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11 UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,
14 Plaintiff,
15 v.
16 BNS INC.; and
17 GIFFORD-HILL & COMPANY, INC.,
18 Defendants.

Civil No. 88 01452 MRP(B)

COMPETITIVE IMPACT
STATEMENT

Judge Mariana R. Pfaelzer

19 The United States, pursuant to Section 2(b) of the Antitrust
20 Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h),
21 files this Competitive Impact Statement relating to the proposed
22 Final Judgment submitted for entry in this civil antitrust
23 proceeding.

I.

24 NATURE AND PURPOSE OF THE PROCEEDING

25 On March 18, 1988, the United States filed a civil antitrust
26 complaint under Section 15 of the Clayton Act, 15 U.S.C. § 25,
27 alleging that the proposed acquisition of Koppers Company, Inc.

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1 ("Koppers") by BNS Inc. would violate Section 7 of the Clayton
2 Act, 15 U.S.C. § 18. The Complaint names as defendants BNS Inc.
3 and Gifford-Hill & Company, Inc.

4 The Complaint alleges that the effect of the acquisition may
5 be substantially to lessen competition in portions of Los Angeles
6 and Orange Counties in the market for the extraction, processing
7 and sale of aggregate. Both Koppers and affiliates of BNS
8 extract, process and sell aggregate in the relevant area. The
9 Complaint seeks, among other relief, the preservation and
10 divestiture of assets sufficient to prevent the anticompetitive
11 effects of the unlawful acts alleged in the Complaint and to
12 maintain competitive conditions in the relevant market.

13 On March 18, 1988, the United States and defendants filed a
14 stipulation by which they consented to the entry of a proposed
15 Final Judgment designed to eliminate the anticompetitive effects
16 of the acquisition. Under the proposed Final Judgment, as
17 explained more fully below, defendants would be required to sell,
18 by January 1, 1989, the aggregate facility in the relevant area
19 acquired from Koppers. If they do not do so, a trustee appointed
20 by the Court would be empowered to sell this operation. The
21 United States and defendants have stipulated that the proposed
22 Final Judgment may be entered after compliance with the APPA,
23 unless the government withdraws its consent. Entry of the
24 proposed Final Judgment would terminate this action, except that
25 the Court would retain jurisdiction to construe, modify, and
26 enforce the proposed Final Judgment and to punish violations of
27 the Judgment.

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II.

EVENTS GIVING RISE TO THE ALLEGED VIOLATION

On March 3, 1988, BNS announced a cash tender offer for all of the outstanding stock of Koppers. The stated purpose of BNS in commencing the offer was to acquire control of, and the entire equity interest in, Koppers. BNS also announced that it intended, as soon as practicable after consummation of the tender offer, to merge or similarly combine Koppers with BNS or an affiliate. The acquisition would, in effect, give BNS control over Koppers.

BNS is controlled by Bright Aggregates, Inc., which is itself an indirect, wholly-owned subsidiary of Beazer PLC. Beazer currently engages in the extraction, processing and sale of aggregate in Southern California through its indirect, wholly-owned subsidiary Gifford-Hill & Company, Inc., which in turn wholly owns Livingston-Graham, Inc. Livingston-Graham owns and operates an aggregate facility in Irwindale, California. Koppers also currently engages in the extraction, processing and sale of aggregate in Southern California through its wholly-owned subsidiary Blue Diamond Materials, which owns and operates an aggregate facility in Irwindale (hereinafter "Blue Diamond facility") as well as facilities at other locations.

Aggregate is an essential material for building and construction. It is used principally as an ingredient in asphalt concrete and Portland cement concrete, and for road base.

Aggregate is a natural resource often found in stream channel, floodplain, and alluvial fan deposits, such as the San Gabriel River alluvial fan deposit in the Irwindale area. Aggregate is

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1 extracted from the ground and processed, which may include
2 crushing, sizing and washing, prior to sale.

3 The Complaint alleges that the extraction, processing and
4 sale of aggregate is a relevant product market for antitrust
5 purposes. There is no reasonable substitute to which a
6 significant number of customers would turn in response to a small
7 but significant and nontransitory price increase in aggregate.
8 The Complaint also alleges that certain specifically-identified
9 portions of Los Angeles County and Orange County, defined as the
10 Irwindale Aggregate District, constitute a relevant geographic
11 market for antitrust purposes.

12 Entry into the extraction, processing and sale of aggregate
13 in the relevant geographic market is difficult and, under any
14 circumstances, time-consuming. To enter the aggregate market, a
15 firm must, among other things, locate a site with available
16 aggregate deposits, develop the site and an aggregate extraction
17 and processing operation on it, and obtain a variety of state and
18 local regulatory approvals and permits. Currently, however, there
19 are virtually no undeveloped aggregate deposits within the
20 Irwindale Aggregate District that are economically available for
21 aggregate extraction.

22 Gifford-Hill and Koppers are direct competitors in the
23 Irwindale aggregate market and are two of the four largest firms
24 that extract, process and sell aggregate in that market. The
25 Complaint alleges that the market is highly concentrated and would
26 become substantially more concentrated, and that the

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1 Herfindahl-Hirschman Index, 1/ a measure of market concentration,
2 would increase by over 500 to over 3400, as a result of the
3 proposed acquisition of Koppers by BNS.

4 III.

5 EXPLANATION OF THE PROPOSED FINAL JUDGMENT

6 The United States brought this action because the effect of
7 the acquisition may be substantially to lessen competition in the
8 market for the extraction, processing and sale of aggregate in the
9 Irwindale Aggregate District in violation of Section 7 of the
10 Clayton Act. The risk to competition posed by this acquisition
11 substantially would be eliminated by the sale by BNS of the Blue
12 Diamond aggregate facility to a purchaser that would continue to
13 operate the facility as an active and independent competitor in
14 the aggregate business.

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20 1/ The Herfindahl-Hirschman Index ("HHI") is a measure of
21 market concentration calculated by squaring the market share of
22 each firm competing in the market and then summing the
23 resulting numbers. For example, for a market consisting of
24 four firms with shares of 30, 30, 20, and 20 percent, the HHI
25 is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI, which
26 takes into account the relative size and distribution of the
firms in a market, ranges from virtually zero to 10,000. The
index approaches zero when a market is occupied by a large
number of firms of relatively equal size and reaches its
maximum of 10,000 when a market is controlled by a single
firm. The HHI increases both as the number of firms in the
market decreases and as the disparity in size between the
leading firms and the remaining firms increases.

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1 To this end, the proposed Final Judgment requires defendants
2 to divest any and all interest that they own or acquire in the
3 Blue Diamond aggregate facility by January 1, 1989. If defendants
4 cannot accomplish the required divestiture within that period, the
5 proposed Final Judgment provides that, upon application by the
6 plaintiff, the Court shall appoint a trustee to sell the facility.

7 The proposed Final Judgment expressly permits the defendants
8 to enter into supply contracts with the purchaser of the Blue
9 Diamond aggregate facility for the supply of aggregate to
10 defendants' concrete plants or other operations. The Judgment
11 prohibits the negotiation of such contracts by defendants,
12 however, until after the divestiture ordered by the Judgment has
13 been completed, unless the United States otherwise consents. This
14 provision ensures that any such contract will be the result of
15 arms-length bargaining. The Judgment's mandate of separate
16 negotiations returns the purchaser and the defendants to the
17 positions they would have occupied absent the acquisition: an
18 independent customer that retains no control over the aggregate
19 facility from which some of its supply will come who is
20 negotiating with an independent aggregate producer that owns the
21 facility.

22 The Blue Diamond aggregate facility must be divested to a
23 purchaser or purchasers who can and will operate it as a viable,
24 ongoing business that can compete effectively in the relevant
25 market for aggregate. The defendants shall take all reasonable
26 steps necessary to accomplish divestiture quickly and, if a
27 trustee is appointed, shall use their best efforts to assist the
28 trustee.

1 If a trustee is appointed, the proposed Final Judgment
2 provides that the defendants will pay all costs and expenses of
3 the trustee. The trustee's commission will be structured so as to
4 provide an incentive for the trustee based on the price obtained
5 and the speed with which divestiture is accomplished. After its
6 appointment becomes effective, the trustee will file monthly
7 reports with the parties and the Court setting forth the trustee's
8 efforts to accomplish divestiture. Within six (6) months after
9 the trustee's appointment becomes effective, if the trustee has
10 not accomplished the divestiture required by the proposed Final
11 Judgment, the trustee and the parties shall make recommendations
12 to the Court, and the Court shall thereafter enter such orders as
13 it shall deem appropriate in order to carry out the purpose of the
14 trust, including extending the trust or the term of the trustee's
15 appointment.

16 The proposed Final Judgment provides the United States an
17 opportunity to review any proposed divestiture before it occurs.
18 If the United States were to request information from defendants
19 to assess a proposed sale, the sale could not be consummated until
20 at least 15 days after defendants supplied the information. If
21 the United States were to object to a proposed divestiture, the
22 sale could not be completed.

23 Until the required divestiture has been accomplished, the
24 defendants must preserve and maintain as an active and viable
25 competitor the Blue Diamond aggregate facility, including both the
26 physical facilities and all permits and rights to operate. The
27 proposed Final Judgment provides that defendants must hold the
28 Blue Diamond facility separate and apart from their other assets

1 and businesses. Defendants must keep separate bookkeeping records
2 for the facility. Defendants also are required to maintain the
3 Blue Diamond aggregate facility as a saleable and economically
4 viable, ongoing business.

5 The proposed Final Judgment will expire on the second
6 anniversary of the divestiture of the Blue Diamond facility.

7 IV.

8 REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

9 Section 4 of the Clayton Act (15 U.S.C. § 15) provides that
10 any person who has been injured as a result of conduct prohibited
11 by the antitrust laws may bring suit in federal court to recover
12 three times the damages the person has suffered, as well as costs
13 and reasonable attorney fees. Entry of the Final Judgment will
14 neither impair nor assist the bringing of any private antitrust
15 damage actions. Under the provisions of Section 5(a) of the
16 Clayton Act (15 U.S.C. § 16(a)), the Final Judgment has no prima
17 facie effect in any private lawsuit that may be brought against
18 the defendants.

19 V.

20 PROCEDURES AVAILABLE FOR MODIFICATION OF
21 THE PROPOSED FINAL JUDGMENT

22 The United States and the defendants have stipulated that the
23 proposed Final Judgment may be entered by the Court after
24 compliance with the provisions of the Antitrust Procedures and
25 Penalties Act, provided that the United States has not withdrawn
26 its consent. The Act conditions entry upon the Court's
27 determination that the proposed Final Judgment is in the public
28 interest.

The Act provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate the comments, determine whether it should withdraw its consent, and respond to the comments. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to: Gary R. Spratling,
Chief, San Francisco Office, Antitrust Division, U.S. Department
of Justice, 450 Golden Gate Avenue, Box 36046, San Francisco,
California 94102.

The proposed Final Judgment provides that the Court retains jurisdiction over this matter for the purpose of enabling any party to apply to the Court for such further orders or directions as may be necessary or appropriate for the implementation, modification, interpretation, or enforcement of the Judgment, or for the punishment of any violations of the Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered including in the Judgment a provision enjoining defendants from acquiring or merging with any other aggregate producer in the Irwindale Aggregate District for ten (10) years, without the approval of the government or the Court. The United States rejected this alternative because it was satisfied that the reporting requirements of the Hart-Scott-Rodino

1 Antitrust Improvements Act, 15 U.S.C. § 18a, would ensure that the
2 United States would have an opportunity to evaluate carefully any
3 such proposed acquisition or merger before consummation to
4 determine whether it was a violation of Section 7 of the Clayton
5 Act.

6 An alternative to settling this action pursuant to the
7 proposed Final Judgment would be for the United States to seek a
8 preliminary injunction to enjoin the acquisition of Koppers by
9 BNS. The United States rejected this alternative because the sale
10 required under the Final Judgment should establish a viable,
11 independent competitor in the Irwindale Aggregate District market
12 and prevent the acquisition from having a significant
13 anticompetitive effect in that market. The government is
14 satisfied that the proposed Final Judgment provides substantially
15 all the relief it could expect to obtain if it were to litigate
16 the case in a full trial on the merits.

17 Under the circumstances, the government determined that the
18 public interest in preserving competition in the Irwindale
19 Aggregate District market would be served best by obtaining an
20 enforceable consent decree requiring the sale of the Blue Diamond
21 facility and by filing the decree with the Court prior to the
22 consummation of any part of the proposed acquisition. Although
23 the proposed Final Judgment may not be entered until the criteria
24 established by the Antitrust Procedures and Penalties Act (15
25 U.S.C. § 16(b)-(h)) have been satisfied, the public will benefit
26 immediately from the safeguards in the proposed Final Judgment
27 because the defendants have stipulated to comply with the terms of
28 the Judgment pending its entry by the Court.

VII.

DETERMINATIVE MATERIALS AND DOCUMENTS

There are no materials or documents that the United States considered to be determinative in formulating this proposed Final Judgment. Accordingly, none are being filed with this Competitive Impact Statement.

Dated: 3/18/88

Respectfully submitted,

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