berkeley, California, 10-13 January 1993.*

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## The Future of Environmental Regulation Under President Clinton and the 103rd Congress

*by Greg Glover*

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### INTRODUCTION

The last few years have witnessed growing concern over the environment. The business community views environmental protection as a drain on profits; environmentalists entertain their own misgivings about the private sector. In this climate a new president and a Congress with over 100 new members must address critical environmental protection issues.

Many environmentalists were disappointed with "the environmental president" George Bush and look to President Clinton and Vice-President Al Gore to be better stewards of the nation's natural resources. This is only the second time since the passage in 1969 of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, that the regulatory framework will be administered by a Democratic administration.

### THE NEW ADMINISTRATION

Vice-President Gore is a well-known proponent of strong environmental protection measures and will likely be the Administration's leader in its efforts to strengthen the nation's environmental policies. It is reported that he will

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oversee panels to change policy in such areas as pollution controls, environmental technologies research, and worldwide efforts to harmonize the protection of the environment and the maintenance of human health. A further indication of the Administration's intentions is the President's appointment of Carol Browner to head the Environmental Protection Agency (EPA). Browner was formerly the Secretary of the Department of Environmental Regulation for the state of Florida, a Senate legislative director for Al Gore, and general counsel for the Senate Energy and Natural Resources Committee. Browner's appointment has been met with praise by environmental groups, who call her the first real environmentalist head of the EPA (William Reilly, President Bush's EPA Administrator and former president of the Conservation Foundation, the U.S. section of the World Wildlife Fund, was curiously not granted that accolade).

### **Environmental Protection Agency**

During her confirmation hearings, Browner attempted to allay the fears of businessmen by stating that the adversarial relationship between environmental and industrial leaders had produced delays in the regulatory process that harm business interests without making significant progress for the environment. Browner promised that her tenure at EPA will be an era of open dialogue between the EPA, business, and environmentalists. She stated that EPA must deliver quick, consistent decisions, encourage the voluntary participation of the industrial community, and foster the development and use of pollution control technologies.

One of the most significant changes that is being considered in the early days of the administration is elevating the EPA from its present status to that of a Cabinet position. Sen. John Glenn (D-Ohio) has introduced a bill that would raise the EPA to a Cabinet-level department. This bill is similar to one Glenn introduced in 1991, which served as a model for a bill that has been introduced in the House of Representatives. EPA was not created by Congress as were all the other major agencies, but was created by an executive order of President Nixon, Reorganization Plan No. 3 of 1970, 5 U.S.C. app. §§ 1 (Supp. 1992). As a result, the EPA has been given inferior status in its relationships with the other major agencies. President Clinton has expressed his support for this legislation.

The bills that have been introduced propose the creation of a Department of the Environment that would be headed by a secretary appointed by the president. The Secretary of the Environment would assist the Secretary of State in the coordination, negotiation, and participation in interna-

tional activities that concern environmental protection. The secretary would also participate in researching international environmental problems and assisting the development of responses to these problems. The bills provide that the appointed positions within the EPA would be redesignated to Cabinet-level department positions without the necessity of repeating the nomination process.

Browner has stated that Cabinet status for the EPA would enhance the role of environmental issues in national matters by ensuring that environmental issues would be fully integrated into any national policy decisions. She also expressed her belief that the present Cabinet is incomplete without an environmental department which would cross traditional boundaries, and that Cabinet status would ensure that the agency would enjoy direct access to the president. While the bills to elevate EPA are relatively unopposed, there is the possibility that amendments may be attached as riders to the bills. Such an amendment prevented passage of similar legislation in 1991. A "takings provision" was placed on the 1991 bill that would have required landowners to be reimbursed when government regulations prevent the landowner from realizing income that he would otherwise have earned. While there have been no such amendments proposed in this session, some Republican senators say that the proposals in Glenn's bill are too expensive.

President Clinton's desire to unify environmental responsibilities under a single agency may be the cause of a confrontation within the new Administration. During the confirmation hearings of the new Secretary of Commerce, Ron Brown, there was a suggestion that the National Oceanic and Atmospheric Agency (NOAA) be placed under the aegis of EPA. NOAA represents nearly one-half of the budget of the Department of Commerce and Secretary Brown stated that he will do what he can to keep NOAA in the Commerce Department. EPA Administrator Browner has indicated that she favors the shift of NOAA, but that she would not take part in a power struggle to obtain control over the agency.

In another early move by the administration, President Clinton's announced the dissolution of the Bush Administration's President's Council on Competitiveness, which had been chaired by Vice-President Dan Quayle. This organization caused an enormous uproar with its recommendations for changes in the regulatory definition of wetlands. But this was not the only action President Clinton has taken to restructure and streamline the federal government's environmental regulatory bodies.

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## Council on Environmental Quality

For the moment, the bill to elevate the EPA has been withdrawn at the request of President Clinton pending the outcome of further government restructuring. On 8 February, President Clinton announced his intention to abolish the Council on Environmental Quality (CEQ) and create an Office of Environmental Policy. The Office of Management and Budget has released a draft bill that would transfer all CEQ functions to EPA and give EPA additional responsibilities, including the authority to veto actions taken by other agencies which are found to be harmful to the environment. Under the draft bill only the President would have the authority to override an EPA veto upon the appeal of the involved agency. The situation is complicated even more by the fact that there are jurisdictional conflicts between the Congressional committees which possess the authority to change EPA to Cabinet-level status and the committees which exercise authority over CEQ.

This is not the only source of controversy surrounding the abolition of CEQ. The CEQ was created by NEPA, which is the backbone legislation for the entire environmental regulatory framework. NEPA requires that all regulatory agencies consider the environmental consequences of every action undertaken by them. CEQ was created in order to promulgate and implement the regulations necessary for compliance and to act as arbiter of inter-agency disputes regarding environmental issues. Under this new framework, Vice-President Albert Gore would reportedly assume that role. As a result of this development, the bill to elevate the EPA to Cabinet-level status was withdrawn by Sen. Glenn at the request of the White House.

Environmental groups are happy about the possibility of unifying environmental regulation under a single agency, but they are also concerned about the manner in which this may be accomplished. CEQ can be abolished only by amending NEPA, because CEQ was created by legislative action. Opening the NEPA to amendment, however, would give business lobbies the opportunity to advocate stronger economic balancing provisions in the act. Many believe this would be a serious setback for environmental protection.

## Department of the Interior

Bruce Babbitt, the former governor of Arizona, is the new Secretary of the Interior. Babbitt's nomination was endorsed by environmental groups such as the Sierra Club and the Environmental Defense Fund, who applaud his leadership in the field of environmental protection as president of the League of Conservation Voters. Babbitt has a reputation

as an effective negotiator and advocates thoughtful, engaged analysis to avoid conflicts between business and the environment.

In discussing the Endangered Species Act during the course of his confirmation hearings, Babbitt stated that while President Clinton did not support mixing economic criteria in the application of the Act's provisions, he believed that there was more administrative flexibility in the Act than has been previously exercised. He advocates a shift in his department's focus from species-by-species management to an ecosystem-wide approach to species conservation. The present enforcement method does little for a species until it is on the brink of extinction, at which point the Act could force a complete shutdown of economic activity in the animal's habitat. Under Babbitt's method, the agency would begin to formulate management plans before a species reaches near-extinction and would then implement a critical habitat conservation plan which would protect the entire ecosystem with a smaller adverse impact on any surrounding economic activity.

## Department of Energy

The new Secretary of Energy is Hazel O'Leary, former executive vice-president of Northern State Power Co. of Minneapolis, Minnesota. O'Leary also served in energy policy positions in the Ford and Carter administrations. She has expressed the need for change in the Energy Department and has stated that the federal government should be a leader in promoting energy efficiency. While environmental groups question her past support for nuclear power, O'Leary has often spoken of her concerns about environmental protection.

## 103rd CONGRESS

In addition to the changes taking place in the structure of environmental regulation, there are considerable issues being considered in the Congressional forum. Several important pieces of environmental legislation are up for reauthorization this year.

## Endangered Species Act

One of the most hotly contested bills to be considered is the reauthorization of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.* The ESA has been the focus of recent controversy due to the listing of the northern spotted owl as endangered, halting the harvest of old-growth for-

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ests in the Pacific Northwest. Spending authorization for ESA expired at the end of 1992. 1992, however, was an election year, and funding was approved for a single year instead of the usual five so that the matter could be considered anew after the November elections. Congress did authorize money in 1992 for the National Academy of Sciences to review the Act and to prepare recommendations for amending the Act.

While there is general agreement from all sides that there is room for improvement in the Act, there is no agreement as to what these improvements may be. Most environmental groups support legislation which is to be introduced by Rep. Gerry Studds (D-Mass.), the new chairman of the House Merchant Marine and Fisheries Committee. This bill will maintain strong protection for endangered species and broaden the scope of the Act to protect a larger number of species. Just as important, the bill would set deadlines for the creation of recovery plans, which has been a problem under the present Act. This bill would also abolish the 60-day moratorium on citizen suits to protect listed species, and include provisions which would shift the focus of the Act from single species consideration to a long-range planning method to preserve entire ecosystems, as has been advocated by Interior Secretary Babbitt. This approach will concentrate more upon the connections between species rather than upon individual species.

Industry and labor groups will be represented in this debate by Rep. Billy Tauzin (D-La.) and Rep. Jack Fields (R-Texas), who will introduce amendments to ESA. Their bill would retain the present listing process which is based solely on biological factors, but adds that once it is determined that a species should be listed as endangered, consideration must be given to the economic impact on the surrounding community.

There are some who believe that the ESA battle will be delayed for another year because President Clinton must first deal with issues surrounding the economy and the deficit. If this delay occurs, then the debate over reauthorization will intensify as the Pacific Northwest timber industry hangs in limbo. In addition, three other species, the Mexican spotted owl, the California gnatcatcher, and the delta smelt are in danger of being listed, which would have further severe impact on the economies of the Western coastal states.

### **Clean Water Act**

The Federal Water Pollution Control Act, or Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.*, is one of the most important bills that will be up for reauthorization in 1993.

One critical question surrounding CWA is how much money the President and Congress are willing to spend in light of the budget deficit. There are approximately \$20 billion in water-related public works projects that may be undertaken, including waste and drinking water projects, construction of new collection systems, and repairs. During his campaign, President Clinton linked environment and public works to the creation of jobs by fostering the development of environmental technologies which would spur growth in the private sector.

President Clinton called for inclusion of standards for nonpoint source pollution controls and incentives for the private sector to develop ways to prevent pollution run-off at its source. To aid in these efforts, the President has advocated a national education plan to encourage citizens to reduce their contributions to nonpoint source pollution from household and lawn chemicals and pesticides.

One recommendation for funding long-term CWA needs was presented last July by the Congressional Research Service (CRS) at the request of Rep. Studds. This recommendation proposed the creation of a National Clean Water Investment Corporation. The proposal centers upon shifting a larger portion of water treatment expense to the major pollution sources by placing a fee on industrial discharge of toxic pollutants and an excise tax on the active ingredients of pesticides and fertilizers. Studds contends that this plan would create an annual revenue of \$6 billion into the existing state revolving-fund program, to which President Clinton has allocated nearly \$1 billion in additional funding for 1993. According to the CRS report, it is difficult to determine the precise effect the taxes will have, but it is unlikely that they would have a significant impact on most affected industries.

A point of contention in the reauthorization will be the federal wetlands protection under section 404 of CWA. The controversy surrounding the federal wetlands delineation manual has ensured that the Clinton administration will delay addressing wetlands protection until NAS has completed a study on wetlands authorized by former President Bush. This delay may necessitate drafting a bill early in the session to which wetlands provisions would be added later. Three main wetland issues that may be addressed include the scope of the program, wetlands mitigation, and state roles in the permitting process. Rep. James Hayes (D-La.) plans to introduce a bill which would relax restrictions on wetlands projects and provide compensation for landowners whose property value has been diminished because of regulation. In the past, landowners have not been compensated on the theory that wetlands were part of the

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"public trust," and that their rights were subject to the rights of the public. While ESA reauthorization may be delayed another year, it is unlikely that CWA will also be delayed because of the high profile which this issue was given during the presidential campaign.

### The Magnuson Act

The Magnuson Fishery Conservation and Management Act (Magnuson), 16 U.S.C. §§ 1801 *et seq.*, is up for reauthorization in 1993 as well. Magnuson established a 200-mile fishery conservation zone (exclusive economic zone) around the U.S. coastline within which American fisherman possess exclusive fishing rights. The law was meant to halt overfishing by foreign fleets, aid the development of the domestic fishing fleet, and create a federally managed regulatory system which would set standards for the prudent use and conservation of fish populations. The law divided the coastline into eight Regional Fishery Management Councils, the aim of which is to achieve and maintain the "optimum yield for each fishery."

The Act, however, has fallen short of its lofty goals and the domestic fishing industry is clamoring for change. The majority of fish populations have been overfished, and several are severely depleted because management measures have been inadequate. Fishermen have complained that the maze of regulatory bodies involved is far too cumbersome and slow. They are regulated by state marine fisheries departments, the Regional Fishery Management Council, the federal National Marine Fisheries Service (NMFS), NOAA, the Department of Commerce, and the Coast Guard. Fishermen are calling for a streamlining of the framework, asking that jurisdiction over commercial fishing be transferred to the Agriculture Department.

Fisherman are represented on each regional council but want that representation to be increased, so that the people who are directly affected will have greater say in the decision-making process. The industry is also calling for tax credits to compensate for loss of income due to the regulations. This issue of conflicts of interest of Council members must necessarily be addressed when considering reauthorization. Another issue which must be considered is setting timetables for the recovery of overfished populations, including the protection of fish habitat and improving the conservation of highly migratory species such as tuna, billfish, and sharks.

Limited entry measures will also play a part in the reauthorization. Proposals to levy fees on fishery users will be considered, as well as limiting access to overcrowded fisheries through the use of a permitting system. Included

in the limited entry concept is the establishment of threshold levels below which further fishing would be prohibited. Considerable emphasis will be placed on the need for the regional councils to concentrate on long-range plans which will include consideration of the entire ecosystem in addition to the individual species under management.

### Other Legislative Action

Also due for reconsideration this session is the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.* The Act is designed to reduce both the intentional and incidental killing of marine mammals during commercial fishing operations. What will certainly be addressed is the use of purse seine nets while fishing for tuna. Tuna school beneath dolphins, and fisherman catch tuna by locating dolphins and encircling the dolphins with the nets, which also trap and kill large numbers of dolphins. There has been a bill introduced in Congress that would allow the Secretary of State to establish a global moratorium prohibiting the harvesting of tuna caught by with purse seine nets. This bill has been proposed despite the contention that such restrictions violate the GATT treaty agreements.

In addition to these coastal issues, President Clinton has expressed his desire to institute considerable changes in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. §§ 9601 *et seq.* President Clinton wants the law to be amended so that polluters pay more and so that Superfund monies will be used for cleanups while reducing the sums spent on attorneys' fees. The administration proposals will increase the proportion of sites cleaned up by private parties and use federal funds only when solvent private parties cannot be found to undertake the cleanup. The plan estimates that four-year savings will exceed \$300 million.

A bill that would implement the Protocol on Environmental Protection to the Antarctic Treaty is expected to be introduced this session. Passage of such legislation would make the U.S. a full party to the treaty, which bans mining and drilling on the continent except for scientific purposes. The legislation has been delayed because of a dispute over which government would be responsible for the regulation and monitoring of standards on the continent. The Bush administration favored giving the duties to the National Science Foundation, while bills in both houses of Congress propose that NOAA be the lead agency. A possible compromise may be reached whereby the two agencies would share the responsibilities.

Unlike ESA and CWA, portions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et*

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*seq.*, were reauthorized in the last session of Congress. One of the main issues that was not resolved was the problem of interstate shipping of wastes. As a result of a precipitous decline in the number of landfills in this country, many state and local governments have passed laws that restrict importing wastes, despite the fact that several such laws have been held to be unconstitutional. Bills have been introduced that would allow the states more power to regulate out-of-state waste imports. The bills would reduce by one-half the amount of out-of-state waste received, which would trigger a 30-percent limit on imports and protect current import contracts established under state laws. Another equally important RCRA bill has been introduced that would establish standards for construction and corrosion prevention of new and rebuilt storage tanks for petroleum products and other hazardous materials. The bill includes provisions for release detection systems, secondary leak containment measures, and periodic inspection of these tanks.

A final issue that must be addressed in the near future is the environmental ramifications of the North American Free Trade Agreement. This agreement has created a stir in the environmental community because of the primitive environmental standards in signatory Mexico. Congressional leaders such as House Majority Leader Richard Gephardt (D-Mo.) have voiced their opposition to the treaty in the absence of side agreements that address environmental and labor protection. President Clinton has stated that while he does not favor reopening the agreement negotiations, he will not seek Congressional implementation legislation until these concerns are addressed in side agreements to the treaty.

## CONCLUSION

The new administration has shown its commitment to environmental protection with the President's appointments to EPA, Interior, and Energy. These individuals have shown genuine conviction for the protection of the environment, and have expressed their desire to use their position in furtherance of these interests. In addition, the President is in the process of streamlining the regulatory framework to perform its duties more efficiently. Some of these changes look promising, but they also pose some danger. With an environmentalist Vice-President like Al Gore, environmentalists can be assured their interests will be protected.

The 103rd Congress is faced with several important environmental issues. Some of the most important and powerful laws that protect our environment are due for

reauthorization. Environmentalists fear that the focus on economic factors such as the deficit will overshadow the need for strengthening these protection. Already there is speculation that the administration will be forced to put the environment on the back burner until economic problems are dealt with. However, the Clinton administration has stated that these issues are not mutually exclusive, that environmental concerns can be used to strengthen our economy by aiding the fledgling environmental technology industry.

The fact that both Congress and the White House are controlled by the same party would indicate that government gridlock should be resolved. However, when environmental issues are raised, Washington often looks more toward the short-term effects these measures will have on their constituents, rather than to long-term benefits for the nation and world as a whole. The environmental and industrial communities have in the past viewed themselves as competing interests, with neither group willing to compromise its own positions. In order to have a flourishing economy we must have a healthy environment, and that can only be accomplished if the new administration encourages and fosters a spirit of trust and cooperation between these competing parties. During this session, Congress must make its decisions with this idea in mind. □

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*The views expressed in this article are those of the author and do not necessarily represent the view of the editors or the Mississippi-Alabama Sea Grant Consortium.*

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**Book Review: *It's All Politics*  
—*South Alabama's*  
*Seafood Industry*  
by E. Paul Durrenberger**  
(University of Illinois Press, 1992),  
xvi+216 pp., diagrams.

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by John Farrow Matlock

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**INTRODUCTION**

The surprise about this book is that it was written not by a political scientist or an economist or a conservationist but by an anthropologist: the author is a professor of anthropology at the University of Iowa. Alongside the citations to interviews with fishermen, newspaper articles, government statistics, and various graphs and tables illustrating commercial aspects of Alabama's coastal fisheries, one finds references to Claude Levi-Strauss and Bronislaw Malinowski and comparisons of the annual blessing of the fleet at Biloxi to ceremonies of the Trobriand Islanders of New Guinea. As one might deduce from the title and the length of the book, it is a thoroughly researched treatment of the history—economic, political, and social—of Alabama's fishing industry from its beginnings in 1819 through its rapid growth in the Gilded Age and its vast expansion in the 1950's to its present difficulties. On the latter subject the author is at his most persuasive when he argues that the interests of sport fishermen, environmentalists who advocate "turtle excluder devices" (TEDs), and corporations seeking wastewater permits have been favored at the expense of commercial fishermen, who are, after all, attempting to pursue a livelihood.

Elsewhere, however, certain distortions intrude. The author is critical of the outcome of a federal prosecution in Mississippi of the Gulf Coast Shrimpers' and Oystermen's Association in 1955 (three of the union's officers were sent to prison for engaging in a criminal combination in restraint of trade), presenting the association's price-fixing as the result of "negotiation" between shrimpers and packers and failing to mention that in at least one instance a mob made up of several hundred members of the union used threats and violence to prevent the landing in Pascagoula of shrimp caught by fishermen from Alabama. A more serious error is propagated when he writes that fishermen cannot organize to improve their condition "because [fishermen's unions] are against the law"—a patent untruth grounded,

one supposes, in the author's misapprehension of the legal system. Persons interested in the problems of the fishing industry and in the ecology of the Alabama coast will, however, find much useful information here, so long as they bear in mind the caveats expressed above. □

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**LAGNIAPPE**

*A Little Something Extra*

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The Environmental Protection Agency recently published *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*, a comprehensive guide on reducing nonpoint pollution in coastal waters from sources like farming, forestry, marinas, and runoff from cities. The measures suggested range from erosion control to watershed planning. A companion volume, *Coastal Nonpoint Pollutant Control Program: Program Development and Approval Guidance*, was jointly published by EPA and the National Oceanic and Atmospheric Administration. States must submit proposals for their coastal nonpoint pollution control programs to EPA and NOAA by July 1995 in order to continue receiving certain federal grants. The *Guidance Specifying Management Measures* may be obtained at no cost from EPIC, 11029 Kenwood Road, Bldg. 5, Cincinnati, OH 45242.

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It now appears unlikely that federal policy towards wetlands will be revised until the National Academy of Sciences completes a study of the question. Thus for the present EPA will continue to use the 1987 wetlands delineation manual. Rep. James Hayes (D-La.) has said that he plans to introduce a bill to relax wetlands laws and to provide compensation to landowners who are denied permits to develop wetland property. Such compensation could cost the government \$15 billion, and the bill stands little chance of passage.