INSIDE

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IN FUTURE ISSUES

Montana court halts timber sale until TMDL established

Nearly six weeks after the Bush Administration officially withdrew a July, 2000 rule to revise implementation of § 303(d) of the federal Clean Water Act, a Montana district court ruled in *Sierra Club v. Austin*, No. CV 03-22-M-DWM, slip op. (D. Mont. April 30, 2003), that the Forest Service cannot proceed with a salvage timber sale on the Lolo National Forest until a total maximum daily load (TMDL) plan is established for neighboring water quality–impaired rivers and streams. Section 303(d) requires states to identify and compile a list of waters for which effluent limitations, regulatory limits imposed on point sources of pollution, are not stringent enough to implement water quality standards prescribed for such waters. 33 U.S.C. § 1313(d)(1)(A). Once the list is prepared, states are then required to develop a total maximum daily load for each water on the list. 33 U.S.C. § 1313(d)(1)(C). A TMDL is a measure that defines the greatest amount of a particular pollutant that can be introduced into a waterway without exceeding an applicable water quality standard. *See Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995).

In *Sierra Club v. Austin*, Judge Donald Molloy of the United States District Court for the District of Montana, Missoula Division, stopped the Forest Service from harvesting timber damaged from a forest fire because neither the federal government nor the State of Montana had established total maximum daily loads for several surrounding waterways listed under § 303(d) as failing to meet water quality standards for sediment. Officials from the Forest Service and the State of Montana have expressed extreme frustration with this ruling, saying that it forces them to abandon the Lolo Post-Burn Project. Molly Villamana, "Judge Halts Salvage and Restoration Work in Lolo NF," *Greenwire*, May 6, 2003, http://www.eenews.net. While this action arose in a forestry context, the decision bears watching in the agricultural community to the extent that it may signal the use of the TMDL process to delay, or in some extreme cases prevent, agricultural activities on public land such as livestock grazing where an analysis of potential impacts on the environment is required.

Background

During the 2000 wildfire season, thousands of acres of timberland in the Lolo National Forest burned. *Sierra Club*, CV 03-22-M-DWM, slip op. at 2. Following the burn, the Forest

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State law and regulations not preempted by Swampbuster

The United States District Court for the Southern District of California has ruled that because the "Swampbuster" provisions contained in Title XII of the Food Security Act (FSA) of 1985, 16 U.S.C. §§ 3821-24, were enacted pursuant to the Spending Clause, they do not preempt the laws or regulations of an unconsenting state and its political subdivisions. *Citizens for Honesty and Integrity in Regional Planning v. County of San Diego*, No. 02 CV 1855, 2003 WL 1900717 (S.D. Cal., Apr. 15, 2003). The court also ruled that even if legislation enacted pursuant to the Spending Clause could preempt the laws or regulations of an unconsenting state, there was no clear and manifest evidence that Congress intended for the Swampbuster provisions to preempt state and local authority to regulate wetlands. *See id.* at *5.

Karl A. Turecek, one of the plaintiffs, was the managing general partner of Jacumba Valley Ranch Ltd. Partnership, an entity that owned and farmed land located in San Diego County, California. *See id.* at *1. He filed a specific plan and applied for a major use permit with the county in order to develop his property. *See id.*

The County of San Diego, defendant, issued an ordinance known as the Resource Protection Ordinance (RPO), which defined "wetland" more broadly than the

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Service developed a recovery plan, known as the "Lolo Post-Burn Project," which included road decommissioning, restoration projects, and the proposed logging of approximately 35.2 million board feet of lumber. *Id.* The project area covered nearly 127,000 acres, 2,200 of which were unroaded. *Id.* Timber harvest activities proposed in the project included commercial thinning and salvage logging in both burnt and insect-killed stands. *Id.*

Concerned about the timber harvest proposals, the Sierra Club and Alliance for the Wild Rockies (hereinafter "Environmental Interests") filed a motion on February 10, 2003 for a preliminary injunction to halt the logging planned as part of the Lolo Post-Burn Project. *Id.* at 1-2. Arguments on that motion were consolidated with arguments for summary judgment and held on March 21, 2003. *Id.* at 2. There, the Environmental Interests raised two major issues. First, they argued that the Forest Service failed to analyze the effects of the Lolo Post-Burn Project on certain roadless areas of the forest. *Id.* at 2-3. Second, they maintained that the project would violate water quality standards. *Id.* at 3.

On April 30, 2003, the court denied summary judgment on the plaintiff's roadless argument while granting summary judgment on the issue of water quality impacts. *Id.* at 2. In so doing, the court enjoined the Forest Service from proceeding on any project activities affecting the § 303(d)-listed segments of Trout Creek, Ninemile Creek, the Clark Fork River, Flat Creek, and Big Blue Creek until TMDL figures for those stream segments have been established by the State of Montana and considered by the Forest Service. *Id.* at 19.

Water quality analysis

On the question of water quality protection, the Environmental Interests made a two-pronged argument. *Id.* at 6. First, they claimed that the Forest Service is bound by § 313 of the Clean Water Act to follow Montana's water quality standards. *Id.* Montana law prohibits activities that will result in increases of sediment above "naturally occurring" concentrations where a stream is classified as impaired. *Id.* (citing Mont. Admin R. § 17.30.623 (f)). Here, the Lolo Post-Burn Project would take place in a number of areas with rivers and streams that the State of Montana has designated as failing to meet water quality standards for sediment. *Sierra Club*, CV 03-22-M-DWM, slip op. at 6. The Environmental Impact Statement found that the project would increase sediment loads above naturally occurring amounts in these waterways. *Id.* With this information, the Environmental Interests expressed particular concern about the impact any such degradation would have on fish living in the area, including the bull trout, which is on the federal threatened species list. *Id.* at 7. While the Forest Service contended that there would be less sediment going into the streams once the road decommissioning was completed, the Environmental Interests maintained that any potential for a positive result in the future cannot justify a current violation of the law. *Id.* Accordingly, the Forest Service's selection of proposed management activities was arbitrary and capricious. *Id.*

Second, the Environmental Interests argued that the Forest Service did not have sufficient evidence of the total sediment that would be produced by the Lolo Post-Burn Project activities or of the streams' capacity to handle the sedimentation that would result. *Id.* At oral argument, they focused on the fact that no TMDL figures had been calculated for the listed stream segments involved in the project. *Id.* Further, they noted that the Forest Service had made no determination as to how much sediment would run into the streams as a result of its actions. *Id.* at 8. Without this information, the federal government had not established that it could protect the streams from further degradation. *Id.*

In response, the Forest Service made several key points. First, it contended that any sedimentation arising from the Lolo Post-Burn Project would be produced predominantly by the road decommissioning and restoration activity—not road building activities. *Id.* at 10. The future benefits of this activity outweigh any short term harms that may result because sedimentation is predicted to decrease in the long term from the project. *Id.*

Second, the Forest Service asserted that the Lolo Post-Burn Project would comply with the Clean Water Act and Montana water quality standards. *Id.* at 10-11. It argued that Montana law defines "naturally occurring sediment" as "conditions or material present from runoff or percolation over which man has no control or *from developed land where all reasonable land, soil and water conservation practices have been applied*." *Id.* at 11 (quoting Mont. Admin. R. § 17.30.623(2)(f)). The practices outlined in the Lolo plan meet the latter requirement and, hence, would not cause sedimentation deemed to be an increase in violation of the law. *Sierra Club*, CV 03-22-M-DWM, slip op. at 11. Moreover, the Montana Department of Environmental Quality and U.S. Environmental Protection Agency have reviewed the project and concluded that it would comply with Montana water quality standards. *Id.*

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Swampbuster definition of "wetland." *See id.* The Swampbuster provisions defined wetland as "any property consisting of: (1) hydric soils, (2) wetland hydrology, and (3) hydrophytic vegetation." *Id.* (citing 16 U.S.C. § 3801(a)(18)). In contrast, the RPO defined a "wetland" as "any property containing: (1) hydric soils, (2) wetland hydrology, or (3) hydrophytic vegetation." *Id.* (citing RPO Art. II, ¶ 16).

In September, 1994, the County's Department of Planning and Land Use (DPLU) informed Turecek of its intention to apply the RPO definition to his property. *See id.* (citations omitted). Turecek urged the cdounty to apply the Swampbuster definition for "wetland," "and in March 1995, he received a letter from the DPLU stating that if 'the land under tillage is not wetland, under federal definitions, then the [DPLU] will recommend that the appropriate hearing bodies also accept that conclusion.'" *Id.* (citation omitted). The county did not attempt to enforce the RPO against Turecek while his application for a major use permit was pending for more than eight years. *See id.* On January 15, 2003, Turecek's application was denied. *See id.*

On September 17, 2002, Turecek and the other plaintiff, Citizens for Honesty and Integrity in Regional Planning (CHIRP), a grassroots community group that was or-

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Third, the Forest Service argued that Montana law does not require the government to develop TMDLs for sediment release. *Id.* at 11-12. It cited § 75-5-703(10)(b) of the Montana Code, which allows activities to proceed in the absence of a TMDL as long as "reasonable" practices are followed. *Id.* at 12. The Forest Service maintained that its use of best management practices ("BMPs") on the Lolo Post-Burn Project would meet this standard. *Id.* In defense of its BMPs, the government claimed that it carefully monitors these practices, that they are sufficiently based on Forest Service expertise and experience, and that the practices are not simply voluntary but are part of the enforceable contract terms. *Id.*

Lastly, the Forest Service contended that it considered and disclosed all potential impacts of the project on fish. *Id.* It argued that this project would benefit fish in the long term as over time closing roads would reduce the negative impacts of road infrastructure on streams. *Id.* Importantly, the potential for short term increases in sedimentation from the project would be less than the impacts from roads and fires. *Id.* Further, the Forest Service noted that it consulted with the U.S. Fish and Wildlife Service about the impacts of its activities on the bull trout. *Id.* at 12-13. That agency concluded that the project is "not likely to jeopardize the continued existence" of the bull trout as required under the Endangered Species Act. *Id.*

After considering these positions, the court stated bluntly: "In short, the law was not followed." *Id.* at 17. It first dismissed the Forest Service's argument that any initial increase in sediment from the Lolo Post-Burn Project would be later mitigated by a greater decrease in current levels once the project is completed on the basis that without a TMDL the government is working on speculation. *Id.* at 18. The court wrote: "Before the Forest Service decides to do anything that will increase sedimentation, even if the proposed action should ultimately decrease long-term sedimentation, the Forest Service must know how much the stream can carry away. Without a baseline, there is no way but speculation to determine how the sediment impacts water quality, adversely or beneficially." *Id.*

The court then warned that any BMPs followed in the project would not be sufficiently reasonable under § 75-5-703(10)(b) of the Montana Code because it is possible that even perfect compliance with the best practices would not be enough to protect the impaired waterways. *Id.* Without an understanding of the exact condition and pollution capacity of the streams at issue, the Forest Service simply does not know. *Id.* Approval of the Lolo Post-Burn Project was arbitrary and capricious within the terms of federal administrative law. *Id.* Accordingly, timber harvest projects impacting the § 303(d) waterbodies cannot proceed until TMDLs are established. *Id.* at 18-19.

Potential implications

Although still an unpublished decision, Judge Molloy's ruling raises at least two important concerns. First, at a time when many in agriculture have moved the TMDL concept to a back burner of concern as a result of the Ninth Circuit's ruling in *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002), which said that the EPA is without authority to force actual implementation of any pollution calculations, this case offers a substantial illustration of the constraints that the TMDL process could place on the ability of an agency to act. As described by a Montana environmental official, TMDL assessments are an elaborate and laborious task in which an agency must go through the whole gamut of trying to understand the environment which it is attempting to manage. Villamana, "Judge Halts Salvage and Restoration Work in Lolo NF." In a state like Montana where the Department of Environmental Quality is already under a court-ordered deadline to design TMDLs for other impaired rivers and streams, a decision ordering the agency to complete TMDL calculations for six streams like those identified in Judge Molloy's ruling could in effect stop the project. Chris Partyka, a project team leader for the Lolo National Forest, said of the decision: "This has the potential for stopping all activities in western Montana and in fact all activities across the Northwest or even the entire country that are occurring in TMDL drainages." *Id.*

Second, the court's decision could have a tremendous impact on the ability of an agency to carry out time-sensitive projects critical to protecting the availability or quality of resources for agricultural use. A significant example of such limitation may arise in the government's ability to control invasive species. According to the Department of Agriculture's Animal and Plant Health Inspection Service, invasive species reduce the economic productivity and ecological integrity of domestic agriculture and natural resources by $138 billion per year. Requiring the Bureau of Land Management to conduct a TMDL assessment before it takes action to control leafy spurge in Montana or yellow starthistle in Idaho will only further diminish the quality of grazing resources for local ranchers as the time and resources needed to develop the calculations will give the species a headstart to take root and spread.

—Anne Hazlett, Washington, D.C.

Swampbuster/Cont. from p. 2

ganized for the purpose of representing the interests of the public, filed an action in district court seeking a declaratory judgment that the RPO definition of "wetland" was preempted by the Swampbuster definition of "wetland." *See id.* On October 28, 2002, the defendant filed a motion to dismiss "pursuant to subsections (b)(1) and (b)(6) of FRCP 12," maintaining that a dismissal "was warranted because: (1) the plaintiffs lacked standing; (2) the matter was not ripe for adjudication; and (3) the Swampbuster provisions do not preempt the RPO." *Id.*

On December 20, 2002, the court determined that CHIRP lacked standing and dismissed its claims for lack of subject matter jurisdiction. *See id.* (citation omitted). The court also determined that Turecek had standing and that the matter was ripe for adjudication, but that the ultimate question of preemption ought to be handled in the context of a summary judgment motion rather than a motion to dismiss. *See id.* The court invited the parties to file cross-motions for summary judgments, and Turecek and the County of San Diego presented their oral arguments on the cross-motions on April 14, 2003. *See id.* at *2.

The court first noted that the powers Congress relied upon to adopt the Swampbuster provisions were the spending powers of Article I of the Constitution. *See id.* at *3 (citing *United States v. Dierckerman*, 201 F.3d 915, 922 (7th Cir. 2000)). It also stated that "even though Congress may lack the authority to regulate directly a strictly intrastate wetland, the incentive provided by the FSA is a valid exercise of the spending power." *Id.*

The court explained that the Supreme Court has "repeatedly characterized Spending Clause legislation as much in the nature of a contract: in return for federal funds, the recipients agree to comply with federally imposed conditions." *Id.* at *4 (citing *Barnes v. Gorman*, 536 U.S. 181 (2002) and quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S 1, 17 (1981)). It added that in this case, the recipient of the federal funds was a private individual, Turecek, and that neither the State of California nor its political subdivision– the County of San Diego–received funding under the Swampbuster provisions. *See id.* Thus, neither the state nor the county were par-

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Overview of modalities text

By William A. Gillon

One of the most significant agricultural policy texts written in the last ten years was tabled in March in Geneva in the current round of agricultural negotiations within the World Trade Organization. The so-called draft "modalities" text has been agreed to by no participants in the negotiations, has been criticized by all, yet will very likely represent the blueprint by which the agricultural negotiations are ultimately decided. It is significant as it may signal the point when the WTO agricultural negotiations began to veer away from the central interests of the two biggest combatants in agricultural trade, namely the European Union and the United States. This article will summarize that text and attempt to describe the significance of these negotiations to U.S. agriculture.

Process leading to the modalities paper

The groundbreaking Uruguay Round trade agreements, which concluded in 1994, established the World Trade Organization (the "WTO") and, among other things, made a very serious attempt to bring trade in agriculture under international rules similar to those applicable to industrial goods. The extensive involvement of government in agriculture, whether through subsidization, import protection, marketing and planting restrictions, or other mechanisms led the countries involved to agree multilaterally to restrictions on their domestic agricultural programs. The Uruguay Round Agricultural Agreement (the "URAA") was hailed by many as the beginning of the end of government manipulation of agriculture.

That agreement (summarized below) included a "built-in mandate" calling for countries to begin new multilateral agricultural negotiations in 1999. After a false start in December 1999 in Seattle, the members of the World Trade Organization established a set of guidelines and goals for a new round of multilateral trade negotiations during a ministerial meeting held in November 2001, at Doha, Qatar.

The first big objective for the agricultural negotiations was to be the development of a "modalities" text by the end of March 2003. In WTO parlance, a modalities paper sets the framework of the negotiations and, once agreed to, provides a strong signal of exactly in which direction the negotiations are moving. It generally contains much of the language over which the countries will argue as they try to reach final agreement.

The chore of writing this paper fell to Stuart Harbinson, the Chairman of the Agricultural Negotiating Group. The Chairman met his deadline, providing the group summaries of all negotiating positions in December, a draft modalities paper in February, and a revised modalities text in March. The definitiveness of his text is surprising. In the past, a document like this would be quite tentative with a lot of [brackets] indicating areas of disagreement among the parties. That is not the approach taken by Chairman Harbinson. While the Chairman clearly stated in his introduction that most of the concepts presented were not agreed upon, the draft modalities text proffers a lot of conclusions without brackets on virtually all aspects of the agricultural negotiations.

Despite a chorus of disapproval directed at the first version of the paper from many countries at a ministerial meeting in Japan in February, Chairman Harbinson's revised text contained very few changes from his original paper. He stated that "there was insufficient collective guidance to enable the Chairman, at this juncture and in those areas, significantly to modify the first draft as submitted on 17 February 2003." What he strongly inferred was that since no one was agreeing on anything, it was up to him to make bold suggestions.

One would think that with all this disagreement, the Chairman's efforts would fall by the wayside. However, it does not always happen like that in Geneva. In the absence of consensus forming around other proposals, the Harbinson Text fills a void and provides a strong indication of what the next WTO agricultural agreement may look like.

Summary of the URAA

Three primary areas of the URAA have an impact on agricultural policy. The URAA required WTO members to increase market access in agricultural products, reduce domestic support, and cut export subsidies.

With respect to market access, non-tariff barriers are to be eliminated and replaced with tariff rate quotas. A tariff rate quota provides for a certain quantity of the agricultural product that can be imported at a low rate of or no duty. Any quantity over that set amount would be subject to a prohibitive tariff. The "in-quota" quantity increased over a 6-year period (generally rising to at least 5% of domestic use of the product), and the "over-quota" tariff decreased – although it remains prohibitively high in most cases. Existing tariffs on products not within the tariff rate quota system were reduced on an offer – acceptance basis.

In order to put limits on domestic agricultural support, the URAA categorized domestic programs into three color-coded boxes representing "the good, the bad and the ugly" of domestic agricultural subsidization.

"Green box" supports are domestic support measures that are deemed to have a minimal impact on trade. These measures, which include decoupled payments and conservation payments, are generally excluded from reduction commitments.

"Blue box" supports were temporarily exempt from reduction commitments, if they met certain strict criteria. This category was designed to exclude domestic programs that included significant production restriction components. The old acreage reduction programs in the United States fell under this exemption, as did many aspects of the Common Agricultural Policy that were implemented immediately following the URAA.

Finally, "amber box" subsidies were deemed to be the most trade distorting. This category, which includes loan programs, loan deficiency payments, and any payment linked to production and price, is subject to disciplines or reduction commitments in the agreement. These types of support were to be reduced by 20% over a 6-year period. (13.3% for developing countries).

The Uruguay Round agreement also called for a 36% reduction in the value of direct export subsidies over a 6-year period and a 21% reduction in the quantity of commodities that benefit from an export subsidy over that same period.

Overview of the Harbinson text

The modalities text specifically addressed market access, domestic supports and export subsidies as follows:

Market access provisions

Tariffs

All tariffs, except in-quota tariffs, are to be reduced on a simple average percentage basis for agricultural products according to the following formula. The reductions are to be made from current bound levels.

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Current Tariff	Percentage Reduction	Time Period
> 90% ad valorem	60%, subject to a minimum of 45% per tariff line	5 years
d • 90% and > 15%	50%, subject to minimum of 35%	5 years
d • 15%	40%, subject to minimum of 25%	5 years
Preferential tariffs that are in place on products important to developing country beneficiary	Same formulas as above	8 years

In applying the formula, if the tariff on a processed product is higher than the tariff for the product in its primary form, the tariff reduction for the processed product shall be 30% more than the reduction applied to the primary product's tariff.
Developing countries[1] would have a different schedule for tariff reductions, set out in the following table.

Current Tariff	Percentage Reduction	Time Period
> 120% ad valorem	40%, subject to minimum of 30% per tariff line	10 years
d • 120% and > 60%	35%, subject to minimum cut of 25%	10 years
d • 60% and > 20%	30%, subject to minimum cut of 20%	10 years
d • 20%	25%, subject to minimum cut of 15%	10 years
SP designated products[2]	10%, subject to minimum of 5% per tariff line	10 years

Developed countries are encouraged to provide for the fullest liberalization of trade in tropical products and for products of particular importance to the diversification of production from the growing of illicit narcotic crops, or crops whose non-edible or non-drinkable products, are harmful for human health.

Tariff rate quotas

Tariff rate quotas ("TRQ") are to be increased to 10 percent of current domestic consumption of the product concerned. Countries may increase one fourth of their TRQs up to only 8% of current domestic consumption provided that they increase the rest of their TRQs to 12%. "Current" domestic consumption means the average consumption during 1999-2001 or of the most recent three-years for which data is available. Increases are to be made over a fire-year period in equal installments.[3]

Developing countries would not have to increase access to designated "strategic products" (see discussion in footnote 2). For other products, the TRQ would be increased to 6.6% of current domestic consumption. However, countries may increase one fourth of their TRQs up to only 5% of current domestic consumption, provided that they increase the rest of their TRQs to 8%. Increases are to be made over a ten-year period.

In-quota tariffs are not required to be reduced, except that developed countries shall provide in-quota duty-free access for tropical products and for other products of particular importance to the diversification of production of developing countries from the growing of illicit narcotic crops, or crops whose non-edible or non-drinkable products are recognized as being harmful for human health.[4] The text also provides that in-quota tariffs should be reduced where "fill rates on average of the most recent [three] years for which data are available have been less than [65] per cent."

The text contains an attachment setting out a new set of proposed rules governing tariff rate quota administration, which mirror very closely a proposal developed by the United States. These rules are designed to ensure that countries implement tariff rate quotas in a manner that will truly lead to greater market access, placing emphasis on transparency and national treatment.

Domestic support

Proposed reductions

The green box category of domestic agricultural support would be maintained under the text and would remain exempt from reduction commitments. Agricultural support measures deemed to fit in the green box are those that are de-coupled from production and price and have been determined to be minimally trade distorting.

The text contained alternative treatments for the blue box category of domestic support (support that contains production limiting components). One alternative would cap blue box expenditures at the most recent notified level and reduce them by 50% over five years.[5] The other would simply shift blue box support into the amber box category – effectively eliminating the exemption. This latter option was proposed by the United States.

The modalities text proposed that amber box commitments (deemed to be the most trade distorting) are to be reduced by 60% over 5 years, with an additional ceiling on individual products.[6] For developing countries, the reductions for amber box are 40% over 10 years.

If a country provides domestic agricultural support that does not exceed 5% of the value of the country's total agricultural production,[7] it does not have to include that support in the country's calculated support levels and it is exempt from reduction. The modalities text would reduce this 5% *de minimis* exemption for developed countries by .5% per year for 5 years (down to 2.5%). The 10% *de minimis* exemption for developing countries would be maintained.

Least developed countries

The modalities text identifies an undefined category of "least developed countries" that would not be required to make any reductions. It also states that developed countries "should" or "shall" provide quota and duty-free access to their markets for all products from the least developed countries.

Recently acceded members

New WTO members would get a two-year reprieve before they must begin to implement the agricultural agreement.

Export subsidies

The Harbinson text is very aggressive on export subsidies. It calls for all export subsidies to be phased out by developed countries over a period of 5 or 9 years (depending on the level of current budgetary outlays), with the most heavily subsidized exports being phased out first using a formula that tends to front-load the reductions.

Developing countries would also have to phase out export subsidies, but would get 10 or 13 years, respectively, in which to do so, and the formula-reduction would be less front-loaded. Uruguay Round exemptions for developing countries for transportation and marketing subsidies are maintained during the implementation period.

Other policy issues

Safeguards

The proposed modalities text provides that agricultural safeguards for developed countries shall be ended. Safeguard actions within this context allow a country to take temporary measures to stop significant increases in imports of a particular product if those imports are disrupting the domestic market. The text states that a new special safeguard mechanism for developing countries is being developed and will be in-

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Modalities text/Cont. from page 5

cluded in the proposed modalities text at the appropriate stage.

Export credit guarantees

The text contains an annex designed, for the first time, to impose disciplines[8] on the use of export credits and export credit guarantees. The URAA failed to deal with export financing assistance, providing that countries would work outside the WTO to develop appropriate disciplines. An effort to establish such rules within the context of the Organization for Economic Cooperation and Development failed and this issue is squarely before the Agricultural Negotiating Group. The rules suggested by the modalities text would generally limit export credit guarantees to a tenor (or term) of 180 days with repayments to be made in 6-month installments. Extended terms are proposed for sales of breeding livestock and agricultural vegetable reproduction materials. The text also provides for a different tenor for developing and "least developed" countries, but does not specify what those terms are. The text would require a minimum cash payment at or before the starting point of the guarantee of not less than 15% of the total amount of the contract value. Premiums to be charged under the particular financial assistance program "shall be risk-based and shall be adequate to cover long term operating costs and losses."

Food aid

Several WTO participating countries have asserted that the U.S. uses food aid programs as another form of export subsidy. The modalities text offers to explore new disciplines on the provision of food aid and includes as an attachment a possible replacement of paragraph 4 of Article 10 of the URAA. In short, the text would shift food aid away from loan programs to purely grant programs.

State trading

The proposal provides that state trading enterprises should be subject to disciplines that are outlined in attachments to the modalities text – one attachment for state trading import enterprises and another for state trading export enterprises. Both attachments provide that state import or export "enterprises" are not to be operated in such a way as to circumvent export subsidy or market access commitments of member countries.

The view from the bleachers

The directness of the Harbinson modalities text may have caught almost all of the countries involved in the agricultural negotiations by surprise. It also brought full light onto the serious disagreements between the major agricultural participants.

By calling for the elimination of export subsidies and significant new disciplines on blue box agricultural programs, the modalities text gave the United States much of what it had asked for. However, the market access provisions of the modalities paper have to be a major disappointment for the United States. Further, the method chosen to reduce domestic agricultural support will leave the EU at a significant advantage to the United States in terms of overall spending.

Nevertheless, it is hard to believe the EU can find very much positive in the modalities text. It does target the U.S. export credit guarantee program (something the EU and Australia certainly desired), but that program does not compare with other significant subsidy programs of the EU that would be slashed under the proposal. Worse, any agreement that would eliminate export subsidies would seriously undermine the foundation of the Common Agricultural Policy, forcing the EU into a conceptual re-write of all of its agricultural policy.

If the United States merely faced a battle with the EU in world agricultural trade, the modalities text might be viewed as a win, but the international battle for agricultural markets involves much more than the European Union. It involves markets in developing countries all around the world - markets in which the U.S. could be at a greater disadvantage should the modalities text become the final agreement.

While the proposed reductions in tariffs in the Harbinson text appear impressive, for many markets the proposed reductions will not increase U.S. market access. Many developing countries carry two tariff numbers – the rates which are bound in the WTO and the rates that are actually "applied." Cotton fiber imports into India, for example, face a 10% applied duty rate, yet India can charge up to 100% duty (its "bound rate") should it choose to do so. A 35% or even 45% reduction from its bound duty rate in this instance would result in no increase in market access for the United States. Meanwhile, for countries that carry only one tariff rate (most developed countries), every percentage point reduction in the tariff translates into real increases in market access.

Further, the modalities text contains different standards for developing countries in virtually every category of agricultural disciplines. Developing countries reduce domestic subsidies less, export subsidies slower and, as noted, provide little, if any, increases in market access. Exemptions for input and transportation subsidies for developing countries would be expanded, while the often used *de minimis* exemption for domestic agricultural support would be halved for developed countries.

Under the modalities text, both the EU and the United States would have to try to maintain agricultural export markets with far less governmental assistance to aid them. U.S. exports that compete head-to-head with EU export subsidies could be significantly better off. All others could face a more competitive international market.

Conclusion

The modalities text will not go away until the major players in the agricultural negotiations hammer out some alternative, and they have so far shown no ability to do so. Absent a new, consensus-building direction, the Harbinson text will likely remain the focal point of the discussions for most of 2003, leading up to a September Ministerial meeting planned for Cancun, Mexico.

While the Harbinson modalities text may not become the final Doha Round agricultural agreement, its provisions paint an intriguing picture of what the future of agricultural trade policy could become. It is a highly complicated picture, with Geneva the center of more frequent and more involved trade controversies. It would require policy "artists" in both the United States and the EU to go back to their drawing boards to develop answers to a significantly different world agricultural market.

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Footnotes

[1] There is no qualifying rule for a country to be considered to be "developing" within the WTO. It has traditionally been a self-notification process, with each country determining whether they are developed or developing.

[2] The text would allow developing countries to declare up to an unspecified number of agricultural products at the [6-digit or 4-digit] Harmonized Tariff Schedule level as being strategic products (SP) with respect to food security, rural development and/or livelihood, security concerns and gives significant breaks for tariff reductions for these products, as indicated above.

[3] If China consumes 20 million bales, it would not have to increase its TRQ under this formula. The US would have to increase to around 800,000 bales.

[4] Apparently, this provision is intended to have developed countries lower tariffs on crops that compete with narcotic crops in order to provide economic alternatives for producers in developing countries. One assumes that the Chairman's text envisages producers to stop growing poppy seeds, for example, and switch to cotton or tropical oils.

[5] 10 years for developing countries and a

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Swampbuster/Cont. from page 3
ties to the contract between Turecek and the federal government. *See id.* The court concluded that

> [i]n other words, neither the State nor the County were parties to the "contract" between Turecek and the federal government. Thus, though Turecek is bound to the terms of Swampbuster, the State and County are not. The Constitution can condone no other conclusion, for if a private citizen could bind unconsenting States to the terms of legislation enacted under the Spending Clause, then the concept of federalism would be a dead letter. It follows, therefore, that–unlike Commerce Clause legislation– a law enacted under the Spending Clause must lack preemptive effect over the policy choices of unconsenting States.

Id.

The court stated that even if legislation enacted pursuant to the Spending Clause could preempt the laws and regulations of an unconsenting state, there was no "clear and manifest" evidence that Congress intended for Swampbuster to preempt state and local authority to regulate wetlands. *See id.* at *5. It explained that there were three types of federal preemption, express, conflict preemption, and field preemption." *Id.* at *2. Express preemption exists when Congress "states expressly, within the federal statute, its intention to preempt state law." *Id.* Conflict preemption "is implied whenever compliance with both the federal and state law is physically impossible or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (citation omitted). Field preemption exists whenever "federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Id.* (citation omitted).

With respect to express preemption, the court determined that the Swampbuster provisions did not contain language of express preemption, that the RPO definition of wetland was not inconsistent with the federal definition, and that there was explicit evidence in the legislative history that Congress did not intend for regulations enacted pursuant to the Swampbuster provisions to preempt state law. *See id.* at *5 (citations omitted). With respect to conflict preemption, the court considered Turecek's contentions that "the RPO definition of 'wetland' is implicitly preempted under the doctrine of conflict preemption" because the RPO "stands as an obstacle to the purpose Congress sought to achieve through its agricultural statutes and reguations." *Id.* at *6 (citation omitted). The court rejected this argument, stating that

> [a]s Congress noted when it enacted the Swampbuster provisions, "in the present time of surplus agricultural production there is certainly no need for the conversion of more resources into agricultural production especially when ... wetland resources have such an inherent value ...." Moreover, in the unlikely event that state environmental regulations come to pose a threat to the nation's food supply, Congress is free to respond by enacting a law that expressly preempts those regulations.

Id. (citations omitted).

The court also stated that the goal in enacting the Swampbuster provisions "was merely to deny federal agricultural subsidies to individuals or entities who choose to farm wetlands" and not to halt the conversion of the nation's wetlands or to restore wetlands already altered. *See id.* at *6. It added that "efforts to completely halt the conversion of wetlands must be undertaken by state and local governments, if at all." *Id*.

The court concluded that "even if Spending Clause legislation could have preemptive force over the laws or regulations of an unconsenting state and its political subdivisions, there is no clear and manifest evidence that Congress intended (explicitly or implicitly) for Swampbuster to supplant state and local authority to regulate wetlands." *Id.* It denied Turecek's motion for summary judgment and granted the defendant's motion for summary judgment. *See id.*

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Announcement from the National Agricultural Law Center

Two years after receiving his LL.M. degree from the Graduate Program in agricultural Law at the University of Arkansas School of Law, Michael T. Roberts returns to Fayetteville to assume the position of Director of the National Agricultural Law Center and Associate Professor of Law. He will also teach a graduate course in food safety law in the Graduate Program in Agricultural Law during the Spring, 2004, semester.

Michael brings to the Center a strong background in representing agribusinesses and agricultural producers and associations. He has practiced law for 14 years, as a shareholder of a large firm where he chaired the firm's intellectual property section, and as general counsel to an international marketing company. He also established and served as chairperson of the Lex Mundi Agribusiness Practice Group, the world's leading association of independent law firms.

Under Michael's leadership, the National AgLaw Center will establish a network of agriculture and food professionals and will continue to expand its Web site at www.NationalAgLawCenter.org into a comprehensive information gateway and legal resource for the general public and members of the agricultural community. The Center will also continue to expand its efforts to provide agricultural and food law contacts, research publications, research guides, and updates of primary law developments.

Modalities/Cont. from p. 6
reduction of 33%.

[6] The individual commodity ceilings are not to exceed the level of support provided on average in 1999-2001. The current URAA does not contain limits on expenditures by commodity. Total amber box expenditures are aggregated across all commodities.

[7] 10% for developing countries.

[8] The WTO commonly refers to rules established in its agreements as "disciplines." This is particularly true with respect to rules that have as their object a restriction in a country's domestic programs. The use of the term "rules" within the context of the WTO is often regarded as being over-stated. The WTO cannot enforce its "rules" by normal means. It can only authorize a complaining country to take retaliatory trade action against a member who has been determined to be in violation of the "rules."