



DEPARTMENT OF JUSTICE

Antitrust Division

JOEL I. KLEIN

Acting Assistant Attorney General

Main Justice Building

950 Pennsylvania Avenue, N.W.

Washington, D.C. 20530-0001

(202) 514-2401 / (202) 616-2645 (f)

antitrust@justice.usdoj.gov (internet)

http://www.usdoj.gov (World Wide Web)

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Joseph M. Sullivan, Esq.
Mundt, MacGregor, Happel,
Falconer, Zulauf & Hall
4200 First Interstate Center
Seattle, Washington 98104-4082

Dear Mr. Sullivan:

This is in response to your request on behalf of the Whiting Conservation Cooperative ("WCC") 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 the proposal of WCC and its members to allocate amongst themselves the fixed quota of Pacific Whiting that Department of Commerce regulations allow to be taken from U.S. Pacific waters by the group of processors to which the members belong.

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 U.S. waters in a given year. This conservation policy is administered by the Department of Commerce ("DOC"). An annual harvest quota has been established for the species that is the subject of this business review request -- Pacific Whiting (also referred to as "hake"). In addition to determining the maximum amount of Pacific Whiting that may be harvested from U.S. waters, DOC's regulatory program divides the total quota between three groups of processors. For the years 1997-2001, the Pacific Whiting Fishery Plan allocates 42% of the total quota to on-shore processing plants, 24% to "Mothership" processors, ships that have on-board processing capabilities but do not catch the fish, and 34% to vessels that catch and process their own fish on-board ("catcher/processors" or "C/Ps"). Entry into the

Whiting fishery is limited. Licenses were issued to qualifying vessels at a prior qualifying date and are transferable.

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 Whiting Conservation Cooperative will be created by the four members of the proposed harvesting agreement -- Alaska Ocean Seafood (one C/P ship), American Seafoods (five C/P vessels), Glacier Fish Co. (one C/P ship), and Tyson Seafood Group (three C/P ships). They hold all of the licenses issued for the catcher/processor segment of the industry. Alaska Ocean, American and Glacier are also members of an export trading company licensed by DOC to agree on prices and output for surimi in certain export markets. Tyson is not a member of that export trading co.

Under the harvesting agreement, the total C/P allotment provided for in the regulatory plan would be divided among the four members in specified proportions. The agreement limits only the harvesting activities of its members. It disclaims any intent to constrain the production or marketing practices of the member companies. No joint discussions of purchasing, processing, marketing or sales will be engaged in other than as appropriate as part of the DOC regulatory process or as permitted by the DOC-certified export committee to which three of the members belong. Each member agrees to carry DOC-certified observers on each of its vessels so that compliance with the agreement can be monitored. Financial penalties are provided for noncompliance. The members agree to contribute money for research and publication designed to increase the yield of processing and reduce incidental by-catch of non-target species.

Pacific Whiting generally is not sold as an end product directly to consumers. Rather, it is primarily used to produce "surimi", a protein paste made by repeatedly macerating and washing the flesh of the fish to remove all water soluble fats and other impurities and blending it with certain compounds. Surimi is used as a component in various consumer products in Japan and artificial crab meat in the U.S. U.S. Pacific Whiting surimi production constitutes approximately 4% of worldwide surimi production and approximately 6% of Pacific Coast/North Pacific

production. By contrast, Alaskan Pollock (from U.S., Russian and Japanese North Pacific fisheries) account for 60% of worldwide surimi production. U.S. produced surimi is primarily shipped abroad. In 1995, approximately 87% was exported to Asia.

You have asserted that the proposed sub-allocation of the quota for catcher/processors amongst all the licensed C/Ps will allow them to avoid the inefficiencies encouraged by the "olympic" system. By removing the artificial urgency from their harvesting, you claim that WCC's members will be able to increase the efficiency of their on-vessel processing (you predict an 18-24% productivity increase from reduced costs and increased yield of finished product from the fish caught), and reduce the amount of incidental by-catch of other fish species that the Government seeks to protect.

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 Pacific Whiting 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 stated 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 over-investment in fishing and processing capacity."¹ From a consumer perspective, the harvesting agreement does not reduce the output of processed Pacific Whiting or the end product into which it is incorporated -- surimi. 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 Pacific Whiting. Since the prices paid for surimi by consumers, and the prices paid for Pacific Whiting by surimi sellers will be determined by the intersection of supply and demand for surimi, 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 Pacific Whiting

¹ Comments of the Department of Justice filed in Department of Commerce Docket No. 911215-1315, January 30, 1992 (involving 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, expresses the Department's current enforcement intention. In accordance with our normal practices, the Department reserves the right 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.

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,

Joel I. Klein
Acting Assistant Attorney General