

# Harris & Hull

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August 10, 1999

Mr. Joel I. Klein  
Acting Assistant Attorney General  
Antitrust Division  
Department of Justice, Room 3109  
950 Pennsylvania Avenue NW  
Washington, D.C. 20530

**Re: Onshore Catcher Vessel Cooperative  
Request for Business Review Letter**

Dear Mr. Klein:

We represent the proposed Onshore Catcher Vessel Cooperative (the "Cooperative"). 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.

The "Members," set forth in the attached Membership Agreement, owners of the "Vessels" identified therein, propose to form the Cooperative as a Washington cooperative corporation. Copies of the draft Articles of Incorporation, Bylaws and Membership Agreement of the Cooperative are attached hereto for your reference as Exhibits A1, A2 and A3.

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 Inshore Component (defined below) of the Alaskan pollock fishery solely with respect to Trident Seafoods Corporation ("Trident"). The purposes of the proposed mutual harvest allocation agreement are to enable the Members and Trident to improve its and their utilization of Alaskan pollock (the "target species" of the fishery); to reduce its and their incidental catch (or "bycatch") of important non-target species; to reduce discards; and to improve safety to each Member Vessel.

1. Fishery Management. The Alaskan pollock stock straddles the United States and Russia off the Bering Sea and the North Pacific ocean and is harvested in both U.S. and Russian fisheries.

The U.S. Alaskan pollock fishery (the "Pollock Fishery") is conducted in the 200 mile Federal Fishery Conservation Zone off Alaska. Pollock Fishery management policy is

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established by the North Pacific Fishery Management Council (the "Council"), one of the regional councils established 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 suballocates harvesting rights to certain of those resources among various fishing gear and processing sectors. Upon adoption by the Council, North Pacific fishery management policy is implemented through regulations drafted and promulgated by the National Marine Fisheries Service ("NMFS"). The NMFS Alaska Regional Office, located in Juneau, Alaska, has management jurisdiction over the Pollock Fishery.

Historically, the Pollock Fishery was managed on a quota-driven basis (i.e., the Council and NMFS set an annual total allowable catch based on stock assessments and other biological and economic considerations). The Pollock Fishery was opened on selected annual opening dates (which varied by management district), and each sector of the fishery remained open to all licensed harvesters until the total allowable catch for that sector had been harvested.

Today, all federal North Pacific fisheries (including the Pollock Fishery) are subject to a limited entry program. See 50 C.F.R. § 679.1, *et seq.* This program limits participation in the affected fisheries to vessel owners who received a moratorium permit (and, commencing January 1, 2000, a license limitation permit) (collectively, the "Permit"), or have acquired a Permit from initial allocants. The entry limitation regulations were adopted to address the issue of over-capitalization in the Pollock Fishery and other fisheries.

Recently, the American Fisheries Act (Title II of division C of Public Law 105-277) (the "Act") was enacted as a way to better manage and rationalize the Pollock Fishery. Pursuant to § 210 of the Act, cooperatives may be formed in certain sectors of the fishery. The Members desire to form a cooperative pursuant to § 210(b) of the Act with respect to the Inshore Component for qualified catcher vessels delivering to Trident shoreside processing facilities.

The Council, NMFS and the Act suballocate certain percentages of the Pollock Fishery harvest guideline to certain harvesting and processing sectors. For the years 2000 to 2005, § 206(b)(1) of the Act allocates as a directed fishing allowance 50% of the Pollock Fishery total allowable catch for harvest by vessels delivering to onshore processors (the "Inshore Component").

## 2. Fishery Production.

Alaskan pollock is primarily processed in the form of surimi, fillets, frozen blocks, mince and meal. Roe is also recovered during certain times of the year. Surimi is 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.

The "product recovery rate" (i.e., the amount of finished product that will be derived from the Pollock Fishery as a percentage of the round weight catch) varies from 24% to 25% (depending on the processor's efficiency and the form of product produced) for surimi and fillets, and 3% to 3.5% for roe. The product recovery rate for meal is approximately 7% to 8%.<sup>1</sup>

3. The Market.

U.S.-produced surimi and roe are primarily export products. A substantial majority of both are exported to Japan, with a smaller amount exported to Europe.

Other Alaskan pollock products — primarily fillets — are consumed domestically in the United States, or exported to Europe and elsewhere.

4. The Harvesters.

Each Member Vessel is a qualified catcher vessel, as that term is defined under the Act. Each of the Member Vessels is qualified to participate in a catcher vessel cooperative pursuant to § 210(b)(1) of the Act.

5. The Shoreside Processor. Trident qualifies as a shoreside processor, as identified under §§ 205(6)(A) and 208(f) of the Act.

6. The Proposed Collective Harvesting Arrangement. The draft Articles of Incorporation, Bylaws and Membership Agreement of the "Onshore Catcher Vessel Cooperative" enclosed herewith 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 Cooperative Is Specifically Permitted in the Act. Section 210(b) specifically permits qualified catcher vessels to form cooperatives with respect to the Inshore Component for delivery to qualified shoreside processors. The Member Vessels are qualified catcher vessels under the Act, and Trident is a qualified shoreside processor under the Act.

(b) The Reasons for the Harvesting Arrangement. Even though the Alaskan pollock resource is to be allocated among the Inshore Component, catcher/processors and catcher vessels in the offshore component, and motherships in the offshore component under the Act,

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<sup>1</sup> Information gathered from industry sources.

within each component the fishery would be prosecuted on an "olympic" basis, under which each component's sub-allocation will be fully available to all participants. Under this management system, each component's participants have an incentive to take as much as possible of their component's allocation as quickly as possible, because the amount each fails to harvest will be harvested by one or more of the others. Harvesters 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, harvesters have a strong disincentive to take measures to reduce their incidental catch of non-target species, if such measures impair their harvest rates.<sup>2</sup> Finally, harvesters are forced to take safety risks, including harvesting in bad weather, or lose out to vessels that are willing to take these risks.

The Members' Vessels represent at least 80% of the qualified catcher vessels licensed to operate in the Alaskan pollock fishery delivering to Trident pursuant to the Act. The purpose of the Cooperative is to permit the Members to allocate among themselves the percentage of the Trident Inshore Component Pollock Fishery allocation that each of them will harvest.

Because the Cooperative allocation arrangement would eliminate olympic competition among the Members with respect to the Pollock Fishery, it would enable the Members and Trident 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 3% to 4% for surimi and fillets alone.<sup>3</sup> 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 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. Incidental catch of these species in the Pollock Fishery can be reduced through careful fishing and avoidance techniques. While the resulting reduction in bycatch has not been

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<sup>2</sup> 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 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.

<sup>3</sup> Information gathered from industry sources.

estimated, the Members believe it would be substantial. Further, the Members and Trident would be able to reduce discards of substandard Alaska pollock.

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 as evidenced by the enactment of the Act. The Members believe that the collective harvesting arrangement contemplated herein 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."

(c) The Nature of the Harvesting Agreement. 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 qualified catcher vessels delivering to Trident in the Inshore Component of the Pollock Fishery; it does not extend to other fisheries in which the Members may participate, except as permitted by the Act.

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, with respect to their purchasing, processing, marketing and sales of any fishery products). See Paragraph 17(h) of the Membership Agreement. A violation of this prohibition is grounds for financial penalties against the Member or Members involved. Id.; See also Section 10.4 of the Bylaws.

7. Processor-Owned Vessels. Of the Cooperative's vessels, fourteen are owned in whole or in part by Trident and twenty-three are independently owned.<sup>4</sup> While the Act is silent about the participation of processor-owned vessels in the fishery cooperatives, the authors of the Act intended that these vessels could be members of these cooperatives and participate with full voting privileges therein. This is supported by Senators Ted Stevens (R. AK) and Slade Gorton (R. WA), as evidenced by their letter to Janet Reno, Attorney General, United States Department of Justice dated July 21, 1999, a copy of which is attached to this letter as Exhibit B.

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<sup>4</sup> According to industry sources, of the fifty-eight catcher vessels which delivered Bering Sea pollock inshore during the winter of 1999, thirty-six are owned, in whole or in part, by the qualified shoreside processors.

Mr. Joel I. Klein  
August 10, 1999  
Page 6

8. Conclusion. Because (i) it is specifically permitted in the Act, (ii) the nature and scope of the Cooperative's proposed activities is limited to the joint harvesting arrangement described above, (iii) the harvesting arrangement will result in increased production, lower bycatch, lower discards, and greater safety, and (iv) 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 or Gerry Davis of this office if you have questions or concerns regarding this matter, or need any additional information.

Very truly yours,

HARRIS & HULL, pllc

  
Bruce M. Hull

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Enclosures