

F.3.h
Agenda Item F.3.h
Supplemental Public Comment 9

MS Ocean Phoenix
MS Excellence
MS Arctic Storm
MS Arctic Fjord

Don Hansen, Chair
Pacific Fishery Management Council
7700 NE Ambassador Pl., Suite 101
Portland, OR 97220-1384
October 30, 2008

RE: Amendment 20. Anti-trust issues.

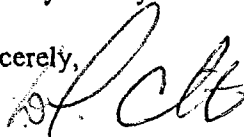
Dear Chairman Hansen,

The Pacific Fishery Management Council is scheduled to take final action on Amendment 20 at its November Council meeting. A last minute concern has been raised about anti-trust issues related to the Mothership Sector Cooperative options. In an effort to appropriately address those issues, our companies have hired a prominent Seattle attorney, with significant experience in anti-trust law. It is his legal opinion (attached) that none of the Mothership sector options, either separately or together, constitutes an anti-trust violation.


The attached legal opinion was drafted at the request of the MS Ocean Phoenix, MS Excellence, MS Arctic Storm and MS Arctic Fjord. All four vessels qualify as motherships under Amendment 20.

Thank you for your detailed attention to our fishery and your efforts to rationalize it.


Sincerely,



Doug Christensen, President Arctic Storm Management Group



Doug Forsyth, President Premier Pacific Seafoods, Inc.



F. Joseph Bersch III, President Supreme Alaska Seafoods, Inc.



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November 4, 2008

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Doug Forsyth
 Phoenix Processor Ltd. Partnership
 111 West Harrison Street
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Re: Pacific Whiting – NOAA General Counsel Comments

Dear Gentlemen:

I have had an opportunity to review the October 31, 2008 letter from NOAA General Counsel with regard to the potential antitrust issues related to Amendment 20.

The issue for the Council's and Secretary's consideration is whether the proposed linkage requirement presents a potential antitrust violation. The secondary question raised by some parties relating to the closure of the mothership class is moot since the Council and Secretary have already approved closure.

The antitrust authorities cited are not in question. As noted in my letter of October 31, 2008, the antitrust savings clause contained in 16 U.S.C. 1853a(c)(9), preserves application of the antitrust laws to the MSA. *Verizon Communications, Inc. v. Trinko*, 540 U.S. 398 (2004), cited by NOAA counsel confirms that principle however the case is otherwise instructive for the situation at hand.

Antitrust analysis must always be attuned to the particular structure and circumstances of the industry, [citations omitted]. "[A]ntitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the industry to which it applies."
 [citation omitted]

One factor of particular importance is the existence of a regulatory scheme designed to deter and remedy

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anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.

540 U.S. 398, 411-412.

This is precisely the industry at hand which is intensely regulated.

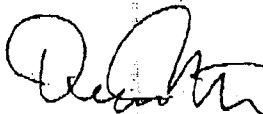
I have yet to see any explanation of why the linkage proposal could possibly be an antitrust issue. To the contrary the existing economic analysis contained within the EIS demonstrates that efficiency and stability of the market are improved by linkage

The letter from NOAA counsel cites *United States v. H/note*, 823 F.Supp. 1350 (S D Miss 1993), for the proposition that fishermen's cooperatives may lose their antitrust immunity in certain circumstances when integrated with processing. That was the precise issue addressed by Joel Klein, Assistant Attorney General in his approval of the Northern Victor Cooperative which contained processor ownership interests. (Ex A to my October 31, 2008 letter). The DOJ approved that coop on grounds of added efficiency.

Here the limited access privilege has Congressional authority for implementation in a fishery which may have over capacity and the program will promote safety, conservation and management and social and economic benefits. The Congressional mandate contained in the MSA requires such a plan to include an allocation of harvesting to fishermen and processors, and an allocation of competition. 109 P.L. 479. Thus there is a clear delegation of the responsibility to the Council and Secretary to remedy anticompetitive harm. Under the decision in *Verizon*, the additional benefit to competition provided by antitrust enforcement will tend to be small and it is less plausible that the antitrust laws even contemplate additional scrutiny.

The probable outcome of the limited access being granted to fishermen and their subsequent formation of a cooperative will create a seller's monopoly. The EIS analysis reasons that the operation of that monopoly will be somewhat tempered and more efficient and stable if the linkage is included as was accomplished under the AFA model. No analysis is presented to the contrary, hence I have concluded that there can be no violation of antitrust law if the linkage provision is included.

Very truly yours,



Douglas M. Fryer

DMF:nds



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October 31, 2008

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Re: The Antitrust Implications of Amendment 20

Gentlemen:

You have requested an opinion on the potential anti-trust implications of proposed agency action to complete rationalization of the Pacific Whiting Fishery under Amendment 20. I am advised that the Pacific Fishery Management Council has identified as its preferred alternative for rationalizing the Mothership Sector a cooperative style fishing effort similar to the one used by the inshore sector of the American Fisheries Act (AFA) Pollock fishery. I am also advised that some vessel owners have questioned whether, as proposed, the closed class and linkage provisions would require either an explicit exemption from Congress or would constitute an antitrust violation.

RELEVANT ANTITRUST LAW

The Sherman Anti-trust Act 15 USC 1-7 is the touchstone for the inquiry. It provides in pertinent part:

Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, is declared to be illegal. Section 1¹

¹ The Magnuson/Stevens Act 16 USC 1853a(c)(9) specifically preserves application of the laws with reference to the Clayton Act 15 USC 12 which in turn refers to the Sherman Act, Section 1.

The definition of a restraint of trade is by judge made law. While Section 1 of the Sherman Act states that every contract in restraint of trade is unlawful, every contract contains the essence of restraint. *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). Thus a host of decisions have shaped a body of law to determine when restraints are unreasonable. There are two complementing categories of anti-trust analysis (1) agreements that are so plainly anticompetitive that no elaborate study is necessary and are illegal per se (e.g. price fixing conspiracies among competitors), and (2) agreements which must be analyzed under the Rule of Reason by examining the facts peculiar to the business. *Id.* It is only after considerable experience with certain business relationships that courts can classify them as per se violations; where the situation is new and *sui generis*, a more careful analysis is required. *Broadcast Music v. Columbia Broadcasting System*, 441 U.S. 1 (1979). The instant situation is unique and thus any analysis of the proposed agency action must be under a Rule of Reason.

The industry at hand is highly regulated; the resource is limited and would be scarce if not so regulated. Regulation by the Secretary is analogous to that of a Public Utility. Antitrust law is framed to guard against monopoly market power which may be achieved by one company or a combination of companies (e.g. conspiracy to fix prices). Where resources are limited, public regulation may substitute for market forces which cannot operate successfully. Thus unlimited competition and the resulting race for fish in the North Pacific and west coast fisheries has led to public allocation to improve efficiency.

The Magnuson/Stevens Act requires that any fishery management plan shall be consistent with the National Standards which require optimum yield, the best scientific information, and efficiency. It also requires that any fishery plan contain what is "necessary and appropriate for the conservation and management of the fishery to prevent overfishing and rebuild overfished stocks, and to protect, restore and promote the long term health and stability of the fishery." (Sec. 303 (a) (1) (A)) 16 USC 1851.

On January 12, 2007, the Reauthorization Act of 2006 provided that the Secretary might approve a limited access program which meets the requirements of 16 USC 1853a. The requirements for such a program include fishing safety, fishery conservation and management 16 USC 1853a(c)(1) C, and the fair and equitable distribution of access privileges in the fishery. 16 USC 1853(6) (F).

In theory any barrier to entry in an industry tends to lessen competition. See DEPT. OF JUSTICE HORIZONTAL MERGER GUIDELINES, ENTRY ANALYSIS (REV APRIL 8, 1997). Thus the limited access to fishermen is a barrier to new entrants which lessens competition by other fishermen. In proposing to segregate the harvested market share to individual vessels, the Council is contemplating that, in ending the race for fish, the impacts of this barrier to competition will be mitigated by the conservation gains to the public resource as well as enhance the economic stability of the fishery. And in proposing to close the class of mothership processors and establish linkages between catcher vessels and processors, the Council is contemplating whether these barriers to entry will be mitigated by increased efficiency, quality, product form, yield and stability of the fishery that will benefit the consumer.

A number of limited access fisheries have been created by the Secretary (e.g. halibut, sablefish and other non-AFA groundfish) with Congressional Approval. (e.g. crab) or by Congress itself (e.g. the AFA Pollock Fishery). Fishermen's cooperatives are not immune from the statutes if they abuse their market power. *Hinton v. Columbia Packers Association*, 131 F2d 88 (9th Cir 1942). The AFA did not provide explicit exemption from antitrust provisions. It did provide tools that allowed the formation of fishery cooperatives as a vehicle to achieve the conservation, safety, and efficiency goals of the action. Following passage of AFA, all nine AFA coops sought and received favorable antitrust business review letters from the Department of Justice. In all cases the DOJ determined that fishery cooperatives, insofar as cooperatives ended the race for fish and allowed increased processing efficiency and reduced bycatch, could have procompetitive effects. "To the extent that the proposed agreement allows for more efficient processing that increases the usable yield (output) of the processed Alaskan Pollock and/or reduces the inadvertent catching of other fish species whose preservation is also a matter of regulatory concern, it could have procompetitive effects." DOJ letter to Northern Victor Cooperative, a shoreside cooperative. June 21, 2000. (See Attachment A).

The principles adopted by Congress and the North Pacific Council to close the class of catcher vessels, motherships and shoreside processors and to establish a linkage between catcher vessels and processors to facilitate efficiency in the fishery are equally applicable to consideration by the Pacific Council of Amendment 20.

With respect to the ability of the Pacific Council to close the class of Motherships, the Council recommended and the Secretary approved Amendment 15 which sought to limit entry of vessels into the whiting fishery, including new entry by motherships without sector specific historical participation. The goal of Amendment 15 was to provide a "bridge" to Amendment 20 when rationalization of all trawl-caught groundfish could be completed. Motherships are vessels engaged in the operation of fishing and so are within the jurisdiction of the MSA and regulated by the Secretary. Motherships are specifically defined under 50 C.F.R. 660.373(a) as "vessels that process, but do not harvest, Whiting during a calendar year." Such vessels are required to be documented with a fishery endorsement. 46 USC 12101, 12108; and are within the definition of fishing vessels under the MSA. 16 U.S.C. 1802(18)(B)

The Pacific Fishery Management Council has taken several important actions seeking to limit or segregate market share beginning in 1991 with approval of Amendment 6 which created the license limitation program, Amendment 9 which created additional limited entry endorsements in the fixed-gear sablefish fishery, Amendment 14 which further rationalized the sablefish fishery by allowing "stacking" of endorsements, the Trawl Buyback Program that allowed purchase of excess permits, the segregation of the whiting fishery into three sectors in 1997, and Amendment 15 that sought to reduce bycatch and stabilize the fishery by prohibiting new sector-specific entry into the three whiting sectors. In segregating entry into the groundfish fisheries over time, the Council has established a long and consistent track record that utilizes limits to competition as a vehicle to best manage the fisheries under its jurisdiction. Having already segregated entry into the fisheries, then the sectors, the Council will take its final step to rationalize the groundfish trawl fisheries, as directed by Congress, by segregating the allocation at the vessel level in Amendment 20.

In the Reauthorization Act, Congress directed the Council to develop a rationalization program and mandated as follows to specifically address concerns of market power and competition:

In developing the proposal to rationalize the fishery, the Pacific Council shall fully analyze alternative program designs, including the allocation of limited access privileges to harvest fish to fishermen and processors working together in regional fishery associations or some other cooperative manner to harvest and process the fish, as well as the effects of these program designs and allocations on competition and conservation. (Emphasis Supplied).

109 P.L. 479, Title III, 302.

The Environmental Impact Statement (EIS) prepared by the Council to meet this congressional mandate and assess the market power and competition issues includes an analysis by NOAA economist Merrick Burden.² That analysis demonstrates that a linkage between processor and harvester provides a processor more certainty over delivery volumes even though that linkage may be broken by the catcher vessel and that it adds stability and more rational fishing practices. The report concludes that the proposed linkage will result in more cost efficiencies and more balanced business planning.

In fact, the model proposed is based on the AFA shoreside delivery program which is discussed above and which has operated successfully since 2000. A goal of the AFA was to benefit both harvesters and processors and give them some share in profits. The AFA model has had review and approval by the Department of Justice.

The stated goal of Amendment 20 is to "Create and implement a capacity rationalization plan that increases net economic benefits, creates economic stability, provides for full utilization of the trawl sector allocation, considers environmental impacts and achieves individual accountability of catch and bycatch". Among the specific congressional objectives to support this goal is to "provide for a viable, profitable, and efficient groundfish fishery" and to "avoid any provisions were the intent is to change the marketing power balance between harvesters and processors."


Application of the Rule of Reason to the closing of the class to harvesters and mothership processors results in a clear conclusion that the restraint on competition is reasonable in view of the limited resource and statutory guidelines. Similarly the proposed processor linkage in Amendment 20 based upon the AFA model appears clearly sustainable given the Congressional mandate to balance marketing power and the historical success of the model itself. An express Congressional exemption is not required because there is no violation of law. To the contrary, adoption of a Management Plan without including the modest linkage proposed would leave the balance of market

² EIS Appendix B.

Implications of Amendment 20
October 31, 2008
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power more overtly with fishermen and hence more problematical from an antitrust standpoint.

Very truly yours,

A handwritten signature in black ink, appearing to read "Douglas M. Fryer". The signature is written in a cursive style with a large initial "D" and "F".

Douglas M. Fryer

DMF:nds
Enclosures



DEPARTMENT OF JUSTICE
Antitrust Division

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June 21, 2000

Joseph M. Sullivan, Esq.
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Dear Mr. Sullivan:

This is in response to your request on behalf of the Northern Victor Cooperative ("the Cooperative") and its members for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6. You have requested a statement of the Department of Justice's antitrust enforcement intentions with respect to a proposed joint harvesting agreement in which the Cooperative's members would allocate amongst themselves the fixed quota of Bearing Sea/Aleutian Island ("BS/AI") Alaskan Pollock allotted to the members as a group by the United States Government under the American Fisheries Act ("AFA") and regulations thereunder.

The United States Government, for environmental and economic reasons, has determined to limit the amount of certain species of fish that may be harvested from United States waters in a given year. This conservation policy is administered by the Department of Commerce in a program that has substantial private industry participation. An annual harvest quota has been established for Alaskan Pollock caught in the "BS/AI" waters. In addition to determining the maximum amount of BS/AI Alaskan Pollock that may be harvested, the regulatory program divides the total quota between three groups. Effective January 1, 1999, the American Fisheries Act allocates 10% of the total quota to Community Development Quota Groups.¹ The remaining ninety percent is divided between "Mothership" processors (ships that have on-board processing capabilities but do not catch the fish) (ten percent), vessels that catch and process their own fish on-board ("catcher/processors" or "C/Ps"), (forty percent), and on-shore processing plants (fifty

¹ The "CDQ" Groups are Western Alaskan Native villages that receive an allocation as part of an economic development program.

percent). The Cooperative's initial members will be twelve catcher vessels that supply the processing vessel the Northern Victor, which is considered to be an onshore processor under the AFA. There are degrees of cross ownership between some of the member catcher vessels and the Northern Victor, as well as between some of the member vessels and other processors, and between members and catcher vessels that supply Alaskan Pollock to processors other than the Northern Victor.²

Under the regulatory plan, the entire sub-allocation of each group of processors may be harvested by each licensed participant. This is referred to as an "olympic" system because it provides each individual processor with the incentive to harvest as much as possible of its sector's total allotment as fast as it can (any amount not harvested by one member of the group will be lost to other members of the group).

The Cooperative and its members assert that their proposal to sub-allocate their collective quota amongst the members will allow them to avoid the inefficiencies encouraged by the "olympic" system. By removing the urgency from their harvesting, they claim that they will be able to "maximize the value of product obtained from the fish", and reduce the amount of incidental by-catch of other fish species that the Government seeks to protect. The proposed activities will be limited to the above-described harvesting allocation. There will be no joint marketing by the Cooperative. Nor will any competitively-sensitive information be exchanged between different processors.

On the basis of the information and assurances that you have provided to us, it does not appear that the proposed elimination of the olympic system race to gather the governmentally-fixed quota of Alaskan Pollock for the catcher vessels that supply the Northern Victor would have any incremental anticompetitive effect in the regulated output setting in which the harvesting agreement would take place. The Department of Justice has previously concluded that reliance on an olympic race system to gather a fixed quota of fish "is both inefficient and wasteful" because it is likely to generate "inefficient overinvestment in fishing and processing

² In response to a request from the Department of Commerce, the Department of Justice's Office of Legal Counsel interpreted Section 210(b) of the AFA to allow processor-owned catcher vessels to join joint harvesting cooperatives under the AFA. As a consequence, the partial vertical integration that exists here does not disqualify the Cooperative and its members from the antitrust exemption afforded by the AFA.

capacity.”³ From a consumer perspective, the harvesting agreement does not reduce the output of processed Alaskan Pollock or the end products into which it is incorporated. On the contrary, if the Applicant’s assertion that “haste makes waste” is true, then eliminating the race will increase processing efficiency and concomitantly the output of Alaskan Pollock products. Since the prices paid for Alaskan Pollock products by consumers will be determined by the intersection of supply and demand for those products, elimination of the race to gather an input whose output is fixed by regulation seems unlikely to reduce output or increase price under any likely scenario.

To the extent that the proposed agreement allows for more efficient processing that increases the usable yield (output) of the processed Alaskan Pollock and/or reduces the inadvertent catching of other fish species whose preservation is also a matter of regulatory concern, it could have procompetitive effects.

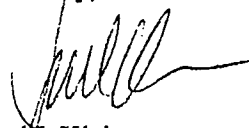
For these reasons, the Department is not presently inclined to initiate antitrust enforcement action against the proposed harvesting agreement. This letter, however, only applies to the allocation among the members of the quota that they would be entitled to collectively under the AFA. It does not apply to any joint marketing by the members, or information exchanges or agreements between or amongst processors. Moreover, this letter expresses the Department’s current enforcement intention. In accordance with our normal practices, the Department reserves the right, in appropriate circumstances, to bring any enforcement action in the future if the actual operation of the proposed agreement proves to be anticompetitive in any purpose or effect.

³ Comments of the Department of Justice filed in Department of Commerce Docket No. 911215-1315, January 30, 1992 (involving Alaskan Pollock). On May 20, 1997 the Department of Justice issued an affirmative Business Review Letter to counsel for the Whiting Conservation Cooperative with respect to its proposal to allocate amongst its members the total quota of Pacific Whiting allocated to the group by the United States Government.

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This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

A handwritten signature in cursive script, appearing to read "Joel I. Klein", with a long horizontal flourish extending to the right.

Joel I. Klein
Assistant Attorney General