



DEPARTMENT OF JUSTICE

STATEMENT

OF

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BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

CONCERNING

THE ECONOMIC IMPLICATIONS OF SEAFOOD PROCESSOR QUOTAS

PRESENTED ON

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Mr. Chairman and Members of the Committee, I am pleased to be here on behalf of the Antitrust Division to discuss our comments on the Alaska crab rationalization plan developed by North Pacific Fishery Management Council.

The National Oceanic and Atmospheric Administration (NOAA) asked the Antitrust Division last year to comment on the crab rationalization program that had been proposed by the Council. In particular, NOAA asked us to comment on the likely effects on competition of the rationalization plan and to identify antitrust issues associated with the plan's price arbitration system.

To prepare a response to NOAA, we reviewed the rationalization plan, interviewed industry participants, and examined economic research on rationalization programs. In a letter of August 27, 2003, we discussed the conclusions we were able to draw on the competitive effects of the proposed plan, which I will summarize here.

Individual Fishing Quotas

Annual limits or quotas are an important part of sound fishery management and conservation. Given the need for an annual quota, in our letter we recommended that NOAA support replacing the current fishery-wide quota system, which generates a dangerous and wasteful "race to fish" as soon as the season opens, with Individual Fishing Quotas, or IFQ. IFQ would be more efficient than the current industry-wide quota, and would be an effective way to eliminate the

race to fish.

Under the IFQ system, crab harvesters with IFQ could catch their quota at any time during the legal season, replacing the rush beginning on opening day as each harvester hurries to bring in as many crabs as possible before the window closes, which is the primary problem of the current system. Under the IFQ system, harvesters would not need the excessive investment in equipment, boats, and crew needed in a race to fish; more importantly, IFQ would allow harvesters to proceed without the dangerous rush that today's system encourages.

We stated that while auctioning the initial IFQ might further improve economic efficiency, the Council's proposal to give the IFQ to established harvesters as compensation for overcapacity was also an acceptable approach, as long as the IFQ were easily transferable. We emphasized that making the IFQ easily transferable was important for maximizing healthy competitive incentives for harvesters.

Individual Processor Quotas

We recommended that NOAA oppose the individual processor quotas, or IPQ, element of the Council's proposed program. Processor quotas would impose new regulatory requirements that produce anticompetitive results in the processing market.

Proponents of IPQ expressed two arguments in favor of IPQ. First, they say that processors and harvesters should be treated equally; if the new program is to compensate harvesters for past overcapitalization, it should compensate processors, too. Moreover, they were concerned that processors with excess capacity would, in an attempt to fill that capacity, bid more for crabs; this would shift the historic division of rents toward harvesters to the detriment of processors. Second, they were concerned that without IPQ, processors that are less competitive would fare poorly in the market; this, in turn, could harm local economies that depend on crab processing.

We appreciate the concerns that motivated the Council to propose IPQ. We acknowledged in our letter that eliminating the race to fish should eliminate processors' need for the excess investment in equipment that has been necessary to hurriedly process a crab harvest that harvesters delivered over a very short season. We proposed that, if the Council concluded it was desirable that processors be compensated for their past overinvestment, this could be addressed more directly and efficiently, rather than constructing an artificial marketplace in which competition is inhibited. We predicted that the effect on price that processors were concerned about would be temporary, that once excess capacity was curtailed for both harvesting and processing, prices would move back to more competitive levels.

We explained that IPQ would eliminate beneficial competition between processors and inhibit product innovation and efficient use of resources. If a processor were entitled to a fixed share of the harvest, then the processor would have less incentive to invest in new equipment or otherwise work to cut costs or improve quality, as those efforts would not be rewarded with greater market share. Moreover, we noted, IPQ were not needed to address the overcapitalization and safety concerns that would be addressed by replacing the fishery-wide quota with IFQ. Finally, we were concerned that the Council's plan limited transferability of IPQ out of any community, which would only prolong the inefficiencies resulting from IPQ.

In short, any quota system distorts the operation of a free market. Although a harvest quota of some sort is necessary for stock management, IFQ is better than the current system because it directly improves safety as well as eliminating incentives to overinvest in harvesting and processing capacity. Adding IPQ further distorts the market's operation, and introduces competitive harm, without offering similar kinds of competitive benefits.

Binding Arbitration

The third element of the Council's proposed program, binding arbitration, was evidently designed to prevent a new quota system from shifting the historic

division of rents between harvesters and processors that has developed under the current quota system. The Council proposed a binding arbitration system for harvesters and processors who could not agree on price in independent negotiations. This process would begin before the fishing season with the announcement by a jointly-selected arbitrator of a non-binding benchmark price, based on information provided by all participants to the arbitrator, to be used for guidance in negotiations and later arbitrations. Then, any harvester who has been unable to negotiate a contract with a processor could initiate a binding arbitration with any processor to which the harvester was willing to sell and who had remaining capacity under its quota.

The Antitrust Division recommended that NOAA oppose the arbitration proposal as a poor substitute for competitive pricing. In addition, as NOAA requested, we described the possible antitrust violations that could result – but would not necessarily result – from conduct by arbitration participants and from the information sharing that was contemplated by the arbitration program.

First, we cautioned that any agreement among processors with respect to price could be viewed as a per se violation of section 1 of the Sherman Act. We read the Council's proposal as envisioning that each processor would make its own independent decisions about its use of arbitration: whether to use the benchmark

price as a starting point for negotiations, whether to put harvesters to arbitration before forming a contract. Each binding arbitration would involve only one processor and would determine only that processor's prices. We stated that it would be critical for processors to act independently, and not coordinate with other processors, to avoid potential antitrust liability for collusion.

We noted that because of the Fishermen's Collective Marketing Act, these restrictions would not apply to harvesters as long as they were acting through a cooperative. Harvesters in cooperatives may bargain jointly and may agree on the basis for negotiations without risking antitrust liability. We cautioned, however, that an FCMA cooperative could not act jointly with non-FCMA cooperative harvesters, and that the courts had never addressed whether an integrated harvester/processor could be eligible for FCMA immunity.

Second, we cautioned that sharing information in conjunction with arbitration, including information from other arbitrations, could violate the antitrust laws. An agreement among competitors to share information regarding price and output, even through the conduit of an arbitrator, can have the effect of dampening competition, and if so can be illegal under the Sherman Act even in the absence of a direct agreement on price. Although harvesters participating in an FCMA cooperative could share such information within their cooperative, they too would

risk antitrust liability if they shared such information outside the cooperative.

Other Issues

In our analysis, we did not evaluate factors outside our legal authority and expertise in antitrust and competition policy, such as the goals of protecting jobs in historic fishing villages or balancing the regulatory effects evenly among harvesters and processors. We certainly recognize that these are legitimate issues for policymakers, but they are beyond the purview of the Antitrust Division.

Thank you for the opportunity to testify. I would be happy to answer any questions.