



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel, GCNW
7600 Sand Point Way N.E.,
Seattle, Washington 98115-6349

October 31, 2008

Donald K. Hansen
Chairman
Pacific Fishery Management Council
7700 NE. Ambassador Place, Suite 200
Portland, Oregon 97220-1384

Dear Mr. Hansen:

This letter is based on relevant facts, applicable legal rules and informal consultations with the Antitrust Division of the Department of Justice (DOJ) about antitrust issues related to the Trawl Individual Quota program under development by the Council. This letter provides the conclusions of NOAA General Counsel, Northwest Region (GCNW), and does not reflect the official position of DOJ.

The first issue is whether the Magnuson-Stevens Fishery Conservation and Management Act¹ (MSA) provides either express or implied immunity from federal antitrust laws.² The recent amendments to the MSA added an "antitrust savings clause" that states:

Nothing in this Act shall be construed to modify, impair, or supersede the operation of the antitrust laws. For purposes of the preceding sentence, the term 'antitrust laws' has the meaning given such term in subsection (a) of the first section of the Clayton Act, except that such term includes section 5 of the Federal Trade Commission Act to the extent that such section 5 applies to unfair methods of competition.³

¹16 U.S.C. §§ 1801 et seq.

²For example, the Fishermen's Collective Marketing Act, 15 U.S.C. §§ 521-522, expressly provides immunity when participants in the fishing industry engage in certain specified activities. In general, "implied antitrust immunity is not favored and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory scheme." National Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City, 452 U.S. 378, 388 (1981)(citations omitted).

³16 U.S.C. § 1853a(c)(9)

The validity and application of a nearly identical statutory savings clause in the Telecommunications Act of 1996 was examined by the Supreme Court in Verizon Communications Inc. v. Trinko.⁴

The Court found, among other issues, that the statute's savings clause⁵ barred a finding of implied immunity, and that while the "1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards."⁶

It is not possible to predict with certainty the outcome of litigation about whether the MSA savings clause also bars the application of the doctrine of implied immunity; however, given the similarity of the MSA savings clause with the savings clause at issue in Trinko, it is likely that a court would reach the same conclusion. Thus, it is important that all fishery participants remain aware of their obligations under the antitrust laws.

We advise that fishery participants should consult three documents published by DOJ and the Federal Trade Commission (FTC). The Horizontal Merger Guidelines⁷ and the Commentary on the Horizontal Merger Guidelines⁸ provide detailed guidance on the current enforcement policy of DOJ and the FTC concerning horizontal acquisitions and mergers subject to section 7 of the Clayton Act,⁹ to section 1 of the Sherman Act,¹⁰ or to section 5 of the FTC Act.¹¹ The Antitrust

⁴540 U.S. 398 (2004).

⁵The savings clause in the 1996 Act stated that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. § 152, note.

⁶Trinko, 540 U.S. at 407.

⁷Horizontal Merger Guidelines, issued April 2, 1992; revised April 8, 1997; available at <http://www.ftc.gov/bc/docs/horizmer.shtm>.

⁸Commentary on the Horizontal Merger Guidelines, issued March 2006, available at <http://www.ftc.gov/bc/guidance.shtm>.

⁹15 U.S.C. § 18 (1988). As stated in the Guidelines, "mergers subject to section 7 are prohibited if their effect 'may be substantially to lessen competition, or tend to create a monopoly.'"

¹⁰15 U.S.C. § 1 (1988). As stated in the Guidelines, "mergers subject to section 1 are prohibited if they constitute a 'contract, combination..., or conspiracy in restraint of trade.'"

¹¹15 U.S.C. § 45 (1988). As stated in the Guidelines, "mergers subject to section 5 are prohibited if they constitute an 'unfair method of competition.'"

Guidelines for Collaborations Among Competitors¹² explain how DOJ and the FTC analyze antitrust issues raised by collaborations among competitors. In addition, we advise that any fishery participants that are uncertain about the legality under the antitrust laws of the United States of any of their anticipated activities should consult legal counsel prior to commencing those activities.

The Council asked specifically about the antitrust implications of the accumulation limits under consideration. Section 303A of the MSA requires that the Council, in order to prevent limited access privilege holders from acquiring an excessive share of the total limited access privileges in the program, specify maximum allowable shares and establish any other measures necessary to prevent an inequitable concentration of limited access privileges.¹³ This raises two separate but related questions. First, could the approval and implementation of specific limits be a per se violation of antitrust law by NOAA? Second, does the establishment of a limit mean that an entity that is in compliance with limits would also be in compliance with antitrust law?

In answer to the first question, establishment of a limit by NOAA would not in itself establish a violation of antitrust law, nor would it require any participant to violate antitrust law. In response to the second question, merely staying within the limits would not guarantee against violation of antitrust laws, as violations could arise from a number of factors in addition to the number of shares held by an individual or entity. Some of the factors that could be relevant include agreements between parties, the geographic market of the product, market substitution, product differentiation, concentration, effects of past actions, and likely future effects of current actions. The Guidelines and Commentary referred to above provide detail on these factors. These are the issues that DOJ would examine if it became aware of evidence of an antitrust violation.¹⁴ DOJ obtains information in various ways, such as complaints from members of the public or information contained in general or trade press. It is the responsibility of each fishery participant, therefore, present and future, to ensure that his or her activities are consistent with the antitrust laws. Participants should also be aware that the MSA requires that any limited

¹²Antitrust Guidelines for Collaborations Among Competitors, issued April 2000. Available at <http://www.ftc.gov/opa/2000/04/collguidelines.shtm>.

¹³16 U.S.C. § 1853a(c)(5)(D).

¹⁴ DOJ initiates a preliminary investigation if “(a) there are sufficient indications of evidence of an antitrust violation; (b) the amount of commerce affected is substantial; (c) the investigation will not needlessly duplicate or interfere with other efforts of the [Antitrust] Division, the FTC, a United States Attorney, or a state attorney general; and (d) resources are available to devote to the investigation.” Antitrust Division Manual, Antitrust Division, U.S. Department of Justice, updated September 2008; available at http://www.usdoj.gov/atr/public/divisionmanual/chapter3.htm#_1_3. In the event that the future activity involves proposed mergers, DOJ would evaluate proposed mergers under the statutory requirements of the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, the Clayton Act, 15 U.S.C. § 18, and the Sherman Act, 15 U.S.C. § 1.

access privilege program “provide for the revocation . . . of limited access privileges held by any person found to have violated the antitrust laws of the United States.”¹⁵

In summary, the Council’s adoption and NOAA’s approval of any specific limit would not establish a per se violation of antitrust laws. In addition, as the above discussion makes clear, it is not possible for the Council to select accumulation limits that, if complied with, would avoid the possibility that participants might be in violation of antitrust law. The Council’s consideration of the accumulation limits must be based on the record and must comply with the requirements of the MSA, specifically determining why certain limits would be excessive and what is necessary to prevent inequitable concentration of limited access privileges.¹⁶

The Council also asked specifically about the “linkage” requirement in the whiting mothership sector cooperative alternative.¹⁷ The alternative requires that each permit holder that chooses to participate in the cooperative must deliver a specified amount to a specific licensed mothership -- in the first year of the program, to the mothership to which the permit holder delivered the majority of whiting catch in certain previous years, and in subsequent years, to the mothership to which the permit holder was obligated the previous year. Based on our review, this linkage requirement appears to raise significant and complex legal issues that call into question whether it complies with antitrust laws and, therefore, whether it could be approved by the agency.

As we have stated previously, under the MSA a proper written record, including a detailed explanation and justification for the alternative, is required for agency decision making. Consideration of the antitrust issues would, of course, be informed by this detailed record containing the rationale for and the details of the linkage provision. Should the Council decide to adopt this provision, we advise, for both MSA and antitrust purposes, that the Council should ensure that the record addresses the rationale, especially why the linkage is necessary for the conservation and management of groundfish. Due to the complexity of the issues, it has not been possible to date to obtain definitive legal advice from DOJ to resolve this particular issue. As you are aware, NOAA can approve an FMP provision only if it is consistent with the MSA and other applicable law, including antitrust law. If the Council elects to forward this alternative to the agency, the agency will have to take into consideration the significant issues raised above in determining approvability of the provision.

¹⁵16 U.S.C. § 1853a(c)(1)(K).

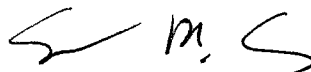
¹⁶ See U.S.C. § 1853a(c)(5)(D).

¹⁷The shoreside cooperative alternative also contains linkage requirements that NOAA GC previously stated are not authorized under the MSA. See Letter to Donald K. Hansen from Eileen M. Cooney, October 30, 2007. Since implementation of that provision would require additional legislative authority, this letter addresses only the linkage requirements in the mothership cooperative alternative.

The final issue is the formation of fishing cooperatives. As discussed above, the Fishermen's Collective Marketing Act¹⁸ (FCMA) provides express immunity from the antitrust laws. One issue that is not clearly settled under case law is whether certain types of processing entities or integrated entities with both fishing and processing abilities can form cooperatives and maintain the FCMA immunity from antitrust laws.¹⁹ As mentioned above, we advise that any fishery participants that are uncertain about the legality under the antitrust laws of the United States of their anticipated activities in forming cooperatives should consult legal counsel prior to commencing those activities.

We look forward to continuing to work with you as you move forward on this important rationalization program.

Sincerely,



Eileen M. Cooney
NW Regional Counsel

¹⁸15 U.S.C. §§ 521-522.

¹⁹See United States v. Hinote, 823 F.Supp. 1350 (S.D. Miss., 1993)(fully integrated catfish processors do not get FCMA immunity, relying on National Broiler Marketing Ass'n v. United States, 436 U.S. 816 (1978), which held not all entities are "farmers" under the Capper-Volstead Act, also known as the Cooperative Marketing Ass'ns Act, 7 U.S.C. § 1, § 291, and thus they do not have immunity from the requirements of § 1 of the Sherman Act).