

Fighting for the U.S. Cattle Producer!



R-CALF United Stockgrowers of America
P.O. Box 30715
Billings, MT 59107
Fax: 406-252-3176
Phone: 406-252-2516
Website: www.r-calfusa.com
E-mail: r-calfusa@r-calfusa.com

June 2, 2009

Docket No. APHIS 2008-0093
Regulatory Analysis and Development, PPD
APHIS, Station 3A-03.8
4700 River Road Unit 118
Riverdale, MD 20737-1238

Via Overnight Mail and Facsimile: 301-734-8934

Re: R-CALF USA's Second Supplemental Comments in Docket No. APHIS-2008-0093: Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Meat, Meat Byproducts, and Meat Food Products Derived From Bovines 30 Months of Age or Older

Dear Administrator:

R-CALF USA submits these second supplemental comments to ensure that the U.S. Department of Agriculture's (USDA's) Animal and Plant Health Inspection Service (APHIS) is informed about the May 15, 2009 confirmation of the 17th BSE-positive Canadian-born cow. This recent animal, like 9 of the other 16 BSE-positive Canadian-born cattle detected before her, was born after the March 1, 1999 birth-date after which Canadian-born cattle are eligible for importation into the U.S. as authorized in the agency's Sept. 17, 2007 rule (which took effect Nov. 19, 2007) that allows the importation of over-30-month (OTM) cattle and beef from OTM cattle into the United States from Canada (Final OTM Rule).¹

In addition, and in light of this confirmation of the latest BSE-positive cow, R-CALF USA wants also to remind USDA that United States District Judge Lawrence J. Piersol has ordered USDA to, after considering comments on the above referenced docket from R-CALF USA and other interested parties, "revise any provisions of the OTM Rule it deems necessary." R-CALF USA, et al. v. USDA, D.S.D. Civ. No. 07-1023, July 3, 2008 Memorandum Opinion and Order on Motion for Preliminary Injunction at 21(emphasis added). Thus, USDA is expressly authorized and indeed encouraged to revise not only the provisions within the OTM Rule that relate to OTM beef, but also to revise provisions within the OTM Rule that relate to the importation of OTM cattle as well within this specific docket.

For the following updated reasons, R-CALF USA believes the risk that OTM Canadian cattle have been exposed to the BSE agent is far greater than APHIS predicted in its OTM Rule,

¹ Bovine Spongiform Encephalopathy; Minimal-Risk Regions; Importation of Live Bovines and Products Derived from Bovines," (Final OTM Rule) published at 72 Fed. Reg., 53314-53379.

resulting in a greater risk that OTM Canadian cattle would introduce BSE into the United States and a greater risk that beef entering the U.S. would be derived from Canadian OTM cattle infected with BSE:

A. APHIS' estimate of the prevalence of BSE in the Canadian cattle herd was a function of the number of known BSE cases detected under Canada's BSE surveillance program (notwithstanding the fact that Canada's BSE surveillance program pales in comparison to every other country that has detected BSE-positive cases in cattle born after implementation of a ruminant-to-ruminant feed ban²).³ APHIS' highest BSE prevalence estimate was 3.9 cases per million adult cattle generated by the agency's BSurVE model, indicating that there are 23.2 BSE-infected cattle standing in the Canadian cattle herd.⁴ This early estimate was based on the detection of only 9 BSE-infected Canadian cattle,⁵ four of which were born after the 1997 feed ban.⁶ When APHIS re-estimated Canada's BSE prevalence based on two additional BSE-positive cattle detected in 2006 and early 2007, APHIS claimed the new prevalence estimate expanded to a range of between 3 and 8 cases per million adult cattle.⁷ Although the original estimate of 3.9 cases per million falls in the lower end of the confidence interval of the newly estimated range, APHIS nevertheless defended its initial estimate claiming it was not sensitive to the two additional cases.⁸ However, with the 17th case of BSE confirmed on May 15, 2009, the number of BSE-positive cattle detected in Canada has nearly doubled (from 9 to 17) since APHIS' initial estimate, and the number of cases born after the feed ban has more than doubled (from 4 cases to 11 cases). The growing number of BSE-infected cattle in Canada, particularly the accumulating number of BSE-infected cattle born after Canada's feed ban, clearly demonstrates that APHIS had grossly understated the ongoing prevalence of BSE in the Canadian cattle herd and, therefore, has grossly understated the risk of introducing both BSE-infected cattle into the United States and introducing beef into the United States beef from BSE-infected Canadian cattle.

B. The OTM Rule is demonstrably predicated on APHIS' central assumption that Canada's BSE prevalence is decreasing and that "there is an extremely low likelihood that cattle born in Canada on or after March 1, 1999, will have been exposed to BSE."⁹ APHIS was so confident in this vital assumption that it repeated it numerous times throughout the OTM Rule to justify its actions. For example, APHIS stated, "[W]e conclude that animals born on or after March 1, 1999, have an extremely low likelihood of exposure to BSE;"¹⁰ "[w]e concluded, based on the above evaluations, that cattle born in Canada on or after March 1, 1999, can be imported into

² See R-CALF USA Comments in Docket No. APHIS-2006-0041: Bovine Spongiform Encephalopathy; Minimal-Risk Regions; Importation of Live Bovines and Products Derived From Bovines, March 12, 2007 (hereafter "R-CALF USA's March 12, 2007 Comments"), at 48-50 (wherein R-CALF USA compares Canada's testing practices with those of other similarly situated countries).

³ See 72 Fed. Reg., at 53319, col. 2.

⁴ See 72 Fed. Reg., at 53318, col. 3; 53321, col. 3.

⁵ See 72 Fed. Reg., at 53319, col. 2.

⁶ See Attachment 1, Estimation of BSE Prevalence in Canada, Assessment of Bovine Spongiform Encephalopathy (BSE) risks association with the importation of certain commodities from BSE minimal risk regions (Canada), U.S. Department of Agriculture, APHIS, October 27, 2006, at 15, 16.

⁷ See 72 Fed. Reg., at 53319, col. 3.

⁸ See 72 Fed. Reg., at 53319, col. 3.

⁹ 72 Fed. Reg., at 53329, col. 3.

¹⁰ *Id.*, at 53324, col. 3.

the United States with an extremely low likelihood that they have been exposed to the BSE agent;”¹¹ “[t]herefore, APHIS concludes that there is an extremely low likelihood that cattle born in Canada on or after March 1, 1999, will have been exposed to the BSE agent via feed. Therefore, these animals have an extremely low likelihood of being infected and can be imported into the United States for any purpose;”¹² “[t]he restriction on live bovine imports by date of birth, age verification, and other safeguard measures are the same in both cases. Consequently, as in scenario 1, the likelihood of BSE infectivity entering the United States via imports of live bovines from Canada in this scenario is extremely low;”¹³ and, “[o]ur peer-reviewed risk assessment concluded that the likelihood of BSE release from cattle imported from Canada is likely to be extremely low because (1) the prevalence of BSE in Canada is extremely low, and (2) measures requiring imported animals to be born on or after March 1, 1999, will further decrease the likelihood that those animals had been exposed to infectious material.”¹⁴ The empirical evidence now before APHIS shows unequivocally that even under Canada’s limited BSE surveillance program, not only were 10 Canadian animals *from two separate Canadian Provinces* exposed to BSE well after March 1, 1999, but also, they were exposed to sufficient amounts of BSE infectivity to cause them to fully incubate the BSE disease. APHIS can no longer claim that animals born after March 1, 1999 have a low likelihood of exposure to BSE when well over half of Canada’s known BSE-positive cattle (10 of 17 cattle) were exposed to and infected with BSE after March 1, 1999, many of which were born years after.

C. In its OTM Rule, APHIS flatly rejected R-CALF USA’s concern that the agency’s risk assessment failed to recognize the problem of geographic heterogeneity, particularly the BSE hot spot in Alberta Province, and it, therefore, understated the risk of releasing BSE infectivity into the United States from cattle originating in Alberta.¹⁵ APHIS defended its dismissal of R-CALF USA’s concern by stating there was no basis for concluding that BSE prevalence varies among provinces and that there would have to be 11 to 20 cases of BSE in Alberta (or 4 to 7 cases in British Columbia) before rejection of APHIS’ hypothesis that all the Canadian provinces have the same prevalence.¹⁶ However, based on the 12 BSE-positive cattle already detected in Alberta and the 4 BSE-positive cattle already detected in British Columbia, it is clear that APHIS’ hypothesis was wrong and that Alberta, and perhaps British Columbia, are dangerous hot spots for BSE that are significantly increasing the risk of introducing BSE into the United States from Canada.

D. In its OTM Rule, APHIS dismissed R-CALF USA’s concern that the BSE cases detected in cattle born after Canada’s 1997 feed ban demonstrate that Canada’s feed ban was ineffective in preventing the spread of BSE on the basis that “Canadian BSE surveillance data do not provide a statistical basis for distinguishing BSE prevalence among birth year cohorts.”¹⁷ APHIS claimed that distinguishing a significant difference in prevalence among animals born in

¹¹ 72 Fed. Reg., at 53330, col. 2.

¹² *Id.*, at 53371, col. 2.

¹³ *Id.*, at 53371, col. 3, 372, col. 1.

¹⁴ *Id.*, at 53339, col. 2.

¹⁵ See R-CALF USA’s March 12, 2007 Comments, at 33.

¹⁶ See 72 Fed. Reg., at 53332, col. 1.

¹⁷ 72 Fed. Reg., at 53328, col. 2.

different years would be one way to demonstrate the effect of Canada's feed ban.¹⁸ However, now with 17 positive cases, well over half (10) of which were born between the years 2000-2003, it is clear that APHIS was wrong to assume that Canada's feed ban was effective in preventing the ongoing spread of BSE in Canada. Empirical evidence now shows that, contrary to claims made by APHIS, the known BSE prevalence in Canadian cattle increased after the implementation of Canada's 1997 feed ban, which definitively demonstrates the ineffectiveness of the feed ban in preventing the ongoing spread of BSE in Canada.

E. APHIS' estimate of the number of BSE-infected cattle expected to enter the United States from Canada was a function of the BSE prevalence in Canada and the number of expected imports of OTM cattle into the United States from Canada. APHIS stated that "[p]rojected imports are a key component of the likelihood of release of infectivity,"¹⁹ and, the fewer the imports of cull cattle, the less the risk of introducing BSE.²⁰ However, APHIS' risk assessment grossly underestimated the number of OTM cattle that would enter the U.S. during the first year of the OTM Rule's implementation, and likely for at least the first 5 years subsequent to its implementation. For example: In 2008, the first year of the OTM Rules implementation, APHIS predicted that only 75,000 cull cows and bulls would be imported.²¹ However, the U.S. actually imported well over twice this number during the first year, nearly 200,000 slaughter cows and bulls from Canada in 2008.²² APHIS predicted that only 79,000 cull cattle would be imported in calendar year 2009.²³ However, as of May 16, 2009, nearly 79,000 slaughter cows and bulls have already been imported into the U.S. from Canada.²⁴ Based on APHIS' gross underestimation of imports of Canadian cull cattle in 2008 and 2009, it is highly probable that APHIS' estimations of cull cattle imports for the years 2010, 2011, and 2012 of 81,000, 134,000, and 161,000 head of cull cattle, respectively, are grossly underestimated as well. As a result of this known and anticipated underestimation of the numbers of Canadian cull cattle entering the U.S., the risk associated with importing BSE-infected cattle under the OTM Rule is necessarily much greater than APHIS has previously represented.

F. In its OTM Rule, APHIS asserted that the reason Canada was detecting more cases of BSE was because Canada had increased its BSE testing. APHIS stated, "An increased number of BSE cases have been detected in Canada as that country has increased surveillance for the

¹⁸ 72 Fed. Reg., at 53328, col. 2.

¹⁹ Revised Assessment of Bovine Spongiform Encephalopathy (BSE) risks association with the importation of certain commodities from BSE minimal risk regions (Canada), U.S. Department of Agriculture, APHIS, September 2007, at 16.

²⁰ See 72 Fed. Reg., at 53333, col. 1 (APHIS stated that as a result of revising import projections for older cull cattle numbers downward, "any potential release of BSE-infected animals should be lower than previously estimated.").

²¹ See 72 Fed. Reg., at 53355, col. 2.

²² See Canadian Live Animal Imports by State of Entry, Data for Week Ending 12/27/2008, USDA Market News, U.S. Department of Agriculture, Agricultural Marketing Service, available at http://search.ams.usda.gov/mnsearch/hiLiteText.aspx?i=46&docid=WA_LS63520081231.TXT.

²³ See Regulatory Impact Analysis and Final Regulatory Flexibility Analysis Final Rule Bovine Spongiform Encephalopathy; Minimal-Risk Regions; Importation of Live Bovines and Products Derived from Bovines (Docket No. APHIS 2006-0041), USDA APHIS, at xi.

²⁴ See Canadian Live Animal Imports by State of Entry, Data for Week Ending 5/16/09, USDA Market News, U.S. Department of Agriculture, Agricultural Marketing Service, available at http://www.ams.usda.gov/mnreports/wa_ls635.txt.

disease.”²⁵ Canada tested 58,174 cattle in 2007, the year the OTM Rule was published, and detected three BSE-positive cattle.²⁶ However, in the year following the OTM Rule’s implementation – 2008 – Canada reduced its BSE testing by 9,370 cattle, which reduced its surveillance to the lowest level since 2004, and it detected four BSE-positive cattle.²⁷ In the first two months of 2009 (the latest data available), Canada tested at an even lower rate than it did during the first two months of 2008 when it reduced its BSE testing.²⁸ Since the implementation of the OTM Rule, Canada has detected one positive BSE case for about every 10,000 head of cattle tested. This is an alarmingly high rate of detection for a country that relies only on voluntary testing to diagnose BSE and indicates that Canada’s BSE prevalence is likely considerably greater than APHIS predicted in its OTM Rule.

G. The risk of introducing BSE into the United States from OTM Canadian cattle is both heightened and compounded by the significant numbers of birth and feed cohorts of known BSE-infected Canadian cattle that have entered, and are most likely continuing to enter, the United States under the OTM Rule. The United Kingdom’s (UK’s) BSE experience shows that birth and feed cohorts of BSE-infected cattle are of increased risk for BSE infection. Data provided by the UK show that only 35 percent of BSE-infected herds in the UK had only one case of BSE, while 65 percent had two or more cases (49 percent of the BSE-infected herds had three or more BSE cases). The UK report showing the percentage of herds with one or more BSE cases is available at http://www.defra.gov.uk/vla/science/docs/sci_tse_stats_gen.pdf (at Page 14).

The investigation reports completed by the Canadian Food Inspection Agency (CFIA) reveal that numerous OTM birth and feed cohorts of BSE-infected Canadian have entered the United States. For example:

- The CFIA report concerning Canada’s 16th case of BSE (which the CFIA considers its 15th case) stated that five BSE cohorts were confirmed to have been exported for slaughter. We presume these cattle were exported to the United States. The BSE cases, and presumably all their birth and feed cohorts, were born on or about 2001. <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/bccb2008/15investe.shtml>
- The CFIA report concerning Canada’s 13th case of BSE (which the CFIA considers its 12th case) stated that three BSE cohorts were confirmed to have been exported for slaughter. We presume these cattle were exported to the United States. The BSE cases, and presumably all their birth and feed cohorts, were born on or about 2001. <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/ab2008/12investe.shtml>
- The CFIA report concerning Canada’s 10th case of BSE (which the CFIA considers its 9th case), stated that one BSE cohort was confirmed to have been exported and the importing country was notified. This BSE case, and presumably all its birth and feed cohorts, was born in 2000. <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/ab2007/9investe.shtml>

²⁵ 72 Fed. Reg., at 53329, col. 3.

²⁶ See BSE Enhanced Surveillance Program, Canadian Food Inspection Agency (CFIA), available at <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/surv/surve.shtml#num>.

²⁷ See *Ibid.*

²⁸ See *Ibid.*

- The CFIA report concerning Canada's 6th case of BSE (which the CFIA considers its 5th case) stated that 15 cohorts were exported to the United States. This BSE case, and presumably all its birth and feed cohorts, was born in 2000. <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/bccb2006/5investe.shtml>
- The CFIA report concerning Canada's 5th case of BSE (which the CFIA considers its 4th case) stated that 90 cohorts either died or were slaughtered at other locations. We presume these cattle were slaughtered in the United States. This BSE case, and presumably all its birth and feed cohorts, was born in 2000. <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/ab2006/4investe.shtml>.

It is clear from the CFIA reports referenced above that the United States is importing live OTM cattle from Canada that were exposed to the same BSE-contaminated feed that was the presumed source of Canada's BSE-positive cattle. Because these cohorts bear an inherently higher BSE risk, it is highly probable that BSE is entering the U.S. at a rate far above what APHIS has predicted. In addition, the foregoing CFIA reports indicate that hundreds of birth and feed cohorts of the numerous BSE-positive cases were slaughtered in Canada. Therefore, there is an extremely high likelihood that the U.S. is importing beef derived from birth and feed cohorts of BSE-positive cows under the OTM Rule and these higher risk cattle are not required to be tested before entering the human food system.

The foregoing information demonstrates that the OTM Rule is subjecting the U.S. to a risk of introducing BSE into the United States from Canadian cattle and beef from Canadian cattle that is far greater than APHIS predicted in its OTM Rule. The primary assumptions that APHIS relied on to justify its OTM Rule have now been refuted by the mounting empirical evidence that shows that Canada's BSE prevalence is higher than APHIS predicted, that BSE continued to circulate in Canada's feed system in sufficient volumes to infect multiple cattle in two Canadian Provinces, and that more and higher-risk cull cattle are entering the U.S. than APHIS assumed. Contrary to APHIS's assumptions and its assurances in past years to the U.S. public, it is now clear that Canadian cattle carry a substantially higher risk of BSE infection than U.S. cattle. In fact, in 2007 Canada detected more BSE-positive cattle than did most countries in Europe, and the comparison of Canada to Europe was no doubt even less favorable in 2008. Indeed, Canada's detection of one positive BSE case for about every 10,000 head of cattle tested represents a rate of detection greater than several European countries considered to be of high risk for BSE.

These facts are both alarming and compelling and justify the immediate overturning of the OTM Rule to protect the U.S. cattle herd and U.S. consumers from the introduction into and dissemination within the United States of BSE from Canada. Subjecting the U.S. cattle herd and U.S. consumers to this higher risk is not necessary and is contrary to the congressional intent expressed in the Animal Health Protection Act, 7 U.S.C. § 8303(a)(3), and the Animal Disease Risk Assessment, Prevention, and Control Act of 2001, P.L. 107-9, 115 Stat. 11. In addition to overturning the decision to allow entry of both OTM Canadian cattle and OTM Canadian beef into the United States, these facts justify decisive action by APHIS to initiate an immediate investigation into Canada's feeding practices as well as the immediate establishment of an enhanced testing protocol for Canada that would both accurately determine Canada's BSE

prevalence and would remove BSE-infected cattle from the human food supply and animal feed supply.

The discovery of BSE in a single Canadian cow imported into Washington State in 2003 sent U.S. imports into a precipitous decline that cost our economy billions of dollars and from which we still have not recovered. Any of the 10 cases of BSE that Canada has detected in cattle born after March 1, 1999 could just as easily have been Canadian cattle that showed symptoms of BSE and were found to be infected after they were imported into the U.S. under the OTM Rule. USDA must not continue to play Russian roulette with the economic viability of domestic cattle production in that way. R-CALF USA urges APHIS to immediately overturn the OTM Rule in its entirety as the agency is fully authorized to do pursuant to the July 3, 2008 order by United States Court Judge Lawrence J. Piersol.

Sincerely,

A handwritten signature in cursive script that reads "R. M. Thornsberry DVM". The signature is written in black ink and is positioned below the word "Sincerely,".

R.M. Thornsberry, D.V.M.
President, R-CALF USA Board of Directors