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April 22, 1997

Mr. Joel I. Klein
Acting Assistant Attorney General
Antitrust Division
Department of Justice
Tenth and Constitution Avenue, N.W.
Room 3109
Washington, D.C. 20530

Re: Whiting Conservation Cooperative
Request For Business Review Letter

Dear Mr. Klein:

We represent American Seafoods Company, a Washington corporation ("American"). The purpose of this letter is to request that the Department of Justice (the "Department") provide us with a statement of its enforcement intentions with respect to the proposed activity described below, pursuant to 28 C.F.R. § 50.6.

American, Alaska Ocean Seafood, Ltd., a Washington limited partnership ("Alaska Ocean"), Glacier Fish Company, Ltd., a Washington limited partnership ("Glacier") and Tyson Seafood Group, Inc., a Washington corporation ("Tyson")(together, the "Members") propose to form "Whiting Conservation Cooperative" ("Cooperative") as a Washington cooperative corporation. Copies of draft Articles of Incorporation, Bylaws and a draft Membership Agreement of the Cooperative are enclosed for your reference.

As more fully explained below, the Cooperative is intended to function as a harvesting association through which the Members would allocate among themselves certain percentages of the total available catch for the catcher/processor sector of the Pacific coast whiting fishery. The purpose of the proposed mutual harvest allocation agreement is to enable the Members to improve their utilization of Pacific whiting (the "target species" of the fishery) and to reduce their incidental catch (or "bycatch") of important non-target species such as salmon and rockfish.

1. Fishery Management. The Pacific coast whiting (also referred to as "hake") stock straddles the U.S./Canada border off the Pacific coast, and is harvested in both U.S. and Canadian fisheries.

The U.S. Pacific coast whiting fishery (the "Whiting Fishery") is conducted in the 200 mile federal Fishery Conservation Zone ("FCZ") off Washington, Oregon and California. Whiting Fishery management policy is established by the Pacific Fishery Management Council (the "Council"), one of the regional councils constituted under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1801 et. seq.)

The Council sets the annual allocation levels for the resources under its jurisdiction, and sub-allocates harvesting rights to certain of those resources among various fishing gear and processing sectors. Upon adoption by the Council, Pacific coast fishery management policy is implemented through regulations drafted and promulgated by the National Marine Fisheries Service ("NMFS"). The NMFS Northwest Regional Office, located in Seattle, Washington, has management jurisdiction over the Whiting Fishery.

As a general matter, the Whiting Fishery (as one of the "groundfish" fisheries under the Council's jurisdiction) is managed on a quota-driven basis, i.e., the Council and NMFS set an annual harvest guideline ("HG") based on stock estimates and other biological and economic considerations, the fishery is opened on a selected annual opening date (which varies by management district), and each sector of the fishery remains opened to all licensed harvesters until the HG amount for that sector has been harvested.

Certain federal Pacific coast fisheries (including the Whiting Fishery) are subject to a limited entry program. See 50 C.F.R. § 660.332 et. seq. (1996) The program limits participation in the affected fisheries to vessel owners who received a permit through initial allocation, or have acquired a permit or permits from initial allocants. The limited entry program was adopted to address the issue of "increasing amounts of excess and unutilizable [sic] fleet capacity in the Pacific coast groundfish fishery." See "Background", 57 Fed. Reg. 221, 54001, November 16, 1992.

A vessel owner must hold a limited entry permit with endorsements for the vessel's length and gear type to be eligible to participate in an affected fishery. See, 50 C.F.R. § 660.333 (1996). Permits were initially issued to owners of vessels that

made qualifying landings during certain qualifying periods. See, e.g., 50 C.F.R. §§ 663.34 - 663.73 (1992). Permits are transferrable, and may be aggregated to increase their length endorsement. See, 50 C.F.R. § 660.333 (1996).

The Council and NMFS sub-allocate certain percentages of the Whiting Fishery HG to certain harvesting and/or processing sectors from time to time. For the years 1994-1996, the Council reserved 40% of the Whiting Fishery HG for harvest by vessels delivering to on-shore processors (the "Shoreside" sector). Since 1995, the Makah Indian Tribe has received an allocation "off the top" in satisfaction of certain treaty obligations, pursuant to 50 C.F.R. §§ 660.324 and 660.332(e). In October of 1996, the Council adopted the current Whiting Fishery plan (the "Plan"), which is expected to take effect in May of 1997. The Plan is intended to remain in effect indefinitely, but is scheduled for Council review in five years. The NMFS proposed rule concerning the Plan has been published at 62 Fed. Reg. 73, 18572-18576, April 16, 1997.

The Plan sub-allocates 42% of the Whiting Fishery HG to the Shoreside sector, 24% to vessels delivering to at-sea processing ships that do not catch fish themselves (the "Mothership" sector) and 34% to vessels that catch and process their own fish, and which may supplement their catch by purchasing additional fish from other vessels (the "Catcher/Processor" sector).[1] The Catcher/Processor and Mothership allocations are scheduled to open for fishing on May 15th.

2. Fishery Production. In 1995, the total Pacific coast whiting catch was approximately 250,000 metric tons ("mt."), approximately 178,000 mt. of which were harvested in U.S. waters off the coasts of Washington, Oregon and California, and approximately 71,000 mt. of which were harvested in Canadian waters. In 1996, the U.S harvest was approximately 212,000 mt., and Canadian harvest was approximately 91,000 mt. The 1997 U.S. Whiting Fishery HG of 232,000 mt. is projected to be allocated as

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[1] Vessels which have both catching and processing capability may harvest under only one sector allocation per year (i.e., either the Catcher/Processor allocation or the Mothership allocation). Vessels operating as Catcher/Processors may purchase additional whiting catch from other fishing vessels, but if they do so, the catch that they purchase is deducted from the Catcher/Processor allocation rather than the Mothership allocation.

follows: (i) the Makah Tribe - 25,000 mt.; (ii) Shoreside - 86,900 mt.; (iii) Motherships - 49,700 mt.; and (iv) Catcher/Processors - 70,400 mt.

Pacific whiting 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 then blending in certain cryoprotectant compounds such as sorbitol.[2] Small amounts of Pacific whiting are used to produce frozen round (i.e., otherwise unprocessed) product, headed and gutted (or "h&g") product, frozen fillets and blocks, and mince.

The "product recovery rate" (i.e., the amount of finished product that will be derived from the fishery as a percentage of the round weight catch) for the Pacific coast whiting fishery varies from 12% to 20%, depending on the processor's efficiency and the form of product produced.

In 1995, the U.S. catch of approximately 178,000 mt. of Pacific whiting was used to produce approximately 20,000 mt. of surimi. In 1996, roughly 90% of the approximately 212,000 mt. of catch was used to produce approximately 39,000 mt of surimi, and the remainder was used to produce frozen h&g product and fillets.[3]

Worldwide production of surimi in 1995 is estimated to have totaled approximately 536,000 metric tons. Of that amount, approximately 326,000 mt. were produced from Alaska pollock (from the U.S., Russian and Japanese North Pacific fisheries) and approximately 28,600 mt. were produced from Pacific whiting (from the U.S. and Canadian fisheries).[4] As these estimates show,

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[2] Surimi is used as a component to produce consumer products such as "kamaboko", a Japanese product form, and "artificial crab meat" distributed in the U.S. market.

[3] This data is drawn from personal communications with industry sources. Confirmation and/or correction of data concerning U.S. surimi production should be available from Dr. Steve Freese of the Trade and Industry Services Division of the National Marine Fisheries Service. Dr. Freese can be reached at the Division's Seattle office, at (206) 526-6113.

[4] The production data cited is drawn from the report of the proceedings of the Groundfish Forum's October 1996 meeting in London. A description of the Forum and a copy of the referenced

U.S. Pacific whiting surimi production composed approximately 4% of worldwide production of the commodity in 1995, and about 6% of the combined Pacific coast and North pacific surimi production.

3. The Market. Pacific whiting surimi generally sells at a price approximately 70%-90% of the Alaskan pollock surimi price.[5] Pacific whiting produces a lower grade of surimi than Alaskan pollock, because in contains a proteolytic enzyme that causes product degradation during processing. The enzyme can be inhibited by additives, but doing so may darken the surimi, impairing its use in some products. Therefore, as a general matter, Alaskan pollock surimi is a substitute for Pacific whiting surimi in all secondary production, but Pacific whiting surimi is a substitute for only the lower grades of Alaska pollock surimi.[6]

U.S. surimi is primarily an export product. Of the approximately 179,000 mt. of surimi produced from U.S. catch of Alaska pollock in 1995, approximately 125,000 mt. were exported to Asia and approximately 9,000 were exported to Europe. Of the approximately 39,000 mt. of whiting surimi produced in the U.S. during 1995, approximately 34,000 mt. were exported to Asia.[7]

4. The Producers. The Members are all vertically integrated fishing companies that harvest, process and market their fishery products. As noted above, the Whiting Fishery is managed under a limited entry permit system. The Members' vessels listed on Exhibit B to the Membership Agreement are all of the catcher/processors that are licensed to fish in the Whiting Fishery at this time.

Alaska Ocean, American and Glacier are members of the United States Surimi Commission ("USSC"), a Washington nonprofit corporation chartered as an Export Trading Company by the U.S. Department of Commerce. As permitted under the Certificate of Review issued by the Secretary of Commerce, USSC members may agree on the prices at which surimi, pollock roe and whitefish meal will be sold in certain export markets, and may establish the quantities of those products for sale in those markets.

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section of the report are enclosed.

[5] Personal communication from industry sources.

[6] Personal communication from industry sources.

[7] Personal communications from industry sources.

Tyson is not a member of the USSC, and several members of the USSC that participate in the Whiting Fishery are not parties to the harvest arrangement described herein.

a. Alaska Ocean. Alaska Ocean owns and operates a single vessel that participates in the catcher/processor sector of the Whiting Fishery. Alaska Ocean does not purchase Pacific whiting catch from other vessels in connection with its vessel's operations. Alaska Ocean does not produce fish products in final market form, or market its products directly to consumers.

b. American. American charters and operates five vessels that participate in the catcher/processor sector of the Whiting Fishery. American also charters and operates one vessel that operates as a mothership in the Whiting Fishery. American's catcher/processors occasionally purchase Pacific whiting from catcher vessels to augment their production. American's mothership (the OCEAN ROVER) purchases Pacific whiting from catcher vessels, but harvests no Pacific whiting itself. An American affiliate produces and markets seafood products for direct consumption; however, none of its consumer products are made with Pacific whiting.

c. Glacier. Glacier owns and operates one vessel that participates in the catcher/processor sector of the Whiting Fishery. Glacier does not purchase Pacific whiting catch from other vessels in connection with its operations. Glacier does not produce or market Pacific whiting products for direct consumption. Occasionally, Glacier produces a small amount of non-surimi Pacific whiting product for the U.S. market.

d. Tyson. Tyson owns and operates three vessels that participate in the catcher/processor sector of the Whiting Fishery. Tyson also operates a surimi processing facility in Depot Bay, Oregon that processes Pacific coast whiting. Tyson's catcher/processors do not purchase Pacific whiting from other vessels. Tyson's plant in Depot Bay purchases Pacific whiting from catcher vessels under the Shoreside allocation. Tyson produces consumer products for the U.S. market from its Pacific whiting surimi production.

5. The Proposed Collective Harvesting Arrangement. The draft Articles of Incorporation, Bylaws and Membership Agreement of the "Whiting Conservation Cooperative" attached hereto provide a detailed description of the reasons for and nature of the proposed joint harvesting arrangement. The following section summarizes key aspects of the proposed arrangement.

a. The Reasons for the Harvesting Arrangement. Even though the Whiting Fishery resource is to be allocated among the Shoreside, Mothership and Catcher/Processor sectors under the Council's Plan, within each sector the fishery will be prosecuted on an "olympic" basis, under which each sector's sub-allocation will be fully available to all participants. Under this management system, each sector's participants have an incentive to take as much as possible of their sector's allocation as quickly as possible, because the amount each fails to harvest will be harvested by one or more of the others. Fishers maximize catch, even if it reduces their product recovery rates below the optimum achievable level, and employ more harvesting and processing capacity than optimal. Further, fishers have a strong disincentive to take measures to reduce their incidental catch of non-target species, if such measures impair their harvest rates.[8]

As noted above, the Members' vessels represent all catcher/processors licensed to operate in the Whiting Fishery. The purpose of the Cooperative is to permit the Members to allocate among themselves the percentage of the Whiting Fishery Catcher/Processor allocation that each of them will harvest.

Because the Cooperative allocation arrangement would eliminate olympic competition among the Members with respect to the Whiting Fishery, it would enable Members to reduce their costs and increase their product recovery. The cumulative increase in productivity that would result from adopting the arrangement has been estimated to range from 18%-24%.[9] The sources of increased productivity include (i) the ability to better match the harvest rate to the optimal processing rate and (ii) the ability to adopt appropriate processing line modifications. Because all processing, marketing and sales will remain fully competitive, reduced costs coupled with increased

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[8] For academically oriented discussions of the losses associated with "olympic" fishery management, see Hardin, Garret, 1968, The tragedy of the commons, Science, 162: 1243-48. For a more practically oriented discussion of the same topic, see Section 2, "Analysis of Alternatives" in the Final Environmental Impact Statement for the Individual Fishing Quota Management Alternative for the Fixed Gear Sablefish and Halibut Fisheries of the Gulf of Alaska and Bering Sea/Aleutian Islands Areas, September 15, 1992, National Marine Fisheries Service.

[9] Personal communications from industry sources.

production will result in lower consumer prices and better inter-brand competition.

In addition, the collective harvesting arrangement would provide the Members with greater incentives and ability to reduce their incidental catch of non-target species of concern. Species subject to incidental catch in the Whiting Fishery include Yellowtail rockfish and several stocks of Pacific coast salmon. These stocks are considered to be at low to very low levels of abundance relative to those necessary to sustain the species. Incidental catch of both species in the Whiting Fishery can be reduced through careful fishing and avoidance techniques. While the resulting reduction in bycatch has not been estimated, the Members believe it would be substantial. It is important to note that some Pacific coast salmon species have reached such a low level of abundance that every single fish is important, and any bycatch reduction with respect to these stocks would be significant.

The Members are sensitive to the heightened public awareness and concern regarding "waste" and "bycatch" in the nation's fisheries. The Members are aware that Congress has begun to address these issues, and is likely to take further steps to do so in the future. See, e.g., Subsections concerning "Bycatch Reduction", "Bycatch Reduction Incentives" and "Full Retention and Utilization" in Section 313 of the Magnuson-Stevens Conservation Act, as amended October 11, 1996. The Members believe that the small number of licensed participants in the Catcher/Processor sector of the Whiting Fishery presents them with a unique opportunity to address these issues of public and Congressional concern, by eliminating the perverse incentives associated with a "race for the fish".

b. The Nature of the Harvesting Agreement. Again, the nature of the harvesting arrangement is explained in detail in the Cooperative documents. The following section summarizes key points.

The proposed harvest agreement affects only the Catcher/Processor sector of the Pacific whiting fishery; it does not extend to other sectors of the Whiting Fishery, and does not extend to other fisheries in which the Members may participate. Further, the draft Cooperative documents provide that the Members will not increase their participation in the Mothership sector of the Whiting Fishery during the term of the Membership Agreement. See Section 6.a of the Membership Agreement. This provision prevents the Members from using the excess processing capacity they may be able to remove from the Catcher/Processor sector

under the harvest agreement to compete with the existing Mothership fleet.

The proposed agreement affects only harvesting activity; the proposed collective activity does not extend to processing, marketing or sales of any of the Members' production, nor does it extend to their purchases of fish from others. Rather, the corporate documents of the Cooperative specifically prohibit any collective activity (including, but not limited to discussions, actions and exchanges of information, other than as appropriate in connection with the fishery management process, and among USSC members as permitted under the USSC Certificate of Review) with respect to their purchasing, processing, marketing and sales of any fishery products. See Section 6.b. of the Membership Agreement. A violation of this prohibition is grounds for expulsion of the Member or Members involved. Id.; See also Article III, Section 4.3 of the Bylaws.

6. Conclusion. Because the nature and scope of the Cooperative's proposed activities is limited to the joint harvesting arrangement described above, because the harvesting arrangement will result in increased production and lower bycatch, and because the Members' products will continue to be marketed and sold on a fully competitive basis, we hope that the Division will conclude that the advantages stemming from the arrangement will outweigh any potential disadvantages, and the Division will therefore issue a favorable enforcement intention letter in connection with this business review request.

Please feel free to contact me if you have questions or concerns regarding this matter, or need additional information.

Very truly yours,

MUNDT, MacGREGOR, HAPPEL,
FALCONER, ZULAUF & HALL

Joseph M. Sullivan

Enclosure
cc: Mr. Richard Cohen, Antitrust Division,
Department of Justice, San Francisco Office (w/encl.)
Alaska Ocean Seafood, Ltd. (w/encl.)
American Seafoods Company (w/encl.)
Glacier Fish Company (w/encl.)
Tyson Seafoods Group, Inc. (w/encl.)

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