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MEMORANDUM TO: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

FROM: Richard Weible
Office Director
Antidumping and Countervailing Duty Operations, Office 6

SUBJECT: Issues and Decision Memorandum for the Final Results of the
2011 to 2012 Administrative Review of the Antidumping Duty
Order on Purified Carboxymethylcellulose from Finland

I. Summary

We have analyzed the case and rebuttal briefs of interested parties in this administrative review. We recommend you approve the conclusion described in the “Discussion of Issues” section of this memorandum. The issue for which we received comments is discussed below.

II. Background

On August 7, 2013, the Department of Commerce (the Department) published the Preliminary Results of the 2011-2012 administrative review of the antidumping duty order on Purified Carboxymethylcellulose from Finland.¹ This review covers one respondent, CP Kelco Oy and CP Kelco, Inc. (collectively, CP Kelco). The petitioner in this proceeding is the Aqualon Company, a division of Hercules Incorporated (Petitioner). We invited parties to comment on the Preliminary Results. In response, we received a case brief from CP Kelco on September 16, 2013.² Petitioner filed a rebuttal brief on September 20, 2013.³

¹ See Purified Carboxymethylcellulose from Finland: Notice of Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 50028 (August 16, 2013) (Preliminary Results), and the accompanying Decision Memorandum (Preliminary Decision Memorandum).

² See case brief from CP Kelco, “Purified Carboxymethylcellulose from Finland; Case Brief” (September 16, 2013) (CP Kelco’s Case Brief).

³ See rebuttal brief from Petitioner, “Purified Carboxymethylcellulose from Finland; Rebuttal Brief” (September 20, 2013) (Petitioner’s Rebuttal Brief).

III. Scope of the Order

The merchandise covered by this order is all purified carboxymethylcellulose (CMC), sometimes also referred to as purified sodium CMC, polyanionic cellulose, or cellulose gum, which is a white to off-white, non-toxic, odorless, biodegradable powder, comprising sodium CMC that has been refined and purified to a minimum assay of 90 percent. Purified CMC does not include unpurified or crude CMC, CMC Fluidized Polymer Suspensions, and CMC that is cross-linked through heat treatment. Purified CMC is CMC that has undergone one or more purification operations which, at a minimum, reduce the remaining salt and other by product portion of the product to less than ten percent. The merchandise subject to this order is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 3912.31.00. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope of the order is dispositive.

IV. Discussion of Issues

Issue: Authority to Conduct a Differential Pricing Analysis and Apply an Alternative Comparison Methodology

In the Preliminary Results, we applied the differential pricing analysis, and in accordance with the results of that analysis, we decided to use the mixed alternative method in making comparisons of export prices (EPs) or constructed export prices (CEPs) to Normal Values (NVs).⁴

CP Kelco's comments: CP Kelco argues that the Department lacks the statutory authority to conduct a differential pricing analysis in an administrative review. CP Kelco argues that the Department provided no statutory provision that affords it the authority or discretion to conduct such an analysis in an antidumping administrative review. Therefore, CP Kelco argues the Department must drop its differential pricing analysis in these final results and base CP Kelco's antidumping margin on an average-to-average comparison methodology.⁵

CP Kelco argues "a plain reading of the statute shows that Congress included the specific exception that forms the basis of Department's differential pricing analysis for use in investigations, but did not include that exception, or anything similar, in the provision for administrative reviews."⁶ CP Kelco argues that the sections of the Act preceding section 777A(d) indicate that they are applicable to both investigations and administrative reviews.⁷ CP Kelco claims that sections 777A(a), and 777A(c) make explicit they apply to both investigations and administrative reviews, while section 777A(b) deals with selection methods that may be used under section 777A(a), and thus, is also applicable to investigations and reviews.⁸

⁴ See Preliminary Decision Memorandum at 4 to 7.

⁵ See CP Kelco's Case Brief at 2.

⁶ Id. at 3.

⁷ Id. at 4 and Footnote 2.

⁸ Section 772 of the Act deals with the calculation of EPs and CEPs. Section 773 deals with the calculation of NVs. Section 751 deals with administrative reviews. Sections 733(d) and 735(c) and deal with investigations, while section 751(a) deals with administrative reviews.

CP Kelco argues, in contrast, that section 777A(d) is broken into two subparts, section 777A(d)(1) and section 777A(d)(2). CP Kelco insists section 777A(d)(1), which contains the differential pricing provision,⁹ is applicable to investigations only, as evidenced by the preceding heading, “Investigations.” CP Kelco insists that section 777A(d)(2), which is preceded by the heading “Reviews” is applicable to administrative reviews.¹⁰ CP Kelco argues that this level of specificity demonstrates that Congress expressly withheld from the Department the authority to conduct a differential pricing analysis in an administrative review.¹¹

Citing Nken v. Holder, CP Kelco argues that “it is a well-established canon of statutory construction that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”¹² CP Kelco further argues that in Keene v. Unites States, the Court held that “interpreters have a duty to avoid reading phrases into statutes where Congress made a disparate inclusion or exclusion.”¹³ CP Kelco further argues that in Bates v. Unites States, the Court held that “Congress is presumed to act intentionally when including or excluding statutory language.”¹⁴ Citing Lindh v. Murphy, CP Kelco claims that “[t]he presumption is stronger when the provisions were considered by Congress at the same time.”¹⁵ Citing Hamdan v. Rumsfeld, CP Kelco claims “it is a familiar principle of statutory construction that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”¹⁶ Citing Marine Harvest (Chile) S.A. v. United States, CP Kelco insists “[w]hen statutory language contains no ambiguity, the Department cannot create authority that has not been explicitly or implicitly granted.”¹⁷

CP Kelco argues, therefore, that the differential pricing exception in section 777A(d)(1)(B) only applies to investigations, as detailed in Section 777A(d)(1)(A), not to reviews, which are detailed in 777A(d)(2). Accordingly, the Department cannot conduct a differential pricing analysis in these final results.

Petitioner’s rebuttal comments: Citing Certain Steel Nails From China,¹⁸ Ball Bearings From France, Germany, and Italy,¹⁹ Frozen Fish Fillets From Vietnam,²⁰ and Graphite Electrodes

⁹ See Section 777A (d)(1)(B) of the Act.

¹⁰ See CP Kelco’s Case Brief at 4.

¹¹ Id.

¹² See CP Kelco’s Case Brief at 4, citing Nken v. Holder, 556 U.S. 418, 430 (2009) (internal quotations omitted).

¹³ See CP Kelco’s Case Brief at 4, citing Keene v. Unites States, 508 U.S. 200 (1993).

¹⁴ See CP Kelco’s Case Brief at 4, citing Bates v. United States, 522 U.S. 23 (1997).

¹⁵ See CP Kelco’s Case Brief at 4, citing Lindh v. Murphy, 521 U.S. 320 (1997).

¹⁶ See CP Kelco’s Case Brief at 4, citing Hamdan v. Rumsfeld, 548 U.S. 557, 578 (2006) (internal quotations omitted).

¹⁷ See CP Kelco’s Case Brief at 4, citing Marine Harvest (Chile) v. United States, 244 F. Supp. 2d 1364, 1369 (CIT 2002).

¹⁸ See Certain Steel Nails From the People’s Republic of China: Preliminary Results of the Fourth Antidumping Duty Admin. Review, 78 FR 56861 (September 16, 2013) (Certain Steel Nails From China), and accompanying Decision Memorandum at 14.

¹⁹ See Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Admin. Reviews; 2010–2011, 77 FR 73415 (December 10, 2012) (Ball Bearings From France, Germany, and Italy).

²⁰ See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results of the Antidumping

From China,²¹ Petitioners contend the Department has held that it has the authority to conduct a differential pricing analysis, and apply the average-to-transaction methodology, where appropriate, in administrative reviews.²² Petitioners therefore argue that the Department should continue to apply its differential pricing analysis and apply the appropriate alternative methodology in these final results.²³

Department's Position: The Department disagrees with CP Kelco's claim that it does not have the statutory authority to employ an alternative comparison method in administrative reviews. Section 771(35)(A) of Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." The definition of "dumping margin" calls for a comparison of normal value and export price or constructed export price. Before making the comparison called for, it is necessary to determine how to make the comparison.

CP Kelco posits that the Department has no statutory authority to consider the application of an alternative comparison method in administrative reviews. CP Kelco states that Congress made no provision for the Department to apply an alternative comparison method in an administrative review under section 777A(d) of the Act. Indeed, section 777A(d)(1) of the Act applies to "Investigations" and section 777A(d)(2) of the Act applies to "Reviews." Section 777A(d)(1) discusses, for investigations, the standard comparison methods (i.e., the average-to-average or A-to-A method, and the transaction-to-transaction or T-to-T method), and then provides for an alternative comparison method (i.e., the average-to-transaction or A-to-T method) that may be applied as an exception to the standard methods when certain criteria have been met. Section 777A(d)(2) discusses, for administrative reviews, the maximum length of time over which the Department may calculate weighted-average normal values when using the average-to-transaction method. Section 777A(d)(2) has no provision specifying the comparison method to be employed in administrative reviews. To follow CP Kelco's logic would yield an absurd result that we do not believe Congress could have intended, namely, that because the statute makes no provision specifying any comparison method(s) which may be used in administrative reviews, the Department has no means to consider any comparison method under the existing statute.

To fill the gap in the statute (the absence of a specified comparison method for administrative reviews), the Department has promulgated regulations to specify how comparisons between NV and EP or CEP would be made in administrative reviews.²⁴ The Department followed proper rule making procedures, including consultations with the appropriate congressional personnel. The Department's regulations at 19 CFR 351.414(b) describe the methods by which NV may be compared to EP or CEP in antidumping investigations and administrative reviews (i.e., A-to-A,

Duty Admin. Review and New Shipper Review, 78 FR 55676 (September 11, 2013), and accompanying Decision Memorandum at 19.

²¹ See Small Diameter Graphite Electrodes From the People's Republic of China: Final Results of Antidumping Duty Admin. Review; 2011-12, 78 FR 55680 (September 11, 2013) (Graphite Electrodes From China), and accompanying Issues and Decision Memorandum at Comment 4.

²² See Petitioner's Rebuttal Brief at 2.

²³ Id. at 3.

²⁴ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification, 77 FR 8101 (February 14, 2012) ("Final Modification for Reviews").

T-to-T, and A-to-T). These comparison methods are distinct from each other. When using T-to-T or A-to-T comparisons, a comparison is made for each export transaction to the United States. When using A-to-A comparisons a comparison is made for each group of comparable export transactions for which the EPs, or CEPs, have been averaged together (*i.e.*, for an averaging group).²⁵ The Department’s regulation at 19 CFR 351.414(c)(1) fills the gap in the statute concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department has determined that in both antidumping investigations and administrative reviews, the A-to-A method will be used “unless the Secretary determines another method is appropriate in a particular case.”²⁶

The Act, the SAA, and the Department’s regulations do not address the circumstances that could lead the Department to select a particular comparison method in an administrative review. Indeed, whereas the statute addresses this issue specifically in regards to investigations, the statute conspicuously leaves a gap to fill on this same question in regards to administrative reviews.²⁷ In light of the statute’s silence on this issue, the Department indicated that it would use the A-to-A method as the default method in administrative reviews, but would consider whether to use an alternative comparison method on a case-by-case basis.²⁸ At that time, the Department also indicated that it would look to practices employed by the Department in antidumping investigations for guidance on this issue.²⁹

In antidumping investigations, the Department examines whether to use the A-to-T method consistent with section 777A(d)(1)(B) of the Act:

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if:

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).³⁰

Although section 777A(d)(1)(B) of the Act does not govern the Department’s examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in an administrative review to be analogous to the issue in antidumping investigations. Accordingly, the Department finds the analysis that has

²⁵ See 19 CFR 351.414(d)(2).

²⁶ See 19 CFR 351.414(c)(1).

²⁷ See section 777A(d)(1)(B) of the Act; SAA, at 842-43; 19 CFR 351.414.

²⁸ See Final Modification for Reviews, 77 FR at 8107.

²⁹ Id. at 77 FR at 8102.

³⁰ See section 777A(d)(1)(B) of the Act.

been used in antidumping investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review.

The SAA does not demonstrate that the Department may consider the application of an alternative comparison method in investigations only. The SAA does discuss section 777A(d)(1)(A)(i) of the Act, concerning the types of comparison methods that the Department may use in investigations. That provision, however, is silent on the question of choosing a comparison method in administrative reviews. Section 777A(d)(1)(A) does not require or prohibit the Department from adopting a similar or a different framework for choosing a comparison method in administrative reviews as compared to the framework required by the statute in investigations. The SAA states that “section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction comparison methodology cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods.”³¹ Like the statute, the SAA does not limit the Department to undertake such an examination in investigations only.³²

The silence of the statute with regard to application of an alternative comparison method in administrative reviews does not preclude the Department from applying such a practice in this situation. Indeed, the Federal Circuit has stated that the “court must, as we do, defer to Commerce’s reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the agency’s generally conferred authority and other statutory circumstances.”³³ Further, the court has stated that this “silence has been interpreted as ‘an invitation’ for an agency administering unfair trade law to ‘perform its duties in the way it believes most suitable’ and courts will uphold these decisions ‘{s}o long as the {agency}’s analysis does not violate any statute and is not otherwise arbitrary and capricious.”³⁴ Commerce has filled a gap in the statute with a logical, reasonable and deliberative comparison method for administrative reviews.

³¹ See SAA at 843.

³² Id.

³³ See United States Steel Corp. v. United States, 621 F.3d 1351, 1357 (Fed. Cir. 2010).

³⁴ See Mid Continent Nail Corp. v. United States, 712 F. Supp. 2d 1370, 1376-77 (CIT 2010), citing U.S. Steel Group v. United States, 96 F.3d 1352, 1362 (Fed. Cir. 1996).

V. Recommendation

Based on our analysis of the comments received, we recommend adopting the position set forth in the "Department's Position," above. If this recommendation is accepted, we will publish these final results, including the final dumping margins for all companies subject to this review, in the Federal Register.

Agree _____ Disagree _____



Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

1/2/14

Date