

DATE: November 3, 2011

MEMORANDUM TO: Paul Piquado  
Assistant Secretary  
for Import Administration

FROM: Gary Taverman  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of Full  
Third Sunset Review of the Countervailing Duty Order on Fresh  
and Chilled Atlantic Salmon from Norway

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### Summary

On June 28, 2011, the Department of Commerce (the Department) published in the Federal Register the preliminary results of the full third sunset review of the countervailing duty (CVD) order on fresh and chilled Atlantic salmon from Norway. See Fresh and Chilled Atlantic Salmon From Norway: Preliminary Results of Full Third Sunset Review of Countervailing Duty Order, 76 FR 37786 (June 28, 2011) (Salmon Sunset Preliminary), and accompanying Issues and Decision Memorandum (Salmon Sunset Preliminary Memorandum). We preliminarily found that subsidization was likely to continue or recur and the net countervailable subsidy rate of 2.20 percent ad valorem, for all producers/exporters, was likely to prevail.

We invited parties to comment on the Salmon Sunset Preliminary and received a case brief from the Government of Norway (GON) and a rebuttal brief from Phoenix Salmon U.S., Inc. (Phoenix Salmon), the domestic interested party. We have analyzed those comments, which are summarized below. We recommend that you approve the positions, which we have developed in the “Discussion of Issues” section. The issues addressed in the final results are:

1. Likelihood of Continuation or Recurrence of a Countervailable Subsidy
2. Net Countervailable Subsidy Likely to Prevail
3. Nature of the Subsidy

### History of the Order

On February 25, 1991, the Department issued a final affirmative determination in the CVD investigation, covering calendar year 1989. See Final Affirmative Countervailing Duty Determination: Fresh and Chilled Atlantic Salmon From Norway, 56 FR 7678 (February 25,

1991). Due to the large number of producers/exporters of salmon in Norway, we conducted the investigation on an industry-wide basis. We found that the following six programs administered by the GON conferred countervailable subsidies on Norwegian producers/exporters of subject merchandise:

<i>Program</i>	<i>Rate (%)</i>
Regional Development Fund Loans and Grants	1.75
National Fishery Bank of Norway Loans	0.03
Regional Capital Tax Incentive	0.06
Reduced Payroll Taxes	0.42
Advance Depreciation of Business Assets	0.01
Government Bank of Agricultural Grants	<0.01

The Department calculated a total net subsidy rate of 2.27 percent *ad valorem* for all Norwegian producers/exporters of subject merchandise. The Department published the CVD order on April 12, 1991. See Countervailing Duty Order: Fresh and Chilled Atlantic Salmon From Norway, 56 FR 14921 (April 12, 1991).

On March 13, 2000, after the conclusion of the first sunset review (expedited), the Department published a notice of continuation of the CVD order. See Continuation of Antidumping Duty and Countervailing Duty Orders: Fresh and Chilled Atlantic Salmon From Norway, 65 FR 13358 (March 13, 2000). Subsequently, on February 13, 2006, after the conclusion of the second sunset review (expedited), the Department published a notice of continuation of the CVD order. See Continuation of Antidumping and Countervailing Duty Orders: Fresh and Chilled Atlantic Salmon From Norway, 71 FR 7512 (February 13, 2006).

On August 5, 2009, the Department issued a scope ruling determining that whole salmon steaks are within the scope of the CVD order. See Notice of Scope Rulings, 75 FR 14138 (March 24, 2010).

The Department has never received a request to conduct an administrative review of the CVD order. Also, the Department has not issued any changed-circumstances determinations concerning the CVD order.

### Background

On January 3, 2011, the Department initiated the third sunset review of this CVD order for the period 2006 through 2010, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). See Initiation of Five-Year (“Sunset”) Review, 76 FR 89 (January 3, 2011).

On January 13, 2011, the GON, the Norwegian Seafood Federation (NSF), and Aquaculture Division of the Norwegian Seafood Association (ADNSA) (collectively, “the respondents”) submitted their letters of appearance.<sup>1</sup> On January 18, 2011, Phoenix Salmon,<sup>2</sup> a

<sup>1</sup>These public documents and all other public documents and public versions of proprietary documents with regard to this third full sunset review are available on the public record located in the Department’s Central Records Unit at room 7046 of the main Department of Commerce building.

<sup>2</sup>Phoenix Salmon claimed to be the successor to the two domestic producers who participated in the prior sunset review – Atlantic Salmon of Maine and Heritage Salmon Company, Inc.

domestic interested party, filed a notice of intent to participate in the review. On January 21, 2011, the NSF and ADNSA supplemented their letter of appearance by filing a list of their members. On February 2, 2011, Phoenix Salmon submitted a substantive response. The respondents also timely filed a joint substantive response on February 2, 2011. We received rebuttal substantive comments from Phoenix Salmon and the GON on February 14, 2011.<sup>3</sup>

On April 6, 2011, we issued an adequacy determination memorandum, finding that the domestic and respondent parties submitted adequate substantive responses and that NSF and ADNSA have standing as interested parties in this review. We, therefore, determined to conduct a full sunset review of this CVD order. See Memorandum to Gary Taverman, Acting Deputy Assistant Secretary for AD/CVD Operations, from Melissa Skinner, Director, AD/CVD Operations, Office 3, regarding “Adequacy Determination: Third Sunset Reviews of the Antidumping and Countervailing Duty Orders on Fresh and Chilled Atlantic Salmon from Norway,” (April 6, 2011). On April 12, 2011, we extended the deadline for the preliminary and final results of this sunset review. See Fresh and Chilled Atlantic Salmon From Norway: Extension of Time Limits for Preliminary and Final Results of Full Third Antidumping and Countervailing Duty Sunset Reviews, 76 FR 20312 (April 12, 2011). We did not receive comments on the adequacy determination memorandum from any party to this review.

On June 28, 2011, the Department published the preliminary results of this review. See Salmon Sunset Preliminary. We preliminarily found that revocation of the order would likely lead to continuation or recurrence of a countervailable subsidy on the subject merchandise in Norway. We also preliminarily determined that the rate of subsidization likely to prevail if the order was revoked is 2.20 percent ad valorem for all producers/exporters of subject merchandise from Norway.

Interested parties were invited to comment on the Salmon Sunset Preliminary. On July 26, 2011, we extended the deadline for the submission of case briefs. See Memorandum to the File from Kristen Johnson, Trade Analyst, AD/CVD Operations, Office 3, regarding “Revised Deadlines for Briefs,” (July 26, 2011). On September 7, 2011, the GON submitted a case brief and on September 12, 2011, Phoenix Salmon filed a rebuttal brief.

We did not conduct a hearing because a hearing was not requested.

## Discussion of Issues

In accordance with section 751(c)(1) of the Act, the Department is conducting this review to determine whether revocation of the CVD order would likely lead to continuation or recurrence of a countervailable subsidy. Section 752(b) of the Act provides that, in making this determination, the Department shall consider (1) the net countervailable subsidy determined in the investigation and subsequent reviews, and (2) whether any changes in the programs, which gave rise to the net countervailable subsidy, have occurred that are likely to affect that net countervailable subsidy.

Below we address the case and rebuttal brief comments of the interested parties.

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<sup>3</sup> In response to a February 4, 2011, request on behalf of Phoenix Salmon, the Department granted an extension for filing rebuttal comments to no later than February 14, 2011. See Memorandum to the File from Melissa Skinner, Director, AD/CVD Operations, Office 3, regarding “Extension of Deadline for Filing Rebuttal Comments,” (February 7, 2011).

1. Likelihood of Continuation or Recurrence of a Countervailable Subsidy

The GON submits that, contrary to the Department's preliminary results, the evidence on the record compels the conclusion that (i) several of the programs found countervailable in the investigation no longer exist, and (ii) for those programs that do exist in some form, there is no likelihood that countervailable subsidies will continue or recur if the order was revoked. The GON states that the Department correctly concluded, in the preliminary results, that the Regional Capital Tax Incentive and the Advance Depreciation of Business Assets programs were terminated. The GON asserts that the Department however erred when it concluded that the National Fishery Bank (NFB) and Government Bank of Agriculture (GBA) programs were not terminated.<sup>4</sup>

The GON claims that, upon dissolution of the NFB and the GBA, the responsibility for administering any outstanding loans or grants was transferred to Innovation Norway.<sup>5</sup> The GON asserts that there is no evidence that the loan and grant programs which originated with the NFB and GBA continue to confer countervailable benefits on the Norwegian salmon farming industry or would recur if the order was revoked. The GON posits that record evidence shows that (i) the NFB and GBA no longer exist; (ii) the banks have not provided loans to the aquaculture industry for over 10 years; and (iii) given the 10-year average useful life for the fish farming industry, any benefits attributable to assistance the NFB and GBA may have issued have been fully amortized.<sup>6</sup> As such, the GON argues that there is no possibility that the NFB or GBA programs could generate countervailable subsidies and, thus, no likelihood of continuation or recurrence of subsidization under these programs. The GON further argues that just because Innovation Norway assumed any outstanding NFB or GBA loans or grants, does not mean, as the Department preliminarily found, that "countervailable benefits for subsidized loans and grants previously provided by the NFB and GBA have not been eliminated with the dissolution of these particular entities."<sup>7</sup>

The GON adds, with regards to the Regional Development Fund Loans and Grants (RDF), which is now under Innovation Norway, and the Reduced Payroll Taxes program, that the continued existence of a program is not sufficient evidence of the continuation or recurrence of countervailable subsidies, especially when those programs do not confer benefits above de minimis levels. The GON, thus, asserts that, after considering the record evidence, the Department must conclude that there is no likelihood of continuation or recurrence of countervailable subsidies if the order was revoked.

In rebuttal, Phoenix Salmon first discusses that the Department has never conducted an administrative review of this order and, as such, has not had the opportunity to properly examine

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<sup>4</sup> See Salmon Sunset Preliminary Memorandum at 9.

<sup>5</sup> Innovation Norway is an entity that promotes industrial development in Norway. Innovation Norway's funds may be used for various activities such as financing (including grants, loans, guarantee and equity arrangements) and marketing Norwegian industries abroad. See Act of 19 December 2003 (No. 130) submitted at Exhibit 4 of the Respondents' Substantive Response (February 2, 2011).

<sup>6</sup> See Respondents' Substantive Response at 6-7.

<sup>7</sup> See Salmon Sunset Preliminary Memorandum at 9.

the GON's assertions that certain programs were terminated and that the level of subsidization of existing programs has declined to *de minimis* levels. Second, Phoenix Salmon notes that the legal standard in a sunset review establishes that the continuation of a subsidy program is "highly probative" of the likelihood of continuation or recurrence of countervailable subsidies. Further, the company states that while the GON argues that the NFB and GBA may be defunct, record evidence demonstrates that their programs were transferred to Innovation Norway, which continues to provide subsidies to the salmon farming industry. Additionally, Phoenix Salmon discusses that countervailable benefits from the remaining programs, which the GON concedes continue to exist, have not been verified to confer *de minimis* benefits. Thus, Phoenix Salmon asserts that the Department should affirm its preliminary finding that revocation of the order would likely lead to the continuation or recurrence of a countervailable subsidy.

### *Department's Position*

In accordance with section 752(b)(1) of the Act, in determining whether revocation of a CVD order would likely to lead to continuation or recurrence of a countervailable subsidy, the Department will consider the net countervailable subsidy determined in the investigation and subsequent reviews, and whether any changes in the programs, which gave rise to the net countervailable subsidy determined in the investigation and subsequent reviews, have occurred that are likely to affect that net countervailable subsidy. The Sunset Policy Bulletin states that "{c}ontinuation of a program will be highly probative of the likelihood of continuation or recurrence of countervailable subsidies" and makes clear that "as long as a subsidy program continues to exist, the Department should not consider company- or industry-specific renunciations of countervailable subsidies, by themselves, as an indication that continuation or recurrence of countervailable subsidies is unlikely." See Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 FR 18871, 18874 (April 16, 1998) (Sunset Policy Bulletin), citing Statement of Administrative Action, H.R. Doc. No. 103-316, Vol. 1, 103d Cong., 2d Sess. at 890 (1994) (SAA).

Two conditions must be met in order for a subsidy program not to be included in determining the likelihood of continued or recurring subsidization: (1) the program must be terminated, and (2) any benefit stream must be fully allocated. See, e.g., Corrosion-Resistant Carbon Steel Flat Products From France: Final Results of Full Sunset Review, 71 FR 58584 (October 4, 2006), and accompanying Issues and Decision Memorandum at Comment 1.

Based on the record, we find that there is only sufficient evidence to demonstrate that just two of the six programs found countervailable in the investigation were terminated; those programs are the Regional Capital Tax Incentive and the Advance Depreciation of Business Assets. Both of these programs were established through the "Regional Tax Act of 19 June 1969," and both were abolished without continuation on January 1, 1991, through the "Act of 21 December 1990, No. 69 with effect from 1 January 1991, repealing Act of 19 June 1969, No. 72," a copy of which the GON provided to the Department.<sup>8</sup> In determining whether a program has been terminated, the Department will consider the legal method by which the government

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<sup>8</sup> See Respondents' Substantive Response at Exhibit 2.

eliminated the program and whether the government is likely to reinstate the program. Programs eliminated through administrative action, for example, may be more likely to be reinstated than those eliminated through legislative action. See Sunset Policy Bulletin, 63 FR at 18875. This approach is fully consistent with other areas of the Department’s CVD practice (e.g., program-wide changes), where we normally expect a program to be terminated by means of the same legal mechanism in which it was instituted. See, e.g., Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From India, 66 FR 49635 (September 28, 2001), and accompanying Issues and Decision Memorandum at Comment 7 (where a program is initiated by a Government Policy Handbook, termination can occur through the same method). Because the Regional Capital Tax Incentive and Advance Depreciation of Business Assets programs were terminated by the same legal basis in which they were established, and these processes were through legislative actions, we determine that the programs were terminated in their entirety and can no longer provide countervailable subsidies in the future.

Contrary to the GON’s claims of termination, the record evidence indicates that the remaining four subsidy programs continue to exist – NFB Loans, GBA Grants, RDF, and Reduced Payroll Taxes. Though the NFB and GBA were dissolved, their programs were transferred to Innovation Norway, which provides assistance to the salmon farming industry.<sup>9</sup> As reported by the respondents, Innovation Norway provides country-wide loans and grants as well as programs that are specific to certain regions or industries.<sup>10</sup> Thus, there is evidence that the countervailable benefits for subsidized loans and grants previously provided by the NFB and GBA have not been eliminated with the dissolution of these particular entities.

Similarly, the regionally-specific RDF loan and grant program was transferred to Innovation Norway and the respondents report that companies engaged in the production of subject merchandise have received assistance through Innovation Norway’s “Regional Risk Loans,” which are regionally-specific and “Grants,” which are regionally- or industry-specific.<sup>11</sup>

Lastly, the program Reduced Payroll Taxes, though modified, continues to exist and the amount of tax contributions is still geographically differentiated.<sup>12</sup>

Because four of the six programs found countervailable in the investigation continue to exist, the level of subsidization provided to subject producers over the last five years or the full allocation of program benefits from the investigation are not relevant when determining the likelihood of continuation or recurrence of countervailable subsidies. The Department has determined that modifications to a subsidy program that resulted in a reduced subsidy rate are not equivalent to a termination of the program in question and do not preclude the government from conferring additional countervailable benefits upon the subject producers in the future. See, e.g., Final Results of Full Sunset Review: Carbon Steel Wire Rod From Argentina, 64 FR 53331, 53332 (October 1, 1999).

Further, section 752(b)(4)(A) of the Act states that a “net countervailable subsidy ... that is zero or de minimis shall not by itself require the administering authority to determine that revocation of a countervailing duty order ... would not be likely to lead to continuation or

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<sup>9</sup> Id. at 11-14 and 16 (Table 2).

<sup>10</sup> Id. at 7-9 and 13-14.

<sup>11</sup> Id. at 14.

<sup>12</sup> Id.

recurrence of a countervailable subsidy.” Thus, even if we were to accept the GON’s assertions that de minimis benefits are being provided to subject producers, where a subsidy program is found to exist, the Department will normally determine that revocation of the CVD order is likely to lead to continuation or recurrence of a countervailable subsidy regardless of the level of subsidization. See, e.g., Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil: Final Results of Full Sunset Review of Countervailing Duty Order, 75 FR 75455 (December 3, 2010), and accompanying Issues and Decision Memorandum at Comment 2.

As such, we continue to find that revocation of the order would likely lead to continuation or recurrence of a countervailable subsidy to the subject merchandise.

## 2. Net Countervailable Subsidy Likely to Prevail

The GON claims that the Department failed to consider evidence on the actual level of benefits provided by two remaining programs, i.e., the RDF and Reduced Payroll Taxes. The GON submits that the evidence shows that any benefits these programs may provide to the salmon farming industry are de minimis.

The GON contends that even though Innovation Norway absorbed elements of the RDF, it has not provided benefits to the salmon farming industry above de minimis levels because:

- Innovation Norway generally offers loans and grants on a basis that is not limited by geography or industry, and data illustrate that any financial contributions provided by Innovation Norway targeting specific regions or industries was provided at de minimis levels.<sup>13</sup>
- Innovation Norway has a policy to provide funding to the salmon farming industry on commercial terms.<sup>14</sup>
- Innovation Norway has provided very little funding to the salmon farming industry over the past several years.<sup>15</sup>

Concerning benefits provided under the Reduced Payroll Taxes, which were de minimis in the investigation, the GON states that it demonstrated that the program’s benefits have further declined since the investigation.<sup>16</sup> The GON, therefore, asserts that the benefits conferred by the only remaining programs would continue to be de minimis.

In rebuttal, Phoenix Salmon states that there are four – not two – remaining countervailable subsidy programs. Because the Department has never conducted an administrative review of the order, the only full investigated and verified rates for the RDF, Reduced Payroll Taxes, NFB, and GBA programs are the investigation rates. Accordingly, Phoenix Salmon states that for the final results the Department should continue to rely on the rates from the investigation for the four continuing programs to determine the rate likely to prevail upon revocation of the order.

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<sup>13</sup> See Respondents’ Substantive Response at 8-9.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id. at 14-15.

*Department's Position*

As discussed above, we find that four subsidy programs found to be countervailable in the investigation continue to exist and provide benefits. Because the investigation rate is the only calculated rate that reflects the behavior of exporters and foreign governments without the discipline of an order, it is the Department's practice to rely on that rate, which was based on fully investigated and verified information. See Sunset Policy Bulletin, 63 FR at 18875.

The Sunset Policy Bulletin also states that the Department, may make adjustments to the investigation rate if "the rate was derived (in whole or part) from subsidy programs which were found in subsequent reviews to be terminated, there has been a program-wide change, or the rate ignores a program found to be countervailable in a subsequent administrative review." Id. at 18876.

Though no administrative reviews of the order have been conducted, based on the information submitted by the respondents in this sunset review, we find that the Regional Capital Tax Incentive and Advance Depreciation of Business Asset tax programs were terminated without continuation or residual benefits on January 1, 1991. We, therefore, are adjusting the rate from the investigation by removing the countervailable subsidy rates associated with these terminated programs.

With regard to the remaining four programs, while there may have been some program modifications, those programs still exist and provide benefits as discussed above in "Likelihood of Continuation or Recurrence of a Countervailable Subsidy." We, therefore, continue to rely on the subsidy rates calculated in the investigation for those programs. As such, we find that the rate likely to prevail upon revocation is 2.20 percent ad valorem.

<i>Program</i>	<i>Rate (%)</i>
Regional Development Fund Loans and Grants	1.75
National Fishery Bank of Norway Loans	0.03
Reduced Payroll Taxes	0.42
Government Bank of Agricultural Grants	<0.01
<i>Total Rate:</i>	<i>2.20</i>

3. Nature of the Subsidy

Consistent with section 752(a)(6) of the Act, the Department will provide the following information to the International Trade Commission (ITC) concerning the nature of the subsidies, and whether the subsidies are subsidies "described in Article 3 or Article 6.1" of the Agreement on Subsidies and Countervailing Measures (ASCM).

We note that Article 6.1 of the ASCM expired, effective January 1, 2000. Neither the GON nor Phoenix Salmon submitted comments on this issue.

The following programs are not subsidies described in Article 3 of the ASCM. However, during the period of investigation, they could have been subsidies described in Article 6.1 of the ASCM if the amount of the subsidy exceeded five percent, as measured in accordance with Annex IV of the ASCM. We are providing to the ITC the following descriptions of the four

programs, which we determine continue to exist:

*RDF Loans and Grants.* The RDF provides loan guarantees, long-term loans, and investment and business development grants to producers and exporters located in specified regions of Norway to strengthen the economic base and to increase employment in regions with low levels of economic activity.

*Reduced Payroll Taxes.* This program is aimed at encouraging employment of persons living in underdeveloped regions of Norway. Under the National Insurance Act, employers are liable for the payment of payroll taxes which are based on a percentage of the wages paid in the course of a year. However, since 1975, the amount of contributions has been geographically differentiated depending on the municipality in which the employee resides.

*NFB Loans.* The NFB provided loans for the financing of fish farms from 1974 through 1987, including long-term loans for investment in production equipment and buildings.

*GBA Grants.* The GBA, which administers the Norwegian Fund of Development in Agriculture, was established to create supplemental income and employment for farmers. The Bank provides both long-term loans and interest-free loans and grants to all agricultural producers throughout Norway; however, there are maximum levels of assistance which differ by region.

#### Final Results of Review

We find that revocation of the CVD order would likely lead to continuation or recurrence of a countervailable subsidy for the reasons set forth in the final results of this full sunset review. We find that the net countervailable subsidy rate likely to prevail if the order was revoked is 2.20 percent ad valorem for all producers/exporters of subject merchandise from Norway.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of this review in the Federal Register and notify the ITC of our determination.

AGREE: \_\_\_\_\_

DISAGREE: \_\_\_\_\_

\_\_\_\_\_  
Paul Piquado  
Assistant Secretary  
for Import Administration

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(Date)