CASE STUDY #5

TURTLE EXCLUDER DEVICES:
Negotiated Rulemaking on a Politically-Charged Issue

"You show me any reason for a sea turtle. It's going to be a hard
time for a man to let his younguns go hungry for worrying about a
sea turtle. Mankind don't have any need for a turtle
whatsoever...It's us against them now. I didn't spend my whole
life getting what little bit I got to let a bunch of damn fools put me
out of business."
(Jack Griffin, Executive, Cracker Seafood, Inc.)

"Perhaps some species were just meant to disappear. If it comes
to a question of whether it's shrimpers or the turtles -- bye-bye
turtles."
(Louisiana Governor Edwin W. Edwards)

"One of the nation's premier wildlife laws is being held hostage
by petty parochial concerns."
(Jim Pissot, National Audubon Society)

The following case study describes the effort to collaboratively negotiate rules governing the use
of turtle excluder devices (TEDs) on shrimp trawlers in the southeastern United States. The conflict
between shrimpers and the provisions of the Endangered Species Act mixes reason with defiance and
cautions with violence. It is a classic case of environmental conflict. Fundamental differences about the
value of the endangered sea turtle species separate the shrimpers and their representatives from the
environmental community. Class differences permeate the case. Interestingly, while those advocating
the use of TEDs to protect the turtles would most likely have won in court, they chose to cooperate and
negotiate in order to avoid potential backlash to the Endangered Species Act. And the shrimpers, who
in reality had very little power to avert the eventual use of TEDs, perceived that in the political arena
they would prevail (as they always had) and chose to fight, rather than negotiate, a choice that the end
analysis indicates harmed both them and the sea turtles.

While the negotiations that were attempted were not entirely successful and were followed by
several years of political activity, the provisions of the negotiated agreement are strongly reflected in the
final rules being enforced today. This case study illustrates the economic stakes, class and value
differences, and emotions that pervade many conflicts involving endangered species and that undermine
negotiations that would otherwise appear rational and promising.

1 This case study was developed by J. Alan Clark.

Source: Steven L. Yaffee and Julia M. Wondollecck, Negotiating Survival: An Assessment of the Potential Use of
Alternative Dispute Resolution Techniques for Resolving Conflicts Between Endangered Species and Development
(Ann Arbor, MI: School of Natural Resources and Environment, The University of Michigan, September 1994), a
report prepared for the Administrative Conference of the United States.
1966-1978: Sea Turtles as Threatened and Endangered Species

Historically, sea turtles have been harvested for their meat, eggs, oil and shells. Products manufactured from sea turtles have included combs, boots, aphrodisiacs, soup meat and eyeglass frames. Demand for these products lead to mass slaughtering of sea turtles and plundering of their nests. In addition, development, erosion and beach activity eliminated much of the sea turtles' historic nesting grounds. Sea turtles are also subject to natural predation and disease. However, dredging, collision with boats, oil-platform removal, power-plant intake pipes, ingestion of plastics and other debris, pollution and shrimp trawling, all associated with human activity, are the primary causes of the decline in sea turtle populations.

On October 15, 1966, the Endangered Species Preservation Act (ESPA) was signed into law. Three years later, the ESPA was superseded by the Endangered Species Conservation Program (ESCP). The leatherback sea turtle (Dermochelys coriacea) and the hawksbill sea turtle (Eretmochelys imbricata) were both listed under the ESCP as endangered throughout their entire range on December 2, 1970. Later that same year, the National Oceanic and Atmospheric Administration (NOAA) was given jurisdiction over protection of endangered marine species, including those already listed under the ESCP. The Endangered Species Act (ESA) replaced the ESCP when it was signed into law on December 28, 1973. On July 28, 1978, the National Marine Fisheries Service (NMFS), which had been created within NOAA, listed two more sea turtles under the ESA. The green (Chelonia mydas) was listed as threatened in part of its range and as endangered throughout the remainder of its range, and the loggerhead (Caretta caretta) was listed as threatened throughout its entire range.

Because female sea turtles leave the water to lay their eggs, an interagency dispute arose as to whether sea turtles should be under the jurisdiction of the Fish and Wildlife Service (FWS) or the NMFS. In a Memorandum of Understanding, signed July 18, 1977, the two agencies agreed to joint jurisdiction. FWS would have authority over sea turtle activities on land, and NMFS would have authority over marine sea turtle activity. In support of that agreement, Jack Gehringer, NMFS Deputy Director, agreed to prepare a new budget to permit expanded study of the effect of fishing gear on sea turtles. In late 1977, as part of that study, NMFS held joint meetings with representatives of the shrimp industry and the environmental community to find ways to keep turtles from drowning in shrimp trawlers which would not hurt the shrimp industry. At this time, NMFS began work on developing an "excluder panel," a device which it hoped would keep turtles from being caught and drowned in shrimp trawling nets but which would not allow the shrimp to escape.

1979-1981: Center for Environmental Education Pushes the Turtle Excluder Device

In November of 1979, the Center for Environmental Education (CEE) (now known as the Center for Marine Conservation), a non-profit environmental organization, co-sponsored the World Conference on Sea Turtle Conservation. That conference recommended that NMFS and the shrimp industry accelerate the development of a shrimp trawler that would preclude the capture of sea turtles. NMFS continued its research on development of such a device. The summer of 1980 saw huge
numbers of dead sea turtles stranded on beaches. These strandings correlated almost perfectly with shrimping activity in the areas of the strandings.

These strandings were noted by the Fund for Animals (FFA) who quickly made the strandings public news. FFA was joined by 26 other conservation groups who called for NMFS meetings with shrimpers to let them know of the new excluder panels. FFA, in an August 22 press release in response to 1300+ sea turtle strandings, called for the following: "Turtle excluder devices to be built into the trawl nets which have been designed by the National Marine Fisheries Service and other turtle conservation operational techniques [to] be utilized as soon as possible." In response, NMFS held a "Sea Turtle Meeting" the following month in Charleston, South Carolina, to examine ways to reduce sea turtle mortality from commercial shrimping activities. At that meeting, NMFS told the attendees of their development of an excluder device. NMFS also issued emergency sea turtle resuscitation regulations in hopes that shrimpers would attempt to revive comatose sea turtles caught in their trawlers.

CEE had been considering filing suit to require NMFS to promulgate regulations to protect sea turtles from takings in shrimp trawling nets. However, CEE decided not to file suit in lieu of the techno-fix: the new turtle excluder device (TED). The following year, CEE began to privately fund manufacturers to build the TEDs using the directions and diagrams in a NMFS booklet. The Gulf and Atlantic Fisheries Development Foundation issued a brochure discussing the benefits of TED use. CEE then planned to give the TEDs away, but due to resistance from the shrimp industry, few TEDs were used during the 1981 season. NMFS was successful in getting a few South Carolina shrimpers to try the new TED. These shrimpers complained that the TED was too heavy. In response, NMFS reduced the weight from 97 pounds down to 37 pounds.

1982-1985: The TED Voluntary Use Committee

Convinced of the value of the TED, Michael Weber, head of CEE's sea turtle program, contacted various parties, including E.C. Bricklemeyer of Greenpeace, Ralph Rayburn of the Texas Shrimp Association and Bob Jones, Executive Director of Southeast Fisheries Association. In a February 11, 1982 letter, Weber asked them to be on a shrimp industry/conservationist committee whose goal would be the voluntary adoption of the TED. As an incentive to participate, Weber also informed these parties that NMFS was developing regulations which might require the use of TEDs. Rayburn accepted Weber's offer, but he qualified his acceptance by stating that he did not necessarily agree that the TED is the way to proceed on this problem. After getting other affirmative responses, Weber organized the first TED Voluntary Use Committee meeting which was held on May 4, 1982. Weber and Rayburn acted as co-chairs. This committee was informal in nature to avoid the red tape of being an official government "advisory committee." The committee provided a forum for both sides to vent their concerns and to pass comments on to the NMFS.

During 1983, CEE and NMFS distributed free TEDs to shrimpers. In June, NMFS Staffmember Oravetz sent a memo to the TED Voluntary Use Committee which discussed the results of TED experiments. Upon an invitation from Weber, the Voluntary Use Committee reconvened again on November 14, 1983. At that meeting, the group reached agreement on a goal that within three years,
50% of southeastern shrimpers should be using TEDs and that 100% of shrimpers should be using TEDs in areas of critical importance to sea turtles. Follow-up meetings were held on May 3, 1984 and November 7, 1985. At the November 7, 1985 meeting, it was revealed that less than 1% of shrimping fleets had ever used a TED. The industry representatives (which only represented between 5-10% of the shrimping fleet) were unwilling to commit any percentage of their members to use of the TEDs. This was the final meeting of the TED Voluntary Use Committee.

Regional/parochial interests seem to have played a quiet, yet pervasive, role throughout this controversy. Apparently, shrimpers in one Louisiana parish had experimented with, and approved of, a variety of TED. When the device was shown to shrimpers in an adjacent parish, they refused to use the device as they would have nothing to do with anything from that other parish. Class and race issues were also subtle underpinnings to the vocal opposition to TED requirements. Class in terms of big government and environmental elitists against self-employed shrimpers, and race in terms of Southern outrage at federal subsidies to Vietnamese "boat people" during a time when cheap imported shrimp was eating away at the market.

1986: The TED Negotiations

Both FWS and CEE were disappointed by the failure of voluntary adoption of TEDs by the shrimp industry. In January of 1986, FWS and CEE went before the Gulf of Mexico Fishery Management Council and asked that it amend its fishery management plan for shrimp and require that TEDs be used throughout the industry at all times. The Council referred their request to a committee which referred the request to another committee and so on. Extremely frustrated with the Council's committee run-around, CEE went to NMFS in April and asked them to promulgate regulations requiring the use of TEDs under the ESA. In August, NMFS politely declined to promulgate any TED requirements. Shortly thereafter, CEE made it known to both NMFS and the press that they were considering filing suit against NMFS to compel them to promulgate regulations under the ESA requiring the use of TEDs.

Dr. Anthony Calio, Administrator of NOAA, in response to CEE's lawsuit threat, called for a meeting of environmental and shrimp industry representatives from the gulf to discuss the use of TEDs. Within a day or so of Calio's request for a meeting, NMFS unveiled proposed regulations regarding the use of TEDs which were to take effect on November 1. Because the proposed regulations left out a huge section of the Texas coast where critical habitat was located, CEE was dissatisfied with the regulations. The next day, CEE served the Secretary of Commerce with notice that unless better regulations were proffered, CEE would file suit within 60 days, demanding that all shrimp fisheries be closed in order to protect endangered sea turtles. Dr. Calio quickly responded with an announcement that, instead of his promulgating a new NMFS regulation, NMFS would offer the parties an opportunity to negotiate a rule that would satisfy everyone. He promised to delay the November 1 effective date of the proposed regulations if the parties could satisfy him that they would negotiate in good faith. Meeting with some resistance, Calio actively worked with the parties and eventually persuaded them to meet.
The actual negotiations took place during 14 days in four cities over a seven week period. NMFS selected the parties it wished to participate, chose the mediator and paid the bills. The schedule was as follows:

October 16-17, 1986: New Orleans, LA  
October 31 - November 2, 1986: Jekyll Island, GA  
November 10-13, 1986: Washington, DC  
December 1-4, 1986: Houston, TX

The participants were:

**Mediator**

Larry Cotter

**Industry Representatives**

Leonard W. Crosby, Jr., Bryan County (GA) Coop (Processor)  
David Eymard, Texas Shrimp Association  
Charles H. Lyles, Louisiana Shrimp Association  
Tee John Mialjevich, Concerned Shrimpers of Louisiana  
Robin Sanders, South Carolina Shrimpers Association  
Eldon V.C. Greenberg, Counsel to Southeastern Fisheries Association

**Environmental Representatives**

Vance Hughes, Counsel to Center for Environmental Education  
George J. Mannina, Jr., Counsel to Center for Environmental Education  
Michael Weber, Center for Environmental Education  
Milton Kaufmann, Monitor International, Fund for Animals  
B.J. Jaildagian/E.C. Bricklemyer, Greenpeace, Southeast  
Michael Bean, Environmental Defense Fund

**NMFS Representatives**

Jim Douglas  
Jay Johnson  
David Cottingham

When the negotiations began, the environmentalists wanted to require the use of TEDs on all vessels in all waters at all times. They were primarily concerned with protecting sea turtles and secondarily with reducing fin fish by-catch. However, at the beginning of the negotiations, the mediator
convinced the environmentalists to drop the demands about fin fish. The shrimp industry had mixed
goals. Some Atlantic and Florida shrimpers were already using TEDs and had found them an efficient
means of reducing fin fish by-catch and thereby reducing the amount of time spent sorting shrimp from
fin fish. Other shrimpers were upset about government subsidies to Vietnamese shrimpers and wanted
no further governmental intervention into their livelihoods. Shrimp processors were quiet, but they
seemed to want to keep prices down and to show support for the shrimpers. The government clearly
wanted to avoid controversy and lawsuits, though on the lower levels of NOAA and NMFS, there was
also real concern for sea turtles.

Parties to the Negotiation

The participants were chosen by Dr. Calio. As noted above, there were three representatives
from NMFS, six representatives from the shrimp industry and six representatives from the environmental
community. Weber believes that the environmental concerns were fully represented, but he felt that this
was not true for the shrimping community which had only about 5% of their numbers represented at the
negotiations. According to Weber, each of the representatives had written authority to represent their
organization: "We weren't going to negotiate with parties who couldn't negotiate and sign on behalf of
their organizations."

Among the interested parties not represented at the negotiations were small boat shrimpers and
North Carolina shrimpers. With time, it was these two unrepresented groups which engaged in the most
pervasive and effective opposition to the negotiated agreement.

The Negotiation Process

Getting Started. The negotiations were initiated at the request and prompting of NOAA
Administrator, Dr. Anthony Calio. Larry Cotter was selected as mediator by Calio, who had heard of
his experience in consensus building efforts with the North Pacific Fishery Management Council.
Cotter's prior experience in negotiation was primarily labor-management disputes. Calio also decided
which parties were invited and encouraged to participate. NOAA paid the mediator's salary and
expenses, covered the cost of the facilities and charged Cotter with its goal for the negotiations: a
finalized agreement on turtle excluder devices which NMFS could adopt and promulgate as a proposed
rule. However, the negotiation process itself was entirely under the control of the mediator, Larry
Cotter.

Meeting Locations/Physical Structure. Calio chose the location (New Orleans) for the first round
of negotiations. Cotter then chose the remaining three locations and attempted to spread the meetings
out: Jekyll Island for the South Atlantic representatives, D.C. for the government and environmentalists
and Texas for the Gulf representatives. The negotiations were generally held in hotel meeting rooms.
Cotter placed the parties around a rectangular table. Because of his self-perceived role as chair, Cotter
placed himself at the head of the table. The government representatives sat at the opposite end, and
industry and the environmentalists sat facing each other on opposite sides of the table.
**Open Meetings.** With the exception of private caucuses, the negotiations were open to the public at the direction of NOAA. Public attendance ranged from around ten to several dozen persons. Cotter felt that it was important to have open meetings for several reasons. Primarily, the open meetings served as an educational process: "One of the problems we had was there was a clear lack of comprehension on both parties' part as to the impact of what was going on." As an example, Cotter noted that there are 30,000 shrimpers. The shrimpers claimed that they may catch a sea turtle once a decade. He felt the environmentalists needed to hear that fact. But he also pointed out that if you multiply that figure by 30,000 shrimpers, you have a significant turtle catch, an important point that the shrimpers needed to know. Cotter also felt that the negotiations "caused everyone to start thinking about what they were doing. I think we also focussed attention on marine debris, degradation of coastlines, streetlights and all those things that have an impact on turtles." Cotter also believes that the open nature of the negotiations eased the burden for industry of reaching agreement: "The open meetings helped the public understand that industry was in a no-win situation. When the discussions were over, at least the industry representatives were able to maintain a sense of dignity. If the discussions had been private, then we would not have had that public education process, and I'm convinced each of the industry representatives would have been castigated, and their careers as representatives would have been done." On legal note, having open meetings helps agencies defend the process used to promulgate rules if lawsuits should ensue in the future.

**Government Participation.** At first, the government representatives attempted to take a very active role in the negotiations, but Cotter squelched this effort. He felt that the decisions needed to be made between the industry and the environmental community and saw the role of government as more of a provider of data and support services. The government also served the necessary function of letting the group know whether a proposal met with statutory and internal governmental regulatory requirements. Towards the end of the negotiations, however, Cotter began to use David Cottingham of NMFS as an assistant.

**Goals.** As a personal goal, Cotter attempted to gain the trust of the parties. Consequently, no actual negotiations occurred at the first round of meetings. The focus, instead, was on mutual education and relationship building: "I attempted to go through an education process . . . . We outlined data requests. We asked for charts. . . . I encouraged both the environmentalists and the shrimp industry to articulate their perspectives. Then, what we would do, as a team, is take a look at each one of those perspectives, and then try and identify what type of data needs were necessary in order for us to establish the degree of veracity accompanying each of those perspectives."

Aside from beginning the education process and "avoiding a lot of chest beating," Cotter's primary substantive goal for the first meeting was to develop a problem statement that both the shrimp industry and the environmental community could agree upon. Cotter saw the problem statement as not only an educational tool, but also a means to control the future behavior of the parties: "Having agreed to a goal or objective which recognizes mutual vested rights, you then draw upon the integrity of each of the individuals on both sides and their desire to live up to the commitment they made when they agreed to that goal or objective. That gave me something then to use in the future if necessary to work on each of the parties if they started to deviate or become obstinate."
**Mediator Style.** Cotter sees two approaches to mediation: "(1) you can sit silently like in labor negotiations or (2) you can act as chairman of a joint committee of two opposing sides." He chose to run the negotiations as a committee. Cotter felt it was his job to structure the meetings: "it is the job of a successful mediator to `guide' the parties down a particular path." He tried to make the talks as informal as possible: "I did my damnedest to inject humor on a continuing basis so that the folks would enjoy themselves. That's one thing I learned in labor negotiations years ago. The situation is tense to begin with, and the folks who have the most success in labor negotiations are the people who just sit at the table and manage to make it fun."

Cotter's personality seems to be open. He is articulate and gregarious. During the negotiations he was quite active. If talks bogged down, he would send the parties out for private caucuses or have them work on joint projects, such as deciding what data was needed and how to divide the country into zones. Cotter actively worked the parties during their private caucuses and freely commented on the talks, arguments and proposals made by the parties. After he felt that a feeling of trust had been established between himself and the parties, Cotter felt free to "call `bullshit' on both sides . . . . What I would do when someone would raise a question or advance an argument is sometimes let the other side respond. But sometimes I would respond and point out the fallacy of their perspective. I was doing this to prevent animosity from developing between the parties . . . I would [confront the antagonistic situation myself] when I felt it was appropriate rather than having someone else do it."

**Incentives to Participate**

The incentives to negotiate varied among the parties, but, in general, the parties can be categorized into three discreet groups: the government, the shrimp industry and the environmental community.

**Government.** NMFS was extremely interested in seeing these negotiations succeed. After all, it was their idea to negotiate. Their motivation to originally promulgate the 1986 rule was in response to a threat by CEE to sue. This was also the motivation for their call to negotiate. NMFS intimated to the parties that if the negotiations failed, the proposed rule would probably go into effect. NMFS believed that the parties would be less likely to sue if they had a stake in the makeup of the rule itself. Litigation is much more costly to the government than negotiated rulemaking in financial, time, and political terms.

**Shrimp Industry.** The shrimp industry clearly did not want to see the imposition of TEDs into their operations. They were facing a very real and increasingly dire financial plight. According to shrimper Ricky Matherne, "I need every shrimp I can catch. I can't lose not one percent. I'm talking about not losing a single shrimp." Many shrimpers feared that TEDs would force them out of business. The U.S. shrimp market has been vastly undercut by shrimp imports, resulting in substantially lower selling prices. Operating costs are higher than ever due to rising insurance and fuel costs. These factors have heightened pressure on shrimpers, necessitating that they trawl longer and with greater effort for subsequently increasingly limited resources. In one survey, shrimper captains saw their annual incomes fall from $39,571 in 1985 to $18,555 in 1989.
Alternatively, the shrimp industry really did not have much to fear at the beginning of the negotiations. They had negotiated with CEE in 1982 and had succeeded in doing nothing but give lip service for four years. After NMFS promulgated the 1986 proposed rule, the shrimp industry went into negotiations thinking that NMFS' proposed rule would be the worst they could do. During the second meeting in Washington, D.C., the talks began to break down when the environmental community began to demand more than was in the proposed rule. Cotter called in Dr. Calio who spoke privately with the shrimp industry representatives and let them know that NMFS was withdrawing the proposed rule because it was clearly insufficient. He also explained the exact consequences of the more likely rule which would be promulgated in the event that the negotiations failed. The shrimpers returned to the bargaining table.

Environmental Community. In 1980, after NMFS revealed its development of the TED, CEE decided not to file a suit it had been considering in order to get regulations protecting sea turtles promulgated under the ESA. In 1983, CEE representative Weber co-chaired the TED Voluntary Use Committee. The agreement reached by that Committee provided for a goal that 50% of southeastern shrimpers should be using TEDs and that 100% of shrimpers should be using TEDs in areas of critical importance to sea turtles. The shrimpers never got anywhere near the goal. CEE's Donnelly has mixed emotions about the decision to negotiate in 1983 rather than sue: "I think it's too bad we didn't decide to sue back in 1983. If we had known in 1983 what we knew in 1986, we would have sued in 1983." CEE's decision to negotiate rather than sue in 1986 was again the desire to avoid litigation if possible. CEE believed that an agreement reached with everyone would be better than one forced on the parties by the courts. Also, being asked by Dr. Calio provided legitimacy to the process that was not present in 1983. Clearly though, CEE's threats to file suit against the NMFS provided much motivation for NMFS.

Reaching Agreement

As the negotiations began to wrap up and a tentative agreement was being reached, the parties began to discuss how they would endorse the agreement. In Cotter's words: "Folks were trying to figure out how they were going to sign: as an individual or as a representative of their organization. There was talk that 'heck, I have to take this agreement back to my association and receive authorization before I can sign it.' Well, I wasn't about to let that happen, simply because I needed signatures, I needed commitments. If we had allowed the parties, including the environmentalists, to take the agreement back to their various organizations for ratification, I'm certain that it would have been rejected by various entities. That would have destroyed the process.” Eventually, with the exception of Mialjevich, all the parties signed the agreement with the name of their organization under their signature.

By the afternoon of December 3, 1986, all of the parties had agreed to sign onto an agreement on the use of TEDs with the exception of Tee John Mialjevich of the Concerned Shrimpers of Louisiana who claimed the agreement was too tough for his constituents. The parties kept working through the evening and finally reached an agreement where, if Mialjevich would sign the agreement, a special provision would be inserted into the agreement lessening the phase-in and actual requirements for
Louisiana. If Mialjevich did not sign, the "Louisiana Variable" would be dropped from the agreement. Mialjevich consented, and the parties agreed to have a signing ceremony the next day. Unfortunately, at 2:00 am, Mialjevich received notice that his mother had died, and he immediately left for Louisiana. The remaining parties signed the agreement. Two weeks later, Mialjevich announced that he would not be signing the agreement, and the special Louisiana provision was dropped from the agreement. He became the leader of the nationwide movement against the agreement and the subsequent regulations promulgated which were based on that agreement.

The act of signing the agreement apparently tempered the future activity of the signatories. According to Cotter, they seemed hesitant to break the bind of their signature. As Mialjevich did not have this constraint, he was much freer to reign havoc on the whole process. Cotter also mentioned that some of the shrimp industry representatives took a lot of heat from their organizations: "It may have affected their careers and subsequent involvement in the industry adversely. But I think they were very credible individuals with high integrity and only signed on because they believed they had done the best they possibly could under the circumstances, and that it was the best for the industry." After David Eymard of the Texas Shrimp Association returned home from signing the agreement, "all hell broke loose." Despite having earlier signed a letter designating Eymard as their representative, the Texas Shrimp Association sent a letter stating that they had never given permission for Eymard to negotiate on their behalf.

Implementation

During the negotiations, Cotter thought that implementation would be forthcoming: "I was looking backwards to the Boldt decision in Washington State where the feds moved in and nailed a couple of guys who were fishing in violation of the Boldt decision. That decision had been preceded by massive threats of civil disobedience. After a couple of guys got nailed (and really badly), I think everybody in Washington State learned that the better part of wisdom was to comply. It was my assumption that a couple of guys were going to get nailed seriously in the Gulf of Mexico, and we would see a similar type of compliance mode thereafter."

1987: Promulgation of Shrimp Trawling Requirements

NMFS published its proposed rule on shrimp trawling equipment on March 2, 1987. These rules were based on the December 4, 1986 negotiated agreement. NMFS held 17 hearings attended by thousands of people. Following publication of the proposed rule, hearings were scheduled in both Houses of Congress on ESA reauthorization. Busloads of angry Louisiana shrimpers descended on Washington to attend the hearings. The Attorney General of North Carolina threatened to file suit if regulations pursuant to North Carolina were not dropped from the proposed regulations. North Carolina was the only state affected by TED regulations that had not been represented during the negotiated rule making. Since North Carolina represented the top fringe of the shrimping grounds and a small percentage of commercial shrimpers, they were not deemed an important party to the negotiations, an obvious miscalculation. NMFS temporarily dropped out the sections of the proposed regulations which dealt with North Carolina. On June 29, 1987, NMFS published its final rule. Changes were
made from the proposed rule, but the final rule still retained the essence of the negotiated agreement. The final rule was to become effective starting from October 1, 1987 and continuing through May 1, 1988.

Many groups were unhappy with the final rule. In August, Tee John Mialjevich decided to expand his organization and formed a national version: Concerned Shrimpers of America. In October, the State of Louisiana, along with intervener Concerned Shrimpers of Louisiana, filed suit in federal district court challenging the validity of the final rule.

1988-1989: Judicial, Administrative and Congressional Intervention

Activity in the courts over the final rule became heavy during 1988 and 1989. In February of 1988, the Federal District Court for the Eastern District of Louisiana ruled that the final rule was not arbitrary and capricious and that the final rule would become effective March 1, 1988. Louisiana, which had filed the suit, appealed, and in July 1988, the Fifth Circuit Court of Appeals affirmed the lower court and stated that the final rule would now become effective September 1, 1988. In its opinion, issued on August 14, 1988, the court stated that "If the tradeoff between marine life and economic success has been skewed in the wrong direction, it is for the legislative and executive branches, not the court, to correct that imbalance." (Louisiana ex rel. Guste v. Verity, 853 F.2d 322, 331, 332, f.n. 20)

Congress took this admonition to heart. On August 22, 1988, the President signed into law a measure which would prevent the final rule from becoming effective until September 17, 1988, by which time Congress hoped to have completed the reauthorization of ESA. The TED requirements comprised a central point of contention in the ESA reauthorization debates, and it was not until October 7 that ESA was amended, reauthorized and signed into law. The amendments to ESA delayed the effective dates for the final TED rule until May 1, 1989 for offshore areas and until May 1, 1990 for inshore areas. Because of statements like that of Senator Heflin (D-AL) who went so far as to say that the Ridley turtle was not even endangered, the amendments also mandated a study of the issue by the National Academy of Sciences (NAS) which was to be completed by April 1, 1989. Not all states were pleased with the delay in implementation. In December, Florida passed its own emergency regulations, requiring use of TEDs in state waters off northeast Florida.

Just days before the delayed final rule was finally to become effective as to offshore areas, Louisiana once again filed suit seeking a temporary restraining order (TRO) and a preliminary injunction (PI) to keep Secretary of Commerce, Robert A. Mosbacher, from enforcing the regulations until the NAS study was complete. On the same day that Louisiana filed suit against him, Secretary Mosbacher announced that the regulation would go into effect as to offshore areas beginning May 1, 1989, but that during a 60 day grace period, only warnings would be issued for violations. Four days later, the district court denied Louisiana's motions for a TRO and a PI. Three weeks later, the parties agreed to continue the suit, but on the merits.
On July 10, ten days after enforcement began after the expiration of the 60 day grace period, the Coast Guard announced the suspension of enforcement of the final rule in response to complaints from shrimpers and pressure from Representative Tauzin (D-LA). On July 20, Secretary Mosbacher announced that he could not legally abandon the final rule's TED requirements and that he was reinstating Coast Guard enforcement. Two days later, shrimpers began blocking ship channels along the Texas Gulf Coast, preventing traffic to and from Houston and Galveston. The shrimpers burned their TEDs and threatened violence if law enforcement agencies were to attempt any further enforcement. On July 24, moments after meeting with Gulf Coast Legislators, Secretary Mosbacher announced that TED regulations would be suspended for 45 days after which shrimpers would be allowed to opt out of TED requirements by limiting their tow time to 90 minutes.

This flip-flop outraged environmentalists. Within hours of Secretary Mosbacher's announcement of the 45 day suspension, the National Wildlife Federation had filed suit making a motion for a TRO to keep the Secretary from enacting the suspension. Four days later, on July 28, the D.C. District Court granted NWF's motion for a TRO, stating that the Secretary had no authority to suspend the regulations. However, the court also gave Secretary Mosbacher until August 7 to either reinstitute the original regulations or to issue interim turtle conservation measures which the court required become effective August 7. On August 1, the federal district court for the Eastern District of Louisiana ruled that Mosbacher had the authority to enforce the TED requirements. Meanwhile, back in Washington, DC, Secretary Mosbacher, barely meeting the court imposed August 7 deadline, announced the issuance of an interim final rule which, as an alternative to using TEDs, would allow limiting trawling time to 105 minutes. This interim final rule was to be in effect from August 8 through September 7.

The next day, NWF filed another suit against Mosbacher, this time objecting to his interim final rule and requesting injunctive relief to keep the interim final rule from going into effect. On August 11, the D.C. District Court denied NWF's motion, stating that it could not make a ruling on the merits until the final rule was published (which was scheduled for September 7). Two days before the September 7 deadline, NMFS announced that the 105 minute trawling limit was insufficient to protect sea turtles and that shrimpers must install TEDs by September 8, 1989. On September 8, the Coast Guard began enforcement. In response, the shrimpers spontaneously boarded 37 boats and blockaded Grande Isle, Louisiana waterway. The blockade ended when President Bush promised the shrimpers that his Chief-of-Staff would look into the matter. On September 13, 1989, NMFS reinstated the original final rule. In October 1989, the National Academy of Sciences report on the endangered sea turtles was released, indicating that their plight was far worse than even the most pessimistic accounts had imagined.

After 1989: The Battle Abates

Though several legislative efforts were made, primarily by politicians from Louisiana, to block the implementation of the final rule as to inshore areas, the final rule did become effective in its entirety, as scheduled, on May 1, 1990. During the 1990 shrimping season, the Coast Guard boarded 684 vessels in the gulf. 481 of these vessels had installed TEDs to their trawling equipment and 203 vessels were in violation. The violations resulted in seizures of equipment, fines and jail sentences. For the entire season, overall total compliance ran 70%. The figures for the end of the season, however, showed
increasing compliance, ending up at 85%. Regional compliance varied widely. For example, Corpus Christi had 77% compliance while New Orleans had only 59% compliance. Data for the 1991 season are sketchy. According to the Coast Guard on March 27, 1991: "We're only four weeks into the TED season here in District 8, and we're seeing quite a bit of compliance across the board - about 85% . . . when I say 85%, a couple of boardings one way or the other could change that a couple of points. But right now, it looks like we're getting good compliance." On July 7, 1991, the Coast Guard boarded 126 shrimp boats near Galveston to check for compliance with TED regulations. Compliance was nearly 95%.

The regulations are still being fine-tuned, and most of the recent efforts in the legislative arena have been in the introduction of bills to provide financial assistance to shrimpers who are required to use TEDs.

Aside from seizures of illegally altered trawling equipment, convictions can result in fines of thousands of dollars. Donnelly claims that many shrimpers did not comply with the TED requirements because they believed Mialjevich "when he said `don't use the gear, we're gonna get the regulations changed.' These people have been thrown in jail and fined. He's [Mialjevich] not paying the $5,000.00 fine, somebody else is."

The Issue Rekindles in 1991

On August 30, 1991, NMFS proposed that regulations requiring use of TEDs from May 1 to August 31 be extended and apply from September 1, 1991 through April 30, 1992, in the Atlantic coast region from North Carolina to Florida (56 Federal Register 36753). Additionally, NMFS announced that it would begin a longer public process with the end goal of permanently requiring year-round use of TEDs in the Atlantic coast region. The final rule, requiring use of TEDs from September 1, 1991 through April 30, 1992, was published September 4, 1991 and was retroactive to September 1, 1991 (56 Federal Register 57313). The regulation was promulgated in response to studies showing a direct correlation between dramatic changes in turtle strandings and the beginning and end of the May 1 through August 31 TED seasons.

Remobilized by this new regulation and the threat of permanent year-round use requirements, Louisiana shrimpers participated in the "Fly-in for Freedom." "Fly-in for Freedom" is a coalition including farmers, ranchers, sheepgrowers, loggers and miners whose goals were to gather in Washington, broaden the groups' lobbying base, win support for legislation more generous to their industries and express their concern that environmental restrictions were crippling their industries. The shrimpers, once again led by Tee John Mialjevich of the Concerned Shrimpers of America (CSA), participated in the Fly-in by visiting members of Louisiana's Congressional delegation, arguing for modifications to the Endangered Species Act that would take their needs into account. Their pleas were well-received by some members of the delegation. Louisiana Senator John Breax responded to CSA's visit: "I think they're right on target. We can't legislate in a vacuum. We have to take into
account the cost of human suffering and human dislocation. Everything we do in society and Congress and life in general is a result of compromise. We need a balancing. This act [the ESA] has no account for the social impact and stands out as an exception." Representative Jimmy Hayes responded to CSA's appeals as well: "Shrimpers are losing their jobs and their incomes are dramatically reduced by the lost catch due to TEDs. They presently are burdened by regulations that don't have substantive support."

As noted above, NMFS announced on August 30, 1991, that based on the 1990 NAS report's surprising data on sea turtle mortality, it would seek permanent year round use of TEDs in all waters. NMFS drafted these expanded regulations, but the Council on Competitiveness prevented NMFS from publishing them.

In early April, 1992, the Environmental Defense Fund (EDF), the Center for Marine Conservation (CMC, formerly CEE) and the National Wildlife Federation (NWF) joined forces and published a report assessing implementation of TED regulations. The report concluded that TED use did not result in the predicted dire economic and safety catastrophes. In addition, EDG, CMC and NWF announced at a press conference that they would be filing suit against NMFS for not publishing the expanded TED regulations. One week later, NMFS announced that the proposed expanded regulations would be released. On April 30, 1992, the proposed expanded regulations were published (57 Federal Register 18446).

Once again, the Council on Competitiveness intervened, this time in an attempt to prevent the final regulations from being published. The Council went so far as to contact most of the state shrimping associations for off-the-record comments on their opinions on the expanded regulations. EDF, CMC and NWF again threatened suit to force release of the final regulations. NMFS was able to temporarily avoid conflict by publishing interim final rules (generally, interim final rules are not judicially challengeable).

The interim regulations, published on September 8, 1992 (57 Federal Register 40861), were due to expire on December 1, 1992. And once again, EDF, CMC and NWF threatened to sue if final regulations were not published by the expiration of the interim final rules. In the meantime, however, President Bush lost his bid for reelection. And, on November 30, 1992, the final expanded TED regulations were published (57 Federal Register 57348).

These final expanded regulations contained nearly every element demanded by the environmental coalition. Included were provisions requiring sea turtle conservation measures throughout the entire year in all waters, both inshore and offshore. Limited tow times, which had been allowed as an alternative to TED use, are scheduled to be phased out by December 1, 1994. Until the phase out is complete, tow times, where still permitted, are reduced to 55 minutes from April 1 to October 31 and 75 minutes the rest of the year. The tow time alternative for small boats in offshore waters was eliminated as of January 1, 1993. In addition, more inshore shrimp trawlers became subject to TED requirements.

**The Expansion of TED Requirements Continues**
The 1990 NAS report concluded that shrimp trawlers were the leading cause of sea turtle mortality. The report also found that non-shrimp fisheries, including the flounder industry, constituted the second largest cause of sea turtle death. Based on the NAS conclusions, NMFS published interim final rules on September 20, 1993 (58 Federal Register 48797), which required the use of TEDs in summer flounder trawl nets in designated areas of southern Virginia and North Carolina. (NMFS is apparently prepared to continue to expand sea turtle conservation measures to reflect the results of incoming research data, and the measures requiring TEDs in summer flounder fishing trawls are likely to expand to include areas further north along the eastern seaboard.) Knowing the interim rules for the summer flounder industry were about to be published, fishing industry officials quickly organized another "Fly-in for Freedom" which was held in Washington, D.C. during September 18-20, 1993. Most visible during this Fly-in were fishing and shrimping industry representatives from North Carolina.

Compliance with the final expanded TED regulations is running around 94% according to Coast Guard enforcement officers Lt. Commander Mark Johnson in Region 8 and Lt. Sawhill in Washington, D.C. Apparently, some shrimpers put up a bit of resistance in December 1992 when the final regulations became effective, but according to the Coast Guard, the resistance was relatively minor. According to Lt. Sawhill, opposition to TEDs has diminished as shrimpers better learn how to operate their TED-equipped trawls. Lt. Sawhill also speculated that opposition to TEDs may reappear when regulations requiring "by-catch reduction devices" on trawl nets become mandatory within the next 2-3 years.

Analysis and Conclusions

What lessons can be drawn from this partially-successful effort to negotiate rules governing the use of TEDs? Did the attempt to collaboratively negotiate rules help or hinder protection of the endangered sea turtles? Given the benefit of hindsight, could this effort have been made more effective if modified in some way?

There clearly were some problems evident in the process employed to negotiate the TEDs rules. In fact, two key problems likely dictated the unsuccessful outcome: representation and ripeness. While the oversight of omitting the State of North Carolina from the process was probably only marginally consequential, the inclusion of individuals representing only 5% of the shrimp industry's diversity likely doomed the effort. When the negotiated rule was completed, the unrepresented small boat shrimpers launched a very effective campaign against it, stalling implementation for three years and engendering significant ill-will towards environmentalists and the Endangered Species Act.

Would more adequate representation have led to a different outcome? Perhaps, but it is likely true that the issue was simply not ripe for a negotiated resolution at this time. Given the level of political activity supporting the shrimpers' opposition to TEDs, and the ESA, one can conclude that the shrimpers would never have willingly agreed to use TEDs as a result of these negotiations because they perceived that they could prevail in the political arena. As the issue became elevated to the halls of Congress, their Congressional representatives apparently concurred.
It is conceivable that TEDs regulations would have been forthcoming with less animosity and in a more timely fashion had attention been paid to ensuring complete representation and attaining a broader political support behind the negotiation "experiment." If neither adequate representation nor political support for the negotiations were forthcoming, then perhaps this would have indicated early on that the problem was not ripe for resolution in this manner and the negotiations should not have been pursued.

Some environmental participants feel that they could have potentially done more to alter the shrimpers' willingness to negotiate by garnering more public support behind the issue. The general lack of national public awareness of the issue itself may have deprived the environmental community of power. As Weber commented: "What is utterly remarkable is that in the national media, it has received little media attention, when, since the Tellico dam episode, there has been no situation that is so critical for a species or that would affect [thousands of] business people directly . . . . People get more upset about whales when Ridleys are on the brink of extinction . . . . Maybe we didn't market the issue."

In the end, the shrimpers' misperception of their power in the situation was to their detriment. Weber, Cotter and Donnelly felt that, ultimately, industry was hurt by their opposition to the agreement-based regulations. Cotter noted that the negotiations took three years to phase-in the extension of the TED requirements out to 200 miles. The modifications which resulted from Mialjevich's campaigning did exempt certain inshore areas and instead allowed tow time limits for small boats, but they also immediately extended the regulations out to the 200 mile limit. This modification had an immediate and severe impact on shrimpers with larger vessels. Donnelly noted that when the NAS study finally was released (which, as noted above was demanded by gulf legislators who claimed that sea turtles were not endangered), sea turtle mortality figures were far worse than anyone had imagined. Weber noted that opposition did result in delays, but ultimately, the delays produced information which vindicated the environmentalists' position and that, therefore, stricter regulations ensued.

It is conceivable that, had the shrimpers been willing to bargain in good faith, that this case would be a success story in negotiated rule-making. While the environmentalists felt certain that they would prevail in court, they perceived an advantage (or less of a disadvantage) in negotiating to promote ownership of the solution and hence advance the use of TEDs and to limit potential hostility towards the ESA.

When Cotter was asked to mediate, Jim Brennen, NOAA General Counsel, said to him: "Well, Larry, frankly it will be a miracle if you get anything." When Cotter was asked how the turtle fared through the negotiations and would CEE had fared better by going right to court, he answered: "Had the environmental community gone to court, I think they would have prevailed. I think that the U.S. shrimp industry would have been shut down in the Gulf of Mexico. I think that would have resulted in a number of things. First of all, there would be a tremendous backlash against the environmental communities down there. Secondly, I do not think that the data generation would have occurred. Thirdly, I suspect that there would have been much stronger efforts to amend the Endangered Species Act. In many respects, we would have had the spotted owl five years ago."
The environmental participants in this drama are equally mixed in their attitudes towards the appropriateness of the negotiations in resolving this issue. When Weber was asked whether the turtle would have fared better if they had sued, he responded that back in 1986, they felt confident that they would win a lawsuit and subsequent appeals and, eventually, get a Supreme Court ruling in their favor. However, what Weber feared was that Congress would then step in and alter the ESA. He comments that Congress did alter the ESA, but that in the hearings, Congress made note of the environmentalists' constant efforts at cooperation. Weber was told by hearing members that they would refuse to reward the environmentalists for this noble effort by "bushwacking" them.

Antipathy to TED requirements has abated since the turbulent conflicts of 1989-1990. However, opposition to TEDs has not disappeared. Deborah Crouse of CMC has observed that nearly all of the present opposition comes from either inshore shrimp trawlers and summer flounder trawlers (which have only recently become subject to TED requirements) or from shrimpers from states with legislators opposed to TED regulations (e.g., Tauzin of Louisiana and Laughlin and Fields of Texas). In other states, support for TEDS has grown tremendously. When the Council on Competitiveness contacted the South Carolina Shrimpers Association, they were told that shrimpers liked TEDs because of the device's ability to exclude other unwanted objects and debris such as jellyfish, and that shrimpers there used TEDs even when they were not required to do so.

When asked, Dr. Crouse commented that she believed the negotiations over TED regulations had a positive impact on the relative ease with which TED regulations have been permitted to expand to reflect the realities exposed through the results of continuing research. Dr. Crouse believes that some participants in the negotiation, particularly NMFS and state agencies, realized, through negotiation, that TEDs could be lived with.

The data wars over sea turtle conservation do continue. But the outcomes of the primary battles to date have been in NMFS' and the environmentalists' favor. Perhaps because of these past data successes, NMFS and the environmental community appear to be more willing to listen to some of the trawlers' concerns. For example, because NMFS really had not adequately tested TEDs in inshore waters, TEDs will not be required until the end of 1994 in inshore waters. This extension was given in order to give time for adequate research and to provide for possible revisions in TED designs. In addition, TEDs are being redesigned for the flounder industry.

Despite its rocky course, there were clearly some beneficial outcomes of this effort to negotiate rules governing the use of TEDs. One obvious result was that the final regulations now in place regarding TEDs mirror those that were developed during the negotiations. Other positive outcomes include the increased understanding and appreciation for the plight of the sea turtles that came about because of the educational and research aspects of the process. Another result was that signatories to the negotiated agreement clearly felt bound by it and either advanced it or purposely did not criticize it during the ensuing years of political battles. (This latter outcome can be a two-edged sword, however. While it is true that this "ownership" factor fosters implementation of negotiated agreements, we should nonetheless not lose sight of the repercussions to some individual shrimpers and industry representatives because of their participation in and then agreement with the negotiated rule.)