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Subcommittee on Homeland Security
Committee on Appropriations
United States Senate

The Honorable David E. Price
Chairman
The Honorable Harold Rogers
Ranking Member
Subcommittee on Homeland Security
Committee on Appropriations
House of Representatives

The Honorable Hillary R. Clinton
United States Senate

Subject: Various Issues Led to the Termination of the United States-Canada Shared Border Management Pilot Project

In the years since the 2001 terrorist attacks, balancing the need to secure U.S. borders while maintaining the flow of legitimate cross-border travel and commerce has taken on an added importance. The United States and Canada share a border that extends nearly 4,000 miles, and one of the world's largest trading relationships. Each year, approximately 70 million travelers and 35 million vehicles cross the border from Canada into the United States, according to the Department of Homeland Security (DHS). Given the volume of cross-border travel and trade between the United States and Canada, border congestion and the resulting wait times have a substantial economic impact on both nations. Furthermore, according to an analysis by DHS, the heightened emphasis on border security following the 2001 terrorist attacks has lengthened processing time for travelers and cargo crossing into the United States. Recognizing the need to improve both border security and border-crossing efficiency, the United States and Canada have cooperated on various cross-border management initiatives intended to increase the flow of legitimate travel across the border while maintaining security. For example, to facilitate the travel of low-risk prescreened individuals across the northern border, the United States and Canada jointly operate the NEXUS program. The NEXUS program allows registered border residents and frequent cross-border travelers identified as low-risk individuals access to dedicated lanes and expedited processing with minimal inspection. The United States and Canada also coordinate on border law enforcement

programs such as the Integrated Border Enforcement Team Program (IBET), which is a bi-national, multi-agency law enforcement initiative that (1) provides, where necessary, support to national security investigations associated to the Canada/United States border and (2) investigates illegal cross-border activities.

A key collaborative effort to improve security and relieve congestion at the ports of entry across the northern border is to move customs and immigration inspection activities away from the border—a concept known as “land preclearance” or “shared border management.” In December 2004, the United States and Canada announced that the two governments had agreed to move forward with a land preclearance pilot project at the Buffalo, New York-Fort Erie, Ontario Peace Bridge and at one other border crossing site along the northern border, which had not yet been determined.

The land preclearance pilot project flowed from the 2001 Smart Border Declaration and its associated action plan, which was meant to enhance the security along the northern border while facilitating information sharing and the legitimate flow of people and goods, and securing infrastructure. The preclearance pilot at the Peace Bridge would involve the relocation of all U.S. border inspection operations for both commercial and passenger traffic from the U.S. side of the border in Buffalo, New York, to the Canadian side of the border in Fort Erie, Ontario. The other preclearance location had not been determined, but would have relocated Canadian border inspection functions to the U.S. side of the border at a different port of entry. Currently, U.S. Customs and Border Protection (CBP)—a component of DHS and the lead federal agency in charge of securing our nation’s borders—conducts inspections of travelers and cargo at all U.S. ports of entry, including the Buffalo port of entry at the Peace Bridge. Under the preclearance pilot project, the Buffalo port of entry would be moved to the Canadian side of the Peace Bridge, and all CBP inspections and operations would take place before travelers and cargo entered the United States.

From 2005 to 2007, the United States and Canada were engaged in negotiations to implement land preclearance at the Buffalo-Fort Erie Peace Bridge ports of entry. However, in April 2007, these negotiations were officially terminated by DHS. Section 566 of the 2008 DHS Appropriations Act mandates that we conduct a study on DHS's use of shared border management to secure the borders of the United States.¹ In accordance with the mandate and discussions with Committee staff, this report addresses the following questions:

- (1) What negotiations have been conducted by the Department of Homeland Security regarding the shared border management pilot project?
- (2) What issues led to the termination of shared border management negotiations?

To address these objectives, we visited the Peace Bridge site in April 2008. We observed the current U.S. inspection facility in Buffalo as well as where the shared border

¹ Department of Homeland Security Appropriations Act, 2008, Pub. L. No. 110-161, § 566, 121 Stat. 2042, 2092 (2007).

management site would have been located in Fort Erie, Ontario, Canada. In addition, we analyzed available documentation from DHS, CBP, and the Peace Bridge Authority (PBA), a public benefit corporation solely responsible for the maintenance and upkeep of the Peace Bridge and for building or expanding both Canadian and U.S. ports of entry at the Peace Bridge. The documentation included a 2004 CBP report on shared border management, a 2005 CBP infrastructure and strategic needs assessment of the U.S. port in Buffalo, a 2005 DHS analysis of shared border management, DHS correspondence to congressional staff on the status of the shared border management negotiations, DHS memos to the Canadian government, and the PBA's U.S. port of entry expansion plans. We did not seek access to documents from the Canadian government because GAO does not have a right of access to documents from foreign governments. However, we interviewed key officials from both countries who participated in the negotiations to gather their views on shared border management at the Peace Bridge site. Specifically, we met with officials from the Department of State, DHS, and Public Safety Canada (PSC), which was the lead Canadian agency involved in shared border management. We also met with officials from the Canada Border Services Agency (CBSA), the General Manager of the PBA, the Canadian Consul General-Buffalo, and the Mayor of Fort Erie. In addition, we met with three local community leaders within the Buffalo/Fort Erie area to obtain their views on shared border management. We conducted this performance audit from January 2008 through September 2008 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings based on our audit objectives.

Results in Brief

From 2005 to 2007, the United States and Canada were engaged in negotiations to implement a land preclearance pilot project (also referred to as “shared border management”), which would have relocated the U.S. border inspection facility from the Buffalo, New York, side of the Peace Bridge to the Fort Erie, Ontario, side. All CBP inspections and operations would then take place before travelers and cargo entered the United States. The Peace Bridge site was selected for the pilot because it is one of the busiest commercial crossings between the United States and Canada,² yet the existing border infrastructure at the Peace Bridge contributes to a number of security and border crossing inefficiencies, according to DHS. Specifically, DHS had concluded that the U.S. inspection facility, which is located near the center of downtown Buffalo, is outdated, undersized, and lacks the modern amenities a port of its size should have to operate efficiently and securely. The facility is located on 17 acres of land, as opposed to the 80 acres that CBP recommends for a large port of entry. DHS has reported that additional inspection space is needed to address these infrastructure issues, but there is no easily available land adjacent to the facility in Buffalo. On the Canadian side of the Peace Bridge in Fort Erie, there are approximately 70 acres of land available on which the U.S. inspection facility could have been co-located with Canadian inspection facilities.

² According to the PBA, approximately \$700 million in goods crosses the Peace Bridge weekly, making it the third busiest crossing by truck volume. In 2007, about 1.3 million trucks crossed the Peace Bridge accounting for 16 percent of all Great Lakes border crossings.

In April 2007, DHS officially terminated negotiations with Canada because a mutually acceptable framework for United States-Canada shared border management could not be reached. Officials from both countries agreed that negotiations were conducted in good faith, and the two governments were able to reach accommodations on several key issues raised during the negotiations, such as the approval of all of the authorities Canada sought for its U.S.-based preclearance area,³ and the arming of CBP officers at the preclearance site on Canadian soil. However, certain issues pertaining to each country's sovereignty and the law enforcement authorities of U.S. CBP officers operating on Canadian soil could not be resolved. These issues included concerns over arrest authority; the right of individuals to withdraw an application to enter the United States while at the land preclearance site in Canada; mutually agreeable fingerprinting processes; how information collected by U.S. officials at the land preclearance site would be shared; and concerns that future interpretations of the Canadian Charter could adversely impact U.S. authorities at the preclearance site.⁴

DHS Entered into Shared Border Management Negotiations to Address Space Constraints at the Buffalo Port of Entry

From 2005 to 2007, DHS engaged in bi-national negotiations with Canada to create the first North American land border preclearance pilot project at the Peace Bridge site. The pilot project would have relocated the U.S. border inspection facility from Buffalo, New York, to Fort Erie, Ontario, Canada. The overarching goal of shared border management at the Peace Bridge site was to facilitate cross-border coordination and collaboration, while eliminating the need to expand the outdated inspection facility in Buffalo and the impact that expansion would have on the surrounding community. The current facility in Buffalo sits on 17 acres and is confined on three sides by the Niagara River, a historic park, and a residential neighborhood, as shown in figure 1 and figure 2.

³ The site for the Canadian preclearance facility had not been finalized.

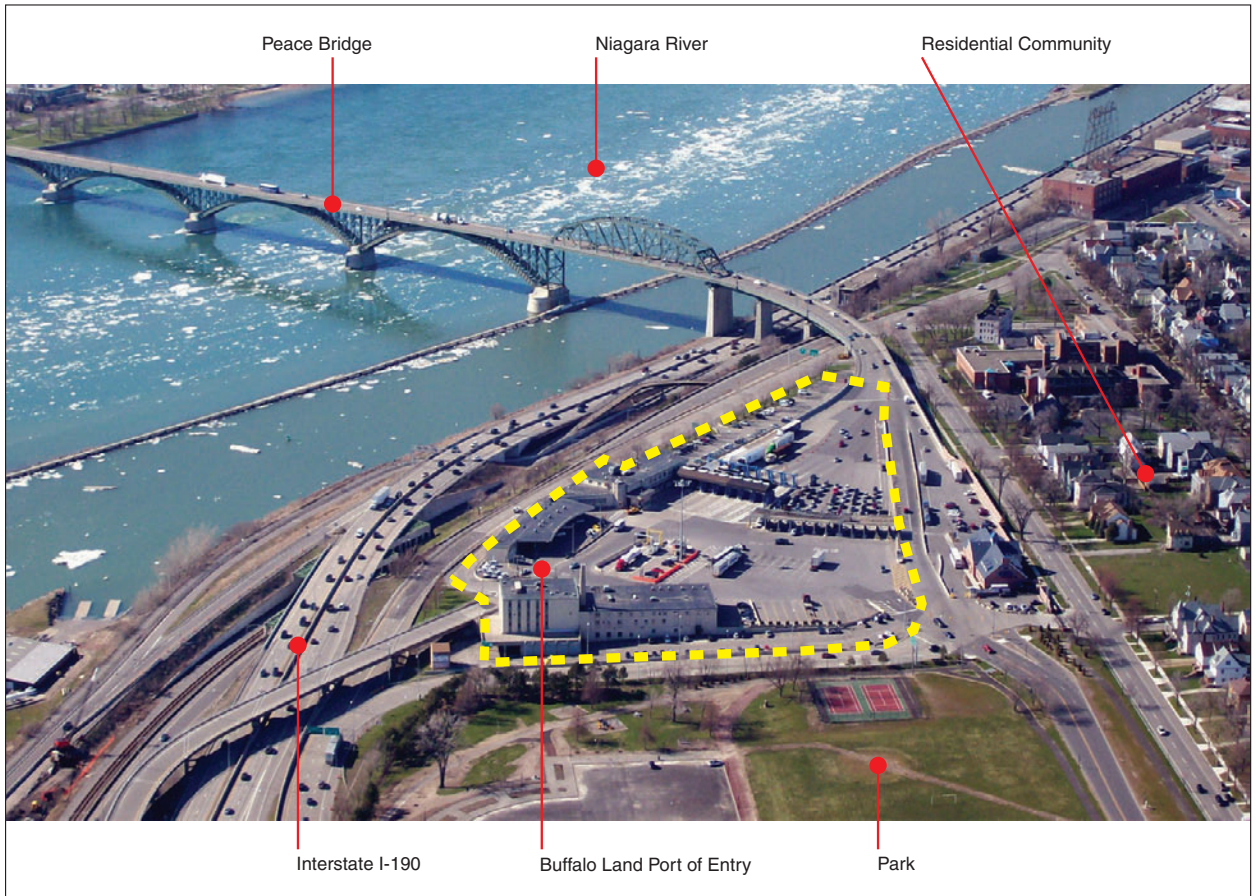
⁴ The Canadian Charter of Rights and Freedoms defines the rights and freedoms guaranteed to Canadians.

Figure 1: Overhead View of Buffalo Land Port of Entry



Source: Peace Bridge Authority.

Figure 2: Close-up View of Buffalo Land Port of Entry



Source: Peace Bridge Authority.

As a result, there is limited real estate available for the port to expand. On the Canadian side of the Peace Bridge, however, there is more land available on which a U.S. inspection facility could be located, as shown in figure 3.

Figure 3: View of Fort Erie, Ontario, Canada Land Port of Entry



Source: Peace Bridge Authority.

According to DHS, the existing infrastructure at the Buffalo port of entry contributes to a number of border crossing and security inefficiencies. In 2005, a DHS cost-benefit analysis of shared border management stated that infrastructure constraints and limitations at the Buffalo port of entry were major impediments to the smooth flow of traffic and trade across the Peace Bridge border crossing from Canada to the United States. Specifically, the size of the inspection facility site—17 acres—does not allow for a sufficient number of inspection lanes to accommodate and process the volume of traffic that crosses the bridge daily, according to DHS.

In 2005, infrastructure improvements were made to the Buffalo inspection facility, which local officials told us have eased congestion. However, DHS stated that additional capacity—that is, more inspection lanes—is still needed. In 2005, the number of lanes for primary processing at the facility was increased from 8 car lanes and 4 commercial vehicles lanes to 10 for cars and 7 for commercial vehicles (and 1 dedicated NEXUS

lane). Furthermore, the new lanes are “hi/low” to allow for flexibility in converting them to commercial lanes for trucks (“hi”) or passengers (“low”), depending on the specific demand. However, DHS stated that the renovations cannot eliminate the congestion at the port because additional inspection lanes are still needed to accommodate the volume of traffic that enters the port daily. Officials from CBP-Buffalo also noted that increased inspection lanes are necessary to improve the operation of the port.

Because the 2005 renovations only included one lane dedicated to NEXUS, expanding the port was expected to help maximize other trusted traveler programs such as Free and Secure Trade (FAST), according to DHS. FAST is an expedited clearance program for known low-risk shipments. DHS reported that a dedicated FAST lane would enable greater processing efficiency, thereby reducing queue length and wait time. For example, lanes dedicated to FAST have average primary processing times of 30 seconds versus Non-FAST lanes at 2 minutes, according to DHS.

DHS has also stated that expansion of the Buffalo port is necessary to improve enforcement and security operations. According to CBP, the current port has inadequate space to handle the number of vehicles (both passenger and commercial) referred for secondary inspections, which are separate, more thorough screenings of selected travelers and cargo. CBP officials told us that if the secondary inspection area is full, CBP officers must hold vehicles referred for secondary inspection in the primary lane, causing congestion that could be avoided if there were sufficient space for secondary inspections. In addition, because of the configuration of the port, vehicles referred to secondary inspections must cross paths with commercial vehicles exiting the primary inspection area, thus creating an obstructive intersection as well as safety and security risks. However, because of space constraints at the facility, this is the only area that can handle secondary inspections, according to CBP. CBP officials also noted that the administration building at the port is not sufficient or effective for their operations. For example, these officials stated that the building has limited space for security and management operations, such as secondary inspection processing and agriculture inspections.

Although DHS recognizes that increasing the size of the Buffalo inspection facility is necessary to address these issues, there is limited room adjacent to the facility for expansion without adversely affecting the surrounding community. According to the PBA—which would manage any port expansion project—expanding the port in Buffalo would require the acquisition and demolition of approximately 83 adjacent residential homes, some of which are historical.⁵ However, on the Canadian side of the Peace Bridge in Fort Erie, there is land available that could be used for a U.S. inspection facility without requiring the taking of any residential properties. Relocating the U.S. inspection facility from Buffalo to Fort Erie under shared border management was intended to address the need for improvements and expansion of the U.S. inspection facility while minimizing adverse impacts on the surrounding community in Buffalo. With sufficient land available, the facility was expected to include a total of 25 commercial and

⁵ The PBA was granted limited eminent domain power by New York State in 2004 to acquire property surrounding the Buffalo inspection facility. The PBA stated that because of the historic significance of Front Park (which is adjacent to the Buffalo inspection facility), expanding the inspection facility into the park was not a viable option.

passenger primary inspection lanes and booths, which is the standard for a large port of entry, according to CBP officials. In addition, DHS stated that shared border management would have also enabled informal information sharing between U.S. and Canadian border inspection officials because the inspection facilities would be located adjacent to each other. According to the PBA, another benefit of shared border management was that constructing a new U.S. inspection facility in Fort Erie would cost approximately \$100 million less and take less time than expanding the inspection facility in Buffalo. Local community officials we spoke with also noted that relocating the U.S. inspection facility to Fort Erie would allow for better accommodation of future growth or new security measures that may be added, as more space is available for facility expansion.

The United States and Canada Were Unable to Find an Acceptable Framework for Shared Border Management

According to U.S. and Canadian officials, shared border management negotiations were terminated in April 2007 because an acceptable agreement that would satisfy both countries could not be accomplished. Specifically, DHS stated that it would not have been able to exercise the same law enforcement authorities in Canada that it currently has at ports of entry in the United States. Officials from both countries agreed that negotiations were conducted in good faith, and the two governments were able to reach accommodations on several key issues raised during the negotiations. For example, all of the authorities sought by Canada for its preclearance area—which would have been located on U.S. soil—could be provided with minimal changes to U.S. laws, according to DHS. Another issue that was resolved was the arming of CBP officers at the preclearance site. When negotiations began in 2005, CBP officers would not have been permitted to carry firearms at the preclearance site because Canadian border officers did not carry firearms. This was a concern for U.S. officials because CBP officers carry firearms at U.S. ports of entry. During negotiations, this issue was resolved as a result of a change in Canadian government policy that permitted the arming of Canadian border officers which allowed for the arming of CBP officers, according to Canadian officials.

Despite agreement on the authorities sought by Canada and the arming of CBP officers, officials stated that an acceptable agreement that would satisfy both countries' sovereignty could not be accomplished. According to DHS, the overarching issue was the subordination of U.S. law enforcement personnel and authorities to Canadian law rather than U.S. law and the inability to ensure necessary U.S. law enforcement authorities under Canada's legal framework. One of the guiding principles of shared border management was that the inspecting country's operations would be consistent with the constitutional and legal frameworks of the host country. However, DHS officials stated that for shared border management to meet their requirements, U.S. border inspection personnel would require full legal authority, comparable to that provided under U.S. law, to replicate the inspection and enforcement activities DHS engages in today. DHS officials stated that operating under Canadian law would have limited DHS's ability to manage and secure the border. The following are key issues that surfaced during negotiations:

- **Arrest authority:** According to officials from both countries, the host country would have sole authority to make arrests at the preclearance site, because of the sovereignty of the host government. These officials stated that for the majority of possible scenarios, negotiators agreed on how these arrests might work. However, U.S. officials told us they were concerned that the U.S. government would not have the ability to arrest and then prosecute high profile/high value terrorists or criminals who might present themselves at the border. For example, if a high value target of interest to the United States presented himself at the preclearance site, U.S. authorities could not arrest him; rather, Canadian authorities would make the arrest. The individual would then have to be extradited to the United States for prosecution. Canadian officials told us that they offered the United States the ability to prioritize cases in order to expedite the extradition process in such circumstances.
- **Right of withdrawal:** Under Canadian law, individuals have the right to withdraw an application to enter Canada at a port of entry, according to Canadian and U.S. officials. For example, in a land preclearance scenario if an individual begins the inspection process at the port of entry and then decides that he or she no longer wants to enter into Canada, under Canadian law that person has the right to withdraw from inspection. However, U.S. negotiators wanted the ability to inspect and fingerprint individuals who present themselves to CBP officers for admission into the United States and then request to withdraw their application to enter the country. Under U.S. law, CBP officers have the discretion to allow an individual they have determined to be inadmissible to withdraw an application for admission in place of formal removal proceedings, but the individual does not have the right to withdraw from inspection and fingerprinting. U.S. officials stated that they were strongly opposed to providing a guaranteed right to withdraw because doing so could allow individuals to "probe for weaknesses" at the preclearance site. According to Canadian officials, they proposed an alternative whereby U.S. Customs and Border Protection would be permitted to search and question individuals who request withdrawal, but not take fingerprints. To address this point of disagreement, Canadian officials stated that they offered U.S. negotiators a compromise position whereby Canadian border authorities would investigate any suspicious person who requests withdrawal. However, U.S. officials told us that this approach was not satisfactory. Officials from both countries noted that the right of withdrawal issue was a major issue during negotiations.
- **Fingerprinting:** According to officials involved, both countries differed on how and when fingerprints could be taken at the preclearance site. Currently, CBP has the authority to fingerprint any individuals who present themselves to CBP officers for admission into the United States, and CBP wanted to maintain this ability at the preclearance site. For example, CBP may fingerprint individuals who cross the border to determine if a person may be a wanted felon. However, according to Canadian officials, in a land preclearance scenario, fingerprints could not be taken unless the individual volunteers or has been charged with a crime. According to Canadian officials, they proposed that CBP would have the ability to take fingerprints only if certain criteria had been met. According to officials involved in the

negotiations, this was not a viable alternative to U.S. negotiators, and this issue was not resolved.

- **Information sharing:** According to officials from both countries, there was disagreement over how information collected by U.S. officials at the land preclearance site could be shared. U.S. officials told us they wanted to maintain the ability to share information collected at the preclearance site with appropriate U.S. law enforcement agencies, which they can do under U.S. law. However, Canadian officials told us that the ability of U.S. authorities to share information collected in Canada would be guided by Canadian laws. As a result, under Canadian law, DHS would not be permitted to share all information collected at the preclearance site with U.S. law enforcement agencies, according to DHS officials.
- **Canadian Charter:** According to DHS officials involved in the negotiations, future interpretations of the Canadian Charter could adversely impact U.S. authorities at the preclearance site. In addition, DHS officials stated that the Canadian Charter, as it has been interpreted by Canadian courts, would limit the use of certain law enforcement tools available to CBP. For example, under U.S. law, CBP officers can search individuals, conveyances, and cargo at the border without a warrant or probable cause. However, according to Canadian officials, under Canadian law, reasonable grounds are needed to conduct searches. According to DHS, these limitations would make it difficult for CBP officers to fully carry out their duties.

Officials from both countries stated that these issues could not be resolved through negotiations because operating a U.S. port of entry in Canada under land preclearance/shared border management would have required the United States to abide by Canadian law—which U.S. officials stated would have limited the ability of U.S. law enforcement personnel to secure the border. DHS wanted to operate the shared border management facility according to the same standards as all other U.S. ports of entry, but to operate in Canada would have meant that those standards could not have been achieved, according to officials from both governments.

According to officials from both countries, the best way to address U.S. concerns related to having a U.S. inspection facility located on Canadian soil would be to conduct what they termed a “land swap.” Under a land swap, the United States would be granted land in Canada to place the inspection facility and Canada would be granted reciprocal land in the United States for placement of its inspection facility. Since the U.S. inspection facility would therefore be technically located on U.S. soil, CBP would be able to conduct its inspections with full U.S. legal authority and could operate the port of entry according to the same standards as all other U.S. ports. However, both U.S. and Canadian officials told us a land swap was never seriously pursued as an option because of the legal and political issues involved. Therefore, officials involved in the negotiations did not believe this was a realistic possibility.

In June 2008, Canadian and U.S. officials told us there are currently no plans to re-open negotiations regarding shared border management at the Peace Bridge site. With the conclusion of the negotiations, the PBA, with the support of DHS, is moving forward with its plans to improve and expand the U.S. inspection facility in Buffalo. According to the PBA, the timeline for beginning construction on the new facility has not been finalized.

We provided a draft of the report to DHS for its review and comment. CBP provided technical comments, which we incorporated as appropriate. We also met with relevant officials within the Canadian Government who confirmed the accuracy of the report and provided technical comments, which we incorporated as appropriate.

We are sending copies of this report to the Secretary of Homeland Security. We will also make copies available to others upon request. In addition, the report will be available at no charge on GAO's Web site at <http://www.gao.gov>.

If you or your staff have any questions concerning this report, please contact me at (202) 512-8777 or by e-mail at Stanar@gao.gov. Contact points for our Office of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in the enclosure.



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Enclosure

Enclosure

GAO Contact and Staff Acknowledgments

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