UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 21109
Juneau, Alaska 99802-1109

AGENDA C-1
Supplemental
DECEMBER 2004

December 3, 2004

MEMORANDUM FOR: James W. Balsiger
Administrator, Alaska Region

FROM: Lisa L. Lindeman
Alaska Regional Counsel

SUBJECT: Harvesting Cooperatives under the Crab Rationalization Program

This memorandum responds to your request for advice regarding whether there is any legal reason why NOAA Fisheries could not change the proposed rule to implement the crab rationalization program to allow groups of crab quota share (QS) holders that include harvesters affiliated with processors to pool their crab QS and use it on one vessel without forming a cooperative under the Fishermen's Collective Marketing Act (FCMA).[1] This would allow affiliated harvesters to participate as members of a crab cooperative and avoid the vessel use caps. We also address whether such a change could occur between the proposed and final rules without violating the Administrative Procedure Act (APA).

Section 313(j)(6) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) states that "[n]othing in the [MSA] shall constitute a waiver, either express or implied, of the antitrust laws of the United States." Given this provision and the inherent antitrust concerns raised particularly by the price arbitration provisions, NOAA-GC understood its mandate to be to advise NOAA Fisheries, in developing the regulations to implement the cooperative structure, on how best to protect prospective participants in the fishery from potential antitrust liability. The Council's motion consistently used the term "cooperative," and did not distinguish among types of cooperatives based upon their functions. It did not define separately or otherwise indicate that it contemplated formation of separate cooperatives to conduct harvesting activities and non-harvesting activities, such as price arbitration. Therefore, after consulting informally with the U.S. Department of Justice (DOJ), we advised NOAA Fisheries that all crab cooperatives should be formed under the FCMA because they could then benefit from the antitrust exemption provided for fishermen under the FCMA.[2]

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[1]15 U.S.C. 521.

[2]The FCMA provides:

> Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and

The FCMA provides limited protection from the antitrust laws for cooperatives formed by qualifying fishermen. According to the case law[3] developed under the Capper-Volstead Act[4] and the FCMA,[5] all members of an FCMA cooperative must be "producers." If all its members properly qualify as producers, an FCMA cooperative has antitrust immunity, but if improperly constituted, all members lose their immunity. However, under the case law, the degree to which affiliated harvesters and processors may join FCMA cooperatives is unclear.

Because the case law is unclear on the permissible degree of integration, the regulations would create a significant risk that a cooperative could lose its antitrust immunity if they allowed harvesters affiliated with processors to join an FCMA cooperative. In order to ensure compliance with the antitrust laws, provide the greatest assurance that a cooperative would qualify for an antitrust exemption under the FCMA and minimize the risk of antitrust violations of participants in the fishery, NOAA-GC advised NOAA Fisheries to require the formation of all cooperatives under the FCMA and to prohibit affiliated harvesters from joining the FCMA cooperatives.

NOAA Fisheries now asks whether affiliated harvesters could form an association to pool their crab QS and use the QS on one vessel without forming an FCMA cooperative and without violating the antitrust laws. The association would be created for the sole purpose of harvesting the QS and would not engage in joint negotiations or arbitration. The regulations would continue to require an FCMA cooperative for the price arbitration system.

We consulted informally with DOJ about this question. DOJ has advised us, again informally, that the "Antitrust Guidelines for Collaboration Among Competitors," issued by DOJ and the Federal Trade Commission (FTC) in August 2000 (attached), state the antitrust enforcement policy of DOJ and FTC with respect to competitor collaborations such as the harvesting pool concept described above. Pursuant to the Guidelines, DOJ and the FTC will challenge as per se illegal agreements "of a type that always or almost always tends to raise price or to reduce output."[6] DOJ and the FTC will evaluate under a rule of reason agreements among competitors that are not challenged as per se illegal in order to determine their overall competitive effect.

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marketing in interstate and foreign commerce, such products of said persons so engaged. . .

[3]National Broiler Marketing Association v. United States, 436 U.S. 816 (1978); United States v. Hinote, 823 F. Supp 1350 (S.D. Miss. 1993).

[4]7 U.S.C. 291.

[5]The antitrust exemption under the FCMA for fishermen and aquatic products is patterned after the Capper-Volstead Act's antitrust exemption for farmers.

[6]Guidelines at §1.2. Types of agreements that have been held to be per se illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers or territories.

Generally, if the activity does not have an anticompetitive effect and promotes efficiency, it is unlikely DOJ would determine the activity violates the antitrust laws.

DOJ informally advised us that, under the Guidelines, affiliated harvesters could pool their crab QS and harvest it from one vessel with the likelihood that such activity would not be an antitrust violation. However, the entity created by the affiliated harvesters, whether it is termed a "cooperative," "entity," "association" or "pool," would not be an FCMA cooperative, and the entity would not enjoy antitrust immunity. Some activities by members of such entities could, under some circumstances, violate the antitrust laws. Therefore, withdrawing the requirement that all cooperatives must be formed under the FCMA will increase the risk of possible antitrust violations for the participants in the crab rationalization program who are not members of an FCMA cooperative. If NOAA Fisheries decides to withdraw the FCMA requirement, NOAA-GC would recommend that NOAA Fisheries include in the preamble a statement that counsel for non-FCMA pooling ventures should consider seeking a business review letter from DOJ before commencing any activity if they are uncertain about the legality of their clients' proposed conduct.

In our opinion, NOAA Fisheries could change the proposed regulations to allow the formation of harvesting associations that are not FCMA cooperatives without rendering the regulations inconsistent with the antitrust laws. Such a change also would not render the regulations legally insufficient.

We also examined whether the agency could issue a final rule that would not contain the proposed mandatory requirement that crab harvesting associations or pools be FCMA cooperatives without violating the APA. An agency may issue a final rule that is different, even substantially different, from the proposed rule as long as the final rule is a logical outgrowth of the proposed rule. In determining whether a change in a final rule is a logical outgrowth of the proposal, the test is whether the agency's notice fairly apprised interested persons of the subjects and issues of the rulemaking, including in particular the aspect of the rule being changed. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983). The proposed rule clearly identified the terms of the proposed program and described the subjects and issues involved with the proposed formation of crab harvesting cooperatives, including the proposed mandatory requirement that crab harvesting associations or pools be FCMA cooperatives, and provided the affected public with an opportunity to comment on that and other aspects of the rulemaking. Additionally, NOAA Fisheries already has received oral comments from the affected public requesting that the final rule remove the FCMA requirement for harvesting associations or pools, and the agency anticipates receiving written comments also requesting this change. Assuming that the record at the conclusion of the comment period supports removal of the FCMA requirement for crab harvesting associations or pools and NOAA Fisheries determines that the change should be made, the APA would not preclude such a determination.

Attachments

cc: Jane Chalmers
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