Canadian Embassy

Ambassade du Canada

501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001

October 13 , 2006

Regulatory Analysis and Development, PPD
APHIS, United States Department of Agriculture
Station 3A-03.8
4700 River Road Unit 118
Riverdale MD 20737-1238
U.S.A.

Docket No. APHIS -2006-0096

Comments on the Interim Rule "Agricultural Inspection and AQI User Fees Along the U.S./Canada Border", as published in the *Federal Register* of August 25, 2006.

The Government of Canada welcomes the opportunity to provide comments on the Animal and Plant Health Inspection Service (APHIS) interim rule, "Agricultural Inspection and AQI User Fees Along the U.S./Canada Border", published in the August 25, 2006, issue of the *Federal Register*.

We ask that the formal rulemaking process for this interim rule be withdrawn. We would also seek bilateral discussions to identify any legitimate issues that may exist concerning cross-border movement of fruits and vegetables and to collaboratively address them in ways that do not disrupt trade.

The following paragraphs outline the Government of Canada's specific concerns.

.../2

The United States and Canada have a unique trading relationship

The interim rule cannot be characterized as simply taking away an exemption that other trading partners have been subject to for quite some time. The sheer volume, value and immediacy of our cross-border bilateral trade is a model unmatched by any other trading relationship in the world. United States and Canadian industries have developed market efficiencies under the North American Free Trade Agreement (NAFTA) and through our long history of collaboration, which includes close cooperation on the management of our shared border. US$ 586 billion of goods and services crossed our shared border in 2005. Additionally, the U.S.-Canada air transportation market is estimated at 18.6 million passengers annually and more-closely resembles a single domestic market than it does the international market. This robust economic relationship has been a key driver of the competitive advantage enjoyed by our two countries in the global marketplace.

Security, including food safety and plant and animal health, is a priority for both the Governments of the United States and Canada to ensure continued consumer confidence and economic success. We work collaboratively to achieve this under a broad range of initiatives including: the Smart Border Declaration of 2001, the United States-Canada Free and Secure Trade (FAST) initiative, the U.S. Customs-Trade Partnership Against Terrorism (C-TPAT), the Security and Prosperity Partnership (SPP), the NAFTA Committee on Sanitary and Phytosanitary Measures, the North American Plant Protection Organization (NAPPO) and the U.S.-Canada Consultative Committee on Agriculture.

The approach taken by the interim rule could increase biosecurity risks

We note that the interim rule focuses on third-country product risks. Third-country risks are most-effectively and efficiently managed by cooperative bilateral actions which address the risk closest to the third-country source, rather than the indiscriminate non-risk-based inspection at the border approach outlined by the interim rule. The strategy of mitigating risk at origin has been successfully employed by our two countries e.g., quality management systems for Ya Pears from China, and has provided superior levels of protection for the citizens and agricultural resources of both our countries. Moving to the approach proposed in the interim rule would be a step backwards from the collaborative U.S.-Canada approach taken up to this point and would likely increase rather than decrease biosecurity risks.

Canadian agricultural exports continue to be low-risk

The relevance of the pre-clearance interception data outlined in the interim rule is exaggerated and alternative measures that have already been successfully implemented bilaterally to address risks or that could be implemented have been ignored.

Spanish oranges and Dutch peppers: Misrepresentation of origin of commodities represents a fraudulent activity. The Canadian Food Inspection Agency (CFIA) maintains provisions to prevent and deter the unlawful re-labelling of third-country fresh fruit and vegetable products for export to the U.S. The CFIA works closely with the U.S. to respond to allegations of commercial

fraud that are brought to its attention and it conducts reviews of existing controls to ensure compliance with trade laws and regulations. Currently, it is not common practice for APHIS to notify the Government of Canada when Canadian shipments are not accompanied by official phytosanitary documentation. Thus, the CFIA was not made aware of the interceptions of Spanish oranges and Dutch peppers illegally-manifested as products of Canada. The U.S. could utilize existing international notification of non-compliance procedures as an effective tool to notify authorities in Canada of events like this so that our two governments could work in a bilateral manner to conduct joint investigations where appropriate and to ensure enforcement action is taken and that plant-health risks are effectively managed. Canada could also consider mechanisms to voluntarily identify Canadian origin products to allow the U.S. to identify higher-risk shipments.

The NAFTA Certificate of Origin is presently required for certain shipments destined for the U.S. to determine if imported goods are eligible for reduced or zero duties, as specified by NAFTA. This certificate could also be used on a voluntary-basis by Canadian producers of fruits and vegetables, as a cost-effective alternative to the measures outlined by the interim rule, to certify that a shipment is of Canadian origin and not of foreign origin or co-mingled with product of foreign origin. This would provide U.S. border officials with additional criteria to direct existing inspection resources toward shipments that are not accompanied by such proof of origin.

Cut flowers: The volume of Canadian shipments of cut flowers to the U.S. is relatively insignificant. In 2005, Canada provided less than one percent (0.064%) of the total volume of U.S. imports of cut flowers from all sources. In the example cited in the interim rule, a bilateral, industry-developed certification program was implemented to mitigate the identified risks. This situation would have been more-appropriately presented as an example of how risks, including those presented by third-country products, have been successfully jointly-managed by the U.S. and Canada.

Our mutual experience has shown that cooperative efforts that target higher-risk third-country products and that mitigate the risk closer to source are the most effective and cost-efficient risk-management approach. Bilateral discussions are ongoing in the SPP on other joint preclearance-type programs in the plant health area to mitigate risks at origin in third countries or at port-of-first-arrival in North America.

Solid wood packaging: It is inaccurate to suggest that solid-wood packing material and the railway conveyances in which they are often carried are a more significant risk pathway now than when APHIS first established AQI user fees. The interim rule fails to mention that Canada and the U.S. are both in compliance with the new international standards developed by the International Plant Protection Convention (IPPC) of the NAPPO harmonization plan. This plan recognizes that each of our country's enforcement systems ensure compliance with the IPPC standards for wood packaging entering North America from third countries. The plan also provides for transboundry movement of wood packaging material originating in either Canada or the U.S. that has not moved internationally. As of July 5, 2006, Canada and the U.S. have both implemented the IPPC international standard on wood packaging, therefore addressing the risk

pathway of off-shore product coming into North America through our marine ports. Additionally, a final U.S. rule entitled, "Importation of Wood Packaging Material", that outlines the new U.S. requirements was published in the *Federal Register* on September 16, 2004, and has been implemented as of July 5, 2006. The potential risks presented by this pathway have already been effectively addressed in a collaborative manner.

Preclearance inspection data: Table 1 of the interim rule is misleading in that it implies that all passengers present risks, when in reality the data shown only deals with secondary inspections conducted on a high-risk subset of passengers. A January 19, 2005, Congressional Research Service (CRS) publication entitled, "Border Security: Inspections Practices, Policies, and Issues", indicates that this data enumerates only those passengers referred to secondary inspections for the purpose of an agricultural inspection, not all passengers. Additionally, Table 1 outlines interceptions of prohibited animal products instead of the rule's stated objective, AQI inspection of fruits and vegetables, and predates nearly all of the border protocols that currently exist to manage risks associated with animal products. In regard to preclearance air passenger inspections, the CRS publication refers to a low rate of interceptions in this program and to Canada as having a "below-average risk profile".

Similarly, Table 2 comprises all quarantined material interceptions, not only fruits and vegetables. Canada notes that this table includes data from 2003 and 2004 during which new import certification restrictions related to the detection of bovine spongiform encephalopathy (BSE) in North America were imposed by the U.S. for beef products. The significantly higher number of incidences where items of quarantine interest were detected in these years, versus the two previous periods, may reasonably be attributed to the challenges at that time of informing the general public of the new restrictions e.g., restrictions against personal importations of beef sandwiches or soup containing meat broth. Canada and the U.S. have now harmonized their beef production methods to mitigate BSE risks. Neither of the tables on preclearance-passenger data, provide evidence of an increasing risk of prohibited agricultural commodities entering the United States from Canada.

A more cost-effective option to even further reduce what the CRS publication describes as low interception rates of Canadian airline passengers, might be to better inform air passengers of which goods cannot be brought into the U.S. through improved public signage or information campaigns involving industry. Canada also notes that effective October 1, 2006, the civil penalty for failing to declare agricultural items at U.S. ports of entry was increased from a range of US$ 100 to US$ 250 to a flat US$ 300 for a first offense. This can also be anticipated to raise awareness and improve compliance without the need for the additional measures outlined in the proposed rule.

Foot and Mouth Disease (FMD): APHIS' North American partners implement similar disease surveillance and control measures to assist in safeguarding livestock resources in North America and to help to prevent introductions of disease. Referring to Table 1, the interim rule states that "imports of animal products from the countries listed in the table [including Canada] may present a risk of introducing FMD or other animal diseases into the United States". This is an overly-

broad statement that, without taking into account the controls already implemented, could include anything from live animals to meat sandwiches that approach the border from either direction. Our respective animal health experts have cooperated to develop bilateral strategies and policies to keep both countries free of FMD.

In summary, the interim rule's assertion that plant-health risks associated with Canadian exports of fruits and vegetables to the U.S. have increased is not substantiated by the examples provided. Canadian agricultural exports continue to be low-risk

Current border programs already effectively manage risks

The approach taken by the interim rule to collect fees to increase random inspection of all conveyances from Canada flies in the face of sound principles of risk management, principles our two countries formalized in the 2001 Smart Border Declaration and reaffirmed in the SPP our leaders announced in Waco in March of last year. The investments made by the Government of Canada and our industries to reduce and effectively manage risks and relieve congestion at key border crossings have been enormous. Canada was a first partner with the United States in the Free and Secure Trade (FAST) initiative, the Container Security Initiative, the Customs-Trade Partnership Against Terrorism (C-TPAT) and the NEXUS program to ensure that the quarter of a million people and US$ 1.5 billion worth of goods that cross the border into the United States from Canada each and every day do not pose unacceptable security risks. We fail to see how the additional inspections proposed by the interim rule can be justified on the basis of alleged bioterrorism risks. If anything, these risks have diminished, not increased.

Under the U.S. *Bioterrorism Act of 2002*, all Canadian food companies exporting to the U.S. are required to secure and register their premises, maintain records and provide the U.S. Food and Drug Administration (FDA) and U.S. Customs and Border Protection (CBP) with electronic cargo data two hours prior to arriving at the border. Under the U.S. *Trade Act of 2002*, all commercial carriers from Canada, regardless of the commodity they are carrying, must also provide advance cargo manifest data to CBP. These two statutes alone provide FDA and CBP with the critical data they need to assess risks before shipments arrive at U.S. ports of entry and to determine which shipments should receive further scrutiny upon arrival. A key goal for both statutes was to minimize the need for unnecessary random inspections by giving U.S. border agencies tools to focus on high-risk shipments and streamline the flow of low-risk trade.

U.S. and Canadian carriers will be harmed by border delays and increased costs

This rule will substantially harm cross-border trade. The Government of Canada is concerned that the interim rule does not provide essential information on how the new fees would be collected and how and where the proposed new AQI inspections would be carried out. Experience has demonstrated that it takes very little to seriously disrupt the flow of traffic through busy land-border crossings whether by truck, rail or passenger vehicles. A malfunctioning radiation detection portal, the closure of a single inspection booth, or other seemingly innocuous circumstance can lead to significant delays, which grow exponentially until

the problem is resolved. The interim rule notes that current infrastructure would need to be expanded to accommodate the activities it proposes. Given U.S. planning processes and legislative requirements, such as the National Environmental Policy Act (NEPA), it may be a number of years before such infrastructure would be operational. Our busiest ports of entry are bridges, with little capacity to absorb the increased burden of fee collection and what in Canada's view are unnecessary increases in inspections as proposed by the interim rule. For instance, the Ambassador Bridge between Detroit, Michigan and Windsor, Ontario is the world's busiest port of entry. In 2004, our leaders pledged to improve traffic flows through this critical trade corridor by reducing transit times and working with local and federal officials. This "25% Challenge" was a joint success of the SPP. A 2005 report entitled, "Cost of Border Delays to the United States Economy", estimated that border delays were costing the United States economy US$ 4.13 billion a year or US$ 471,461 an hour. Implementation of the interim rule may actually diminish the gains we have made and the commitments we undertook with our stakeholders under the SPP.

The interim rule provides no information on the exact nature of the AQI inspections to be carried out at ports of entry, beyond the vague assertion that, "the inspection process may take only a few minutes or it can be quite extensive." Many products enter the U.S. to serve just-in-time market demands. Additionally, agriculture and agri-food firms on both sides of the border have developed sophisticated food-safety, food-security and traceability practices to meet international standards and commercial protocols. Invasive inspections by untrained inspectors (assuming the interim rule is implemented on November 24) may contravene these protocols, resulting in contaminated food and/or rejection of shipments by buyers. Delays at the border can be expected to jeopardize U.S. and Canadian reputations as a dependable suppliers as well as the quality of our products.

Under the interim rule, not only will all commercial U.S. and Canadian carriers be subject to border delays when entering the U.S., they will also be subject to the new fees.

Revenue estimates are questionable

The Government of Canada questions the accuracy of the revenue estimates provided in the interim rule as well as how the estimated costs relate to the new AQI services outlined. Canada notes that the 2007 AQI fee schedule referenced actually came into effect on October 1, 2006.

Rail and maritime transport: No rail or maritime AQI services are outlined in the interim rule to correspond to the revenue generated. Canadian exports of fruits and vegetables are not carried by rail to the U.S., however, US$ 6.5 million of revenue is projected to be collected in 2007 for AQI railcar inspections by the interim rule. In 2005, 1.27 million full railcars travelled from Canada to the U.S. versus the 827,793 baseline provided in the interim rule. Thus, railcar movements would generate 34% more revenue in 2007 than outlined in the interim rule (US$ 9,842,500 versus US$ 6,479,550) with no actual AQI service being provided. Based on 2003 data, the revenue collected for 2007 could be 38% more than what the interim rule outlines. Canada estimates revenues generated by maritime vessels could be as high as US$ 1.3 million

instead of the US$ 937,836 set out in the interim rule. Foreign-flagged vessels that are Canadian owned or operated have not been accounted for in the interim rule and it is unclear how the weight exemptions will be applied to vessels in the Great Lakes.

Air passengers and aircraft: The revenue estimates for air conveyances in the interim rule are inaccurate and there is no justification as to why the fees to be collected to pay for increased pre-clearance staff are so much higher than land-border staff.

In the interim rule, the total revenue from air passengers and aircraft is projected at US$ 55.8 million for 2007, meaning that over US$ 859,000 per year would be collected to maintain each of the additional 65 preclearance airport staff proposed by the rule. A similar calculation for the 136 additional staff at the U.S.-Canada land border results in US$ 163,236 per year per staff member. The interim rule provides no explanation for why the fees to be collected for the pre-clearance staff appear to be more than five times greater than for the land-border staff.

Additionally, based on 2006 schedules, Canada believes that APHIS has underestimated the annual aircraft movement baseline by approximately 20,000 aircraft movements. Thus, American air carriers can anticipate to pay more than half of the fees collected (over US$ 4.0 million) from approximately 90,000 movements by aircraft with more than 64 seats (versus the 69,398 cited in the interim rule) that leave Canada annually to land in the U.S.

Questions about U.S. compliance with international trade obligations

Canada is currently assessing whether the interim rule complies with the United States' international trade obligations. For example, the rule generates questions as to how the costs of providing the inspections outlined in the interim rule will be calculated so as to ensure that they are applied equitably to the actual beneficiaries of such services. There are also questions as to how the costs of AQI inspections will be segregated from the costs of other programs conducted at the border. It is important to note that the United States has undertaken commitments under international trade agreements that require, among other things, that inspection requirements be limited to what is reasonable and necessary, and that any fees imposed for such inspections are applied equitably and are no higher than the actual cost of providing these services.

The interim rule should be withdrawn

We ask that the formal rulemaking process for this APHIS interim rule be withdrawn to allow bilateral discussion to occur to identify legitimate issues that may exist and to allow us to collaboratively determine means of addressing these in ways that do not disrupt trade.

If you require any clarification, please contact either myself or Fred Gorrell at (202) 682-7629.

Yours sincerely,

Claude Carrière
Minister (Economic) and
Deputy Head of Mission