UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

NORTH CAROLINA GROWERS' ASSOCIATION, INC., *et al.*	)	
Plaintiffs,	)	
v.	)	Case No. 09 CV 411
HILDA L. SOLIS, *et al.*,	)	
Defendants.	)	

AFFIDAVIT
OF LEE WICKER

The affiant, having been duly sworn, affirms and states as follows:

1. My name is Lee Wicker. I am Deputy Director for Plaintiff the North Carolina Growers' Association, Inc. ("NCGA"). NCGA is a non-profit growers' cooperative that consists of 750 farmers from across the state of North Carolina that produce a wide variety of labor-intensive, diversified crops, including Christmas trees. NCGA growers are unique because of their compliance with federal immigration and labor laws, as well as their progressive labor-management practices that include a collective bargaining agreement with the Farm Labor Organizing Committee ("FLOC") union and a grievance/alternative dispute resolution program that covers approximately 7,000 H-2A workers and thousands more U.S. workers. NCGA is the largest H-2A program participant in the nation and has held that distinction for at least the last 15 years.

2

2. On behalf of its farmer-members who employ H-2A workers, NCGA strongly supports the rule issued by then-Secretary of Labor Elaine L. Chao on December 18, 2008, and which became effective January 17, 2009 ("the Chao Final Rule"). NCGA strongly opposes the replacement of the Chao Final Rule with the Solis Final Rule issued May 29, 2009, as well as the withdrawal issued by Secretary Solis on March 26, 2009 ("the Withdrawal"), of the Preamble to the Chao Final Rule as it relates to reimbursement of transportation expenses and the Fair Labor Standards Act ("the Arriaga theory"). Attached as **Exhibit A** to this Declaration is the comment that I drafted for Stan Eury, Executive Director of NCGA, and that we submitted on March 27, 2009, on behalf of the NCGA Board of Directors and its members, to the U.S. Department of Labor ("DOL") in response to Secretary Solis's March 17, 2009 notice of proposed rulemaking ("the Solis NPRM"). I attest, under penalty of perjury, to the statements in Exhibit A that are based on my personal knowledge.

3. I will not restate here everything that is in the NCGA comment referenced above, but for purposes of this action for declaratory and injunctive relief, I would like to emphasize a few points.

4. First, it should be noted that the Southeast region of the United States, which includes North Carolina, has a long growing season, and that most farmers in our part of the country begin land preparation, planting, and in some cases, crop harvesting, very early in the calendar year. Therefore, when former Secretary Chao issued the Chao Final Rule in December 2008, many of our members made plans and other business and financial commitments for the 2009 season, relying on the lower costs of H-2A program

compliance that would apply under the Chao Final Rule, of which labor costs are a significant part. Specifically, our members planned the crops and the amount of land they would farm based on the Chao Final Rule. Most also negotiated contracts for the purchase of their crops based on the Chao Final Rule. Acreage was leased, equipment was repaired, purchased or leased, loans were procured, promissory notes were signed, ground was prepared, fertilizer and chemicals were applied, and seed was planted. Of course, for the year 2009, these are irreversible decisions. They cannot be undone. Farmers cannot "quit farming" in 2009 to cut their losses resulting from the Solis Final Rule.

5. The applicable wage rates for North Carolina under the Chao Final Rule are between $7.25- $8.51 per hour. By my estimate, more than 85% of the H-2A farmworkers in North Carolina will work in areas where the wage specified by the Chao Final Rule is $7.25 per hour. Under the rule that Secretary Solis has issued, however, the applicable wage rate will be $9.34 per hour. This $2.09/hr difference dramatically affects many farmers who executed legally binding contracts and made irrevocable business and financial plans on the assumption that the wage range specified by the Chao Final Rule would apply. I understand that they will not be able to sue the federal government for monetary damages, and of course, they cannot recover their losses from the H-2A workers if the Solis Final Rule is found to have been issued in violation of the law. So, if the court doesn't enjoin the government, these farmers will suffer substantial economic loss with no way to recover it.

6. I have farmed my land in Sanford, North Carolina, for the last 23 years and also work directly with the members of NCGA, who are all farmers as well. Most farms are not large operations, and they operate on very thin margins. The old saying that a farmer is "land rich and cash poor" is definitely true. Due to the economic realities of farming, almost all farmers borrow production capital at the beginning of the season to finance their crops and operational costs until harvest time. Many often pledge their homes, land, and farming equipment as collateral for the loans. If the Solis Final Rule isn't enjoined, farmers will be forced to continue farming in 2009, knowing that they will lose money and may be unable to repay their loans – putting their homes, land, and equipment, they have worked years to acquire, at risk.

7. I would also like to note that it is preposterous to issue in mid-March a proposed regulation that completely rewrites the entire H-2A regulatory regime and provides farmers who use the H-2A program with just a 10-day comment period. This displays either complete ignorance of the realities of farming, or a willful attempt to prevent users of the H-2A program from being able to fully express their views about the impact of the proposal. This is one of the busiest times of the year for farmers, and they cannot be expected to "plow" through, and understand, complex regulations and provide meaningful comments during that short a period.

8. The Withdrawal issue is somewhat complex, and I would like to explain it. H-2A workers, of course, come from other countries, and they incur transportation expenses and other travel-related expenses. (I will refer to all of these expenses collectively as "transportation expenses.") The regulations issued by the DOL have

always said that the H-2A workers' inbound transportation expenses must be reimbursed by the employer when the workers complete 50 percent of the season. (I will refer to this as "the Reimbursement Rule.") The primary objective of the Reimbursement Rule has been to control illegal immigration. In other words, the rule was intended to prevent foreign workers from coming into the United States as H-2A workers, immediately being reimbursed for their inbound transportation expenses, and then "skipping out" on their H-2A employers and staying in the United States illegally. (Essentially obtaining a free trip to the United States on an air conditioned bus with a visa issued by the Department of State.) The Reimbursement Rule clearly states when workers must be reimbursed for inbound transportation. For this reason, farmers employing H-2A workers have, quite reasonably, reimbursed transportation expenses in accordance with the Reimbursement Rule.

9. About seven years ago, a farmworker legal services group sued a Florida farmer who handled reimbursement in accordance with the Reimbursement Rule. The plaintiffs claimed that the farm violated the minimum wage provisions of the Fair Labor Standards Act because the inbound transportation expenses were "primarily for the benefit of the employer" and therefore were considered "deductions" from the workers' wages. The plaintiffs' theory was that, unless the expenses were reimbursed in the first workweek, these were "*de facto* deductions" from wages. If the "deductions" took the plaintiffs below the minimum wage, then the farmers were in violation of the FLSA. In addition, the farmers were liable for breach of their Clearance Orders (the contracts between the farmers and the workers, which set forth the wages to be paid) and for breach of applicable state wage payment statutes.

10. For years, NCGA and other growers' associations, as well as many individual farmers, pleaded with the DOL to provide clarification on this issue, but none was forthcoming. North Carolina Congressman Martin Lancaster first pursued an opinion from DOL in 1994. There were repeated attempts by NCGA and other parties in the years after. Interestingly, Wage and Hour under the DOL Employment Standards Administration never took an enforcement position on this issue in the Clinton or Bush Administration.

11. In 2002, the U.S. Court of Appeals for the Eleventh Circuit affirmed judgment for the plaintiffs in the case of *Arriaga v. Florida Pacific Farms, LLC*. Since that decision, every federal court of which I am aware that has been faced with the issue has followed *Arriaga*. NCGA and its members were defendants in one "*Arriaga*" lawsuit, and the plaintiffs won summary judgment. Considering that the only guidance for farmers was in the DOL Rule (saying that these expenses did not have to be reimbursed until the 50 percent point of the season), these court decisions seemed to us to be "*ex post facto*" and eminently unjust.

12. When the Chao Rule was published in 2008, farmers and growers' associations believed that we were finally at the end of the years of legal uncertainty, unplanned-for back pay liability, and substantial legal fees. The Chao Rule takes the position that inbound transportation expenses are not "primarily for the benefit of the employer" and therefore that farmers may lawfully wait until the worker has completed 50 percent of the season to reimburse these expenses.

13. Then, on March 26, 2009, Secretary Solis issued the Withdrawal, which would have the effect of reinstating the *Arriaga* theory. In other words, farmers will now have to reimburse H-2A workers inbound transportation expenses when paying them for their first workweek, regardless of whether the H-2A workers will stay on the job or not. This increases the incentive for unscrupulous H-2A workers to violate the terms of their visas by leaving the farms quickly and going to work elsewhere in the United States illegally. The value of the transportation expenses is approximately $500 per worker. Once reimbursed, the farmer will never be able to recover the amount – either from the government or from the worker.

14. Moreover, in issuing the Withdrawal mid-season, Secretary Solis again seems to have no concept of the realities of farming. The Clearance Orders, in accordance with the Chao Rule, specifically provide that inbound transportation expenses will not be reimbursed until the 50 percent point of the season. The Clearance Orders have been approved by the DOL and have been accepted and executed by the farmers and the H-2A workers. Now that it is June, many H-2A workers have already completed their first workweeks without being reimbursed. So, now what happens to the farmers? Are they in violation of the law because the *Arriaga* rule is now in place, even though they were in compliance with the law when they executed and applied their Clearance Orders? Are they excused "just this once" because the Withdrawal was not issued until after the Clearance Orders were already executed and the first workweek already completed? If the *Arriaga* rule does apply retroactively in 2009, do the farmers get a "grace period" in which to reimburse the transportation expenses? If farmers will be retroactively liable for violating *Arriaga*, should the DOL also be retroactively liable for having approved

"illegal" Clearance Orders that farmers relied upon? I do not know the answers to these questions, but I do know that our farmers will suffer irreparable harm if the *Arriaga* rule applies retroactively to Clearance Orders entered into between January 17 and March 26, 2009.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

This the 4th day of June, 2009.

Lee Wicker

SWORN TO AND SUBSCRIBED BY ME
This the 4th day of June, 2009

Barbara Coe
Notary Public
My Commission Expires: 8/05/2011

NCGA NORTH CAROLINA GROWERS ASSOCIATION INC.

March 27, 2009

Mr. Thomas Dowd
Administrator
Office of Policy Development and Research
Employment and Training Administration
United States Department of Labor
Room N-5641
200 Constitution Avenue, NW
Washington, DC 20210

RE: Public Comment on the Impact of Suspending the Bush Administration H-2A Rule on Program Participants – RIN 1205-AB55

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Dear Mr. Dowd:

The North Carolina Growers Association (NCGA) is writing to submit comments for the public record regarding the proposed U.S. Department of Labor (DOL or Department) regulatory action published in the Federal Register on Tuesday, March 17, 2009, to suspend the H-2A Program Final Rule that went into effect on January, 17, 2009.

NCGA is a non-profit growers' cooperative that consists of 750 farmers from across the state of North Carolina that produce a wide variety of labor intensive diversified crops. NCGA growers are unique because of their compliance with federal immigration and labor laws, as well as their

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progressive labor management practices that include a collective bargaining agreement with the Farm Labor Organizing Committee (FLOC) union and a grievance/alternative dispute resolution program that covers 7000 foreign H-2A workers and thousands more US workers. NCGA is the largest H-2A program participant in the nation and has held that distinction for at least the last 15 years.

At the outset it should be noted that NCGA strongly opposes the substance of the Department's proposal to suspend the H-2A Final regulations and objects to the process by which the Department is pursuing this regulatory change, including the extremely condensed 10 day time frame that has been established for public comment. The Department's proposal appears to be nothing more than a Notice of Proposed Rulemaking (NPRM) couched in different terms (a suspension of rules) in an attempt to avoid complying with the requirements of the Administrative Procedure Act, which governs the process for federal rulemaking.

First of all, the truncated 10-day comment period is an unreasonable time in which to expect the public to be able to evaluate and comment on the substance and implications of the Department's proposal. Growers throughout the country, who are the vast majority of the regulated public affected by this proposal, are fully engaged in the production of crops to feed this nation and simply do not have sufficient time to stop what they are doing at this critical juncture in the peak of spring preparation, planting, and in some cases harvesting, to adequately and comprehensively address this devastating and destabilizing proposal that was sprung on the regulated community with absolutely no advance warning or notice. By contrast, the rules currently in effect included an NPRM by the prior Administration that was preceded by more than 6 months of review and notice to the regulated community, beginning with an announcement from the White House in August of 2007, that the Department was undertaking a review of the H-2A program.

Given the complexity and wide-ranging implications of the Obama Administration's H-2A proposal, we are asking the Department to extend the comment period in this rulemaking for at least 60 more days. Even after the six months of advance notice to the public that the Department was preparing the February 13, 2008 NPRM, the Department initially provided the

public with 45-day comment period. President Barack Obama, who was then a U.S. Senator, then requested the Department extend that comment period for 90 days, and the Department ultimately provided a total of 60 days for public comment. The Obama Labor Department has provided no reasonable – let alone compelling – explanation for why a 10-day comment period is appropriate in this rulemaking when the now-President of the United States of America believed a similar rulemaking on the H-2A program just one year ago required a comment period of at least 90 days.

In addition, given the unprecedented nature of this proposal to reverse regulations already in effect and promulgated after more than a year and a half of development and public comment (and compliance with the APA), as well as the complexity and wide-ranging implications such a reversal would have on growers, the Department should, before making any Final decision on the proposal, hold several public hearings in locations around the U.S. convenient to users of the H-2A program in order to more fully explain the Department's proposal and hear directly from stakeholders about the effect the Department's proposal would have on their operations and agricultural production.

Furthermore, in the Federal Register notice, the Department specifically notes that it will not consider comments on the merits or substance of the Final rule issued on December 18, 2008, nor the old rules that the Department proposes to reinstate. It defies logic and fairness that a government agency would propose, with virtually no notice, to upend the settled expectations of H-2A program users by cancelling hundreds of pages of an existing regulatory regime and replace it with hundreds more pages describing a completely different regime and not accept public comment on even one sentence of any of those regulations. NCGA, as the largest H-2A user in the United States, has numerous comments it would like to offer on both the current regulations, as well as the prior regulations, if the Department is considering making changes to the H-2A program. We strongly object to the Department's attempt to adopt new regulations without taking public comment on the very regulations proposed to be adopted. Accordingly, we request that the Department amend this rulemaking to accept comments on the substance of regulations the Department is considering adopting. Indeed, a central purpose of the

Administrative Procedure Act is to give the public an opportunity to provide input on the regulations an agency seeks to adopt. The Department has not provided any rationale for why it is abandoning normal rulemaking procedures and refusing to accept comments on the regulations it proposes to adopt.

The Department apparently seeks comment only on whether or not it should suspend the current rules and replace them with the old rules. The Department's claimed justification and explanation for pursuing this proposed suspension of the H-2A regulations, however, lacks sufficient crucial details and analysis necessary for stakeholders to fully evaluate the proposal. The Department's proposal repeatedly asserts broad conclusions about the impact of the current regulations without one iota of supporting data, facts, or analysis that can be evaluated by stakeholders. Moreover, the unreasonably short comment period does not allow stakeholders enough time to fully evaluate the allegations and conclusory statements the Department has provided.

While DOL argues that the Department and State Workforce Agencies (SWA's) lack sufficient resources to effectively and efficiently implement the new H-2A rules, DOL has not cited any specific funding levels or explained what resources it needs. Without that relevant data, the public is unable to judge the merits of the Department's proposal. Moreover, there is ample evidence contradicting the Department's allegation that it lacks sufficient resources. According to the Office of Management and Budget (OMB), the Department's discretionary budget in Fiscal Year 2009 is more than $17.5 billion – nearly a 50% increase over Fiscal Year 2008 levels of $11.8 billion, and the President's budget for Fiscal Year 2010 includes even further increases for DOL. The DOL Office that carries out labor certifications, including processing H-2A applications has also seen huge funding increases this year that appear to be nearly 25% greater than Fiscal Year 2008 funding levels, according to publicly available data. It simply defies logic for the Department to claim as a reason for suspending the H-2A rules that it lacks sufficient resources when it provides no funding information and all available data shows the Department receiving huge funding increases.

SWA's receive grant funding from DOL pursuant to the Workforce Investment Act and Wagner-Peyser Act to carry out administrative responsibilities, including those under the H-2A program, and, on balance, compared with last year under the old H-2A rules, the SWA responsibilities have been reduced under the new rules while funding remains essentially constant or has even increased. In addition, new DOL grant agreements with the states were issued late in 2008 and at that time each state knew what its responsibilities would be under the new H-2A program rules, including verifying the work eligibility of workers referred to H-2A job orders. Each state that accepted a grant agreed to conduct the required H-2A administrative activities, as they had agreed in prior years. The fact that states may not like to perform every activity that is required by law (or pursuant to a grant agreement), or may claim that the cost of their work load exceeds the amount of grant money DOL provides is not a new development, nor a sufficient basis upon which to suspend the current rule. States have made similar complaints about requirements, work load, and funding for years, including under the old rules where their responsibilities were greater than they are under the new regulations.

Furthermore, although DOL claims a lack of funding for the H-2A program is a problem, it fails to explain how it can afford to engage in the present suspension rulemaking, including preparing a proposal, evaluating comments, and issuing a Final rule presumably returning us to the old H-2A regime, which will require even more effort and costs by the SWAs than are required under the new rules. In addition, as described in the Notice of Proposed Suspension, the Department apparently plans to turn around and conduct yet another full-blown H-2A rulemaking this year, which given the size of last year's rulemaking would surely be a lengthy, expensive and staff intensive effort. The Department also failed to consider any alternatives to suspending the current regulations as a means to compensate for alleged funding deficiencies, such as asking Congress to redirect the H-2A application fees for the Department's use rather than depositing them in the U.S. Treasury. If sufficient funding is truly a concern - and it appears that it is not – then the most prudent course would be for the Department to maintain the status quo and administer the new regulations, since it appears to be less costly than returning to the old regulations.

DOL asserts that delays in processing have occurred under the new regulations and will increase as the season progresses. DOL has failed to cite any specific evidence supporting this allegation. Statements from program participants and an informal survey of SWA staff suggest to us that application delays are not a problem under the new rules. On the contrary, the old rules that the Department proposes to reinstitute frequently caused extensive delays and returning to those regulations and processes would adversely affect program users. NCGA suffered innumerable lengthy delays each year with its applications under the old rules. Indeed, the problems with delays under the old rules were well know by the Department and repeatedly cited by the Department as a reason for reforming the old regulations. NCGA, for example, made the transition to the new rule without interruption or delay. In fact, NCGA has filed nearly 66% of CY2009 applications. To date, certifications have been issued on time or have only been late by a day or two at the most. The new process is a marked improvement over the process we endured with the old regulations and we appreciate that the Department is, under the new rules, finally utilizing a process that enables it to comply with the statutory requirement to ensure a timely adjudication.

DOL states that it has been unable to implement the sequence of operational events required to avoid confusion and application processing delays, but provides no description of what these "operational events" are. The Department discusses the failure to implement an automated review system and says that is requiring it to conduct manual reviews of applications and imposing a significant strain and processing delays. This argument is contrived as the H-2A program has never had an automated review system and none was promised under the new rule. In fact, in the preamble to the December 18, 2008 Final rule, the Department specifically stated that it would not be establishing an electronic system at this time, but hoped to do so at some point in the future. Program users were not expecting an automated review system, the Department did not promise an automated review system and the lack of such as a system is not adversely affecting operation of the H-2A program for program users. In fact, processing under the new rules has improved. This is no doubt due in part to the removal of the duplicative SWA review of applications and the reformed application process that includes an attestation element to speed processing. This attestation based application system is exactly what those who have

asked the Department to suspend this rule (as well as the Secretary of Labor herself) have long advocated and supported as part of federal legislation (AgJobs) reforming the H-2A program. As another reason for suspending the rules, DOL cites an inability to conduct training for Federal program staff, SWA staff, and program users. This is intentionally misleading and factually untrue. The Department held training sessions for users and staff in Atlanta and Denver last December after adequate notice and before the new rules went into effect. Program staff in Chicago held numerous training sessions and conference calls to train their adjudicators and state program administrators on the new H-2A rules. The DOL Federal program staff designed the new regulations, so it is not clear what further training they would require.

The Department fails to acknowledge that extensive training has already taken place and fails to explain what other training is required for staff and program users and why such training could not be provided. We also understand from SWA staff that the Department had even scheduled additional training for SWAs, but suddenly and without explanation cancelled that training. As part of the Department's extensive training efforts to date, it had an informative and easy to understand powerpoint program and other guidance posted on its website to help users comply with and understand the program. The Department also set up an email box to encourage questions from users and provide guidance. One of the most egregious recent actions by the Department was the sudden removal from the DOL website of the powerpoint presentation and other guidance material that had been developed by the Department for the benefit of the regulated community. This material had been posted and maintained during the current Administration, but now is inaccessible. The Department has also disabled an email inbox that had been utilized by program users for months to send questions to DOL.

It is disingenuous, at best, for the Department to clam it has been unable conduct training for program users, SWA, and DOL staff when DOL plainly has conducted such training and provided guidance. Furthermore, the Department cannot now cancel further training, attempt to remove all evidence of prior guidance and claim it never existed, as a rationale for suspending the current regulations. Any of these alleged problems could be easily and quickly remedied by the Department. The Department cannot neglect its administration of the rule and then credibly

argue that the rule isn't working and there is widespread confusion when it is itself sowing the seeds of confusion and disruption. Such behavior reminds one of the story of the child who murders his parents and then throws himself on the mercy of the court as an orphan.

DOL states that it believes it has a responsibility to employers, workers, SWA's and the public to ensure the regulatory regime "has a sound basis" and is capable of effective implementation. The Department has already articulated a sound basis for the current regulations in the preamble to the Final rule. That sound basis was developed over nearly a year and half, with extensive public comment, and included in a rule that was promulgated in compliance with the APA. The Department cannot now reverse the prior regulations and their previously articulated sound basis without a well reasoned analysis as part of a rulemaking in compliance with the APA. The Department has not done that in this case. In addition, the federal court hearing the challenge to the H-2A Final regulations has not found the basis for the new rules to be lacking.

The Department maintains that suspending the new regulation and reinstating the prior regulation allows an examination of the new rule while maintaining the "previous status quo." That statement is illogical and borders on nonsense. The status quo is what exists presently. Suspension of the current regulations results in a substantive change in rights, liabilities, responsibilities, and remedies for employers and workers under the program and that is not maintaining the status quo.

DOL claims it has increasing evidence that implementing the new regulatory program before an additional examination of relevant legal and economic concerns is unnecessarily disruptive and confusing to DOL's administration of the H-2A program, SWA's, agricultural employers, domestic and foreign workers and suggests it is important to avoid disruption in light of severe economic conditions. First of all, the Department seems to be implying that it has not implemented the Final rule. The new rule became effective on January 17 and DOL is compelled to administer the regulations, as they are presently the law of the land. If the Department seeks to revise or change its administration of the program then it must make those changes in compliance with the APA.

The Department has failed to describe just what evidence it possesses on this point or what type of disruption or confusion it is concerned about. Without any discussion of those elements by DOL it is not possible for the pubic to evaluate the Department's position or proposed actions, nor judge the quality and quantity of the Department's alleged evidence supporting its position. DOL has also failed to consider or acknowledge the disruption and confusion that would result from its proposal to suspend the current regulations. Similarly, DOL has also failed to consider, acknowledge or quantify the disruption and confusion that would result from reinstating old regulations after program users have made extensive business decisions based on the new regulations. Moreover, the new users of the program who have been attracted to it by the reformed regulations have no familiarity with the old regulatory regime. In that case, the Department's proposal would cause massive confusion and disruption.

There is zero analysis of the specific legal and economic concerns the Department is referring to or how and to what extent those concerns are impacted by the claimed disruption and confusion. Without more detail about those specific issues, it is not possible for us to adequately evaluate the Department's proposal. By contrast, the Department, in promulgating the Final rule in 2008 included considerable discussion about the confusion and uncertainty caused by the old rules and addressed those concerns in the preamble. It is clear from our experience as the largest user of the H-2A program in the United States that utilizing the current H-2A program to secure legal seasonal workers is more logical, predictable, reliable, and less disruptive than the old H-2A regulations the Department proposes to reinstate.

One relevant legal and economic concern resulting from the Department's action that it has ignored relates to a SWA's legal obligation to conduct employment eligibility verification on all workers it refers pursuant to agricultural job orders. The H-2A rule contained important clarifications for SWAs and H-2A users relating to this issue. By suspending the H-2A Final rule and the clarification on eligibility verification, DOL is unnecessarily creating potential confusion among SWAs about their obligations. That confusion could lead some SWAs to stop conducting the employment eligibility verification they are legally required to perform and that

will result in increased costs and burdens for employers, including forcing employers to expend additional time and effort screening referred illegal workers from the applicant pool when that activity could have been more efficiently performed by the SWA. In addition, if SWAs stop conducting employment verification that decision will almost certainly result in SWAs expending state and federal tax money to refer illegal workers to jobs that U.S. workers should be able to apply for. DOL has not explained how its action and the expenditure of public money for the benefit of illegal aliens would help U.S. workers, employers or the U.S. economy.

The Department states that the development of the new regulations was based on policy decisions of the prior Administration, which may differ from the current Administration and the Department may wish to reconsider those decisions in light of rising unemployment of U.S. workers, their availability, and economic problems of the country. DOL, however, failed to describe how any of these factors affect or are affected by the new rules. The rate of unemployment is irrelevant to DOL's responsibility under the statute. The new rules have U.S. worker protections and hiring preferences as required by the statute. Therefore, H-2A program users are required to hire U.S. workers before hiring foreign workers, as well as guarantee under a strong penalty structure to hire any qualified U.S. worker through the first 30 days of the employment period. Therefore, any unemployed and qualified American worker is protected in their ability to secure one of these farm jobs.

While it may be reasonable to assume that as the unemployment rate rises, more U.S. workers will apply for these jobs, this is not necessarily the case. The numbers of U.S. workers applying for the temporary farm jobs are not as high as one might think, apparently due in part to severance pay, the unemployment insurance program, and the 54 week extension of UI benefits provided under the economic recovery and stimulus package enacted by the Congress and signed into law by President Obama. It has long been true that most unemployed Americans will accept a temporary farm job only after exhausting all their benefits and other employment options.

The Administration seems to be concerned about use of the H-2A program amid rising unemployment rates of U.S. workers, but as discussed above, H-2A workers do not compete with

U.S. workers for specific jobs because U.S. workers have the first opportunity to take that job. It is interesting to note, however, that on March 19, 2009 several media stories reported on President Obama's support for legalizing all the people who are currently in the country illegally. It has been estimated that there are 10 - 15 million illegal aliens present in the U.S. Of course, legalizing all of those people would suddenly add huge numbers of "U.S." workers to several industries, presumably including agriculture. But the Department in this proposal fails to explain how the Administration's support for legalization of illegal aliens would not detrimentally affect all the U.S. workers currently out of work and who the Department seems to imply could take a farm job instead of an H-2A worker taking the job. Millions of formerly illegal workers who suddenly become new "U.S." workers would certainly have more of an effect on those unemployed U.S. workers because they would be on equal legal footing to compete for the jobs. By contrast, H-2A workers only get a chance at a job when U.S. workers aren't available to take it.

The Obama Administration very well may wish to change certain policies of the prior Administration, but when it comes to changing federal rules there is a well established and legally required process the Administration must follow to effectuate those policy differences. The course the Department is following with this proposed suspension violates that well established and legally required process. Furthermore, the Department's actions here are a dangerous precedent. Under the new rulemaking process the Department is using to pursue this action, any agency could suspend any rule for as long as they wanted with virtually no advance notice or supporting data, and prevent meaningful public comment, just because the agency decides one day to change its mind about what rules it would like to see in effect.

Any reconsideration of the H-2A regulatory scheme must be done through notice and comment in compliance with the APA. The Department's proposed suspension will cause chaos throughout the regulated community. The APA lays out a consistent and predictable process in order to avoid exactly this type of whipsawing of the regulated community when an agency wishes to change its policy. If DOL's approach under this initiative was followed in every

rulemaking, the regulated community would be thrown into perpetual chaos and our government would be more dysfunctional than it is at present.

It would be difficult to imagine a more arbitrary and capricious action by an agency than a mere 10 days notice that does not permit comment on the substance of an impending 180 degree turn on an extensive regulatory regime that governs the NCGA's entire reason for being. The far-reaching impact of this monumental change on our small family farmers is too great to effectively quantify in the short comment period provided. To say such a change would result in confusion and disruption would be a huge understatement.

For instance, NCGA, like many growers across the country, has already contracted with over a thousand workers under the current regulatory scheme and plans to contract with many thousand more in the next few months. If DOL changes the rules in mid season there will be scores of growers with different groups of workers working side by side on the farm this season under at least two or even three distinct and vastly different regulatory schemes governing wages, benefits, recruitment, protections, penalties, record keeping, enforcement and processes. Trying to keep track of which rules apply to which workers will be virtually impossible. DOL provides no explanation about how growers would be expected to keep the differing standards straight or what the Department's enforcement procedure would be in the midst of all this confusion.

DOL asserts that the new rule would not be an efficient use of limited agency resources and it would be confusing and disruptive to program users to engage in steps necessary to make the current rule operational if the Department were then to soon after issue a different rule. As part of DOL's rationale it again implies that the current rule is not"operational." In fact, the new rule is operational and has been for more than two months and is working just as the Department stated it would in the Final regulation (with the exception of DOL suddenly refusing to provide guidance).

There is no added confusion or disruption caused by administering the law as it exists. In addition, the Department fails to explain how it could possibly be a more efficient use of limited

agency resources, as well as less confusing and disruptive, to replace the current rules with the old rules and then later in the year promulgate an entirely new set of H-2A rules, as it says it intends to do. The Department's proposed action is completely illogical and incompatible with the rationale for the action. Although the NCGA is content to operate under the H-2A regulations as they presently exist, if the Department is intent on proposing changes to the program, it would undoubtedly be more efficient, less confusing and less disruptive to follow proper APA procedure and put forward just one proposal than it would be to go through the proposed suspension of one set of rules and establishment of another set that would then later be replaced by a third version later this year. Spending resources on writing a new rule to replace the existing Final rule would be a waste of resources at a time when our government is drowning in red ink. This is, by far, the most inefficient, confusing, and disruptive idea in the history of DOL, and that is saying a lot.

The Department maintains that suspending the rule would prevent all parties from having to incur costs of learning, filing, implementing, and operating under a new program that will likely be subject to further changes. This is yet another straw man argument. Program users have already made the transition as we have described in the preceding paragraphs. And there are extensive costs associated with abandoning the current regulations and reinstating the old regulations. The Department failed to include any discussion of these costs or their impact on program users, including the entities that have no familiarity with the old rules.

DOL states that a 10-day comment period is necessary due to the time constraints and concerns inherent in the administration of the program and in the use of the program by the agricultural community. DOL also asserts that the new rules have been in effect already for 6 weeks (in reality it has been 8 weeks) and time is of the essence as new applications are currently being filed. This justification is wholly insufficient for the proposed action. It is also laughable considering many organizations that oppose the current rules (and presumably support the Department's present proposal) asked for an extension of the 60 day comment period on the H-2A NPRM issued in February 2008 that led to promulgation of the current Final rules. Ten days is simply not enough time for growers to gather all the relevant data and analysis, economic and

otherwise, necessary for the Department to consider in its deliberations. The new applications are being filed legally and in compliance with the new regulations enacted after lawful notice and a 60 day public comment period. Changing the rules midseason only to change them again later (as DOL has suggested that it will do) will result in confusion, inefficiency, and delay that will inevitably cost incalculable sums as workers lose jobs, and growers lose crops, profits and potentially farms.

DOL argues that a longer comment period stretches the uncertainty over the applicable rules further into the upcoming season. This is outrageous. This season is not up coming. It is here. It has already begun. The only uncertainty is what has been created by this DOL. DOL need only provide growers with guidance on small issues not covered by the extensive new rules as the Department said it would do in the preamble to the Final regulations. It is breathtaking to see a federal government agency in the most democratic nation on earth claim that it can't allow reasonable public input on a regulatory proposal because that may cause "uncertainty." There is a real problem – larger than the administration of the H-2A program - when the U.S. government starts defending its actions by spouting the same rationale we hear from dictators and communist regimes. Apparently the Department, and this Administration, could use some history and civics lessons. For starters, you should know that public participation is the essence, indeed the very foundation, of a democratic government.

The Department declares that growers require clear and consistent guidance on the rules. This is disingenuous on the part of the DOL. The Department is not precluded or prohibited in any way from issuing guidance on the new rule. To the contrary, DOL has a duty to do so. DOL is needlessly promoting confusion by failing to provide the guidance it promised in the preamble. DOL staff that assisted in writing the new rule knows very well what the rule states and what is required for program users to comply. DOL just needs to answer grower's questions when they arise. For the record, it should be noted that DOL went silent on any guidance after the inauguration on January 20, 2009. The information, email box, and telephone calls from DOL have ceased. If you don't believe it, call the telephone number listed for William Carlson 202/693-3010, Administrator for the Office for Foreign Labor Certification, and tell the secretary

who answers you are a grower that needs to ask a question about the H-2A program. They will put you on hold and leave you to rot. Mr. Carlson also will not return calls when messages are left. Believe it or not, even the Internal Revenue Service has better customer service than DOL. Never, in the twenty year history of NCGA's participation in the H-2A program have we experienced anything like this. In fact, a career employee with decades of experience at the Department (and who obviously fears retribution and wants to remain anonymous) has stated to us privately that this Administration is the most secretive and controlling of any they have seen.

The Department argues that it is mandated by the enabling statute to ensure that H-2A applications are processed under an expedited timeframe and the Department's ability to meet the statutory requirement is undermined by uncertainties and technical deficiencies in administering the program. DOL fails to explain what these uncertainties and deficiencies are and thus we cannot evaluate or comment whether the new regulations or the old regulations are best at addressing the concern. But we can definitely say as the nation's largest user of the H-2A program that any alleged "uncertainties and technical deficiencies" are less significant than the uncertainties, deficiencies and problems with the old H-2A regulations. As for processing, in our experience submitting applications for thousands of workers, the Department's processing under the current H-2A regulations is much more efficient, predictable and timely than under the old regulations.

The Department states that confusion or delay in administration of the program will result in disruption of agricultural production, sales, and market conditions in areas served by H-2A workers, which could have further deleterious effects on an already unstable economic environment. This is another unsupported conclusion for which DOL provides zero details or evidence about specific effects on market conditions that can be measured or evaluated by the public. Again, with the unreasonable comment period and lack of advance notice, there is insufficient time for growers to gather and present all the relevant data and analysis, economic and otherwise, demonstrating the harm of this proposed suspension. The Department's failure to include any supporting factual data for their position makes it even more difficult to respond with data that might contradict, challenge, or inform the Department's position. It is clear,

however, and well settled among economists that for every farmworker employed there are 3-4 supporting jobs in the broader economy. It is also clear that given the uncertainty created by this proposed suspension some growers will avoid and/or abandon the H-2A program and certain low value, high labor cost crops like pickle cucumbers. Obviously, that will put U.S. workers in supporting jobs out of work. This destabilizing effect is not what is needed in the current economic environment and is further evidence that the Department's actions would bring about the very harm it purportedly is trying to remedy.

It is obvious that what DOL is proposing will have an adverse effect on growers who have already made plans, personnel decisions, budgeted production, borrowed operating capital, and signed commodity production contracts, all based on the new Final rule. Banks have lent capital based on these budget projections. In some cases, growers financial health is so marginal banks would not have lent the money based on budgets under the old rules in the current credit crunch. Again, as stated above, there is no evidence presented by the Department about delays in processing applications or administration of the program, and there certainly is no evidence presented that application processing has resulted or will result in disruption of production, sales, or markets. On the other hand, proceeding with the plan to suspend the current rules and replace them with outdated rules will certainly result in disruption of production, sales, or markets for all the reasons previously mentioned, including forcing growers out of the H-2A program altogether, forcing them to reduce and/or change crops, and increasing labor uncertainty and compliance costs resulting from having to conform business practices to a new regime in mid-season and on short notice.

The current H-2A rules finally addressed many problems with the program to make it more reflective of the modern agricultural industry. The old rules were written more than 20 years ago and basically continued a program that had been operating for decades before that. Farming and agricultural production in the U.S. has, just like the rest of the economy, undergone profound changes in the last two decades. The prior public comments on the NPRM last year reflected that fact and the new H-2A rules include several important improvements to modernize the

program. It is hard to envision a more disruptive effect on H-2A growers than to return to an outdated regulatory regime designed for a different era.

The Department states that it is imperative that the regulations and positions taken in the preamble be reviewed to ensure they effectively carry out the statutory objectives of the program. DOL goes on to say there is a compelling need to undertake a review as soon as possible so any changes in the Final rule can be implemented in time to avoid jeopardizing program use by stakeholders and workers. A review of the new regulations and prior policy decisions does not require a suspension of the new Final rule. The entire U.S. economy would be thrown into chaos if every agency of government followed this same approach when undertaking a rulemaking. If the Department is truly concerned about jeopardizing program use by stakeholders and workers it makes no sense that the Department would propose an action that would have the very result of it purportedly wants to prevent. As we have discussed elsewhere in these comments, the suspension of the current regulations and return to the old regulations will result in dramatic negative effects on program users and the broader economy. Although NCGA has used the H-2A program for twenty years, there are numerous farms that are using the program for the first time this year to hire legal foreign workers after the new regulations finally created a more workable and navigable program. DOL's reinstatement of the old program will certainly jeopardize program use by those farmers and the workers on that farm.

DOL states that it is also imperative during the time of review, that the Department, SWA's, workers and employers experience minimal disruption as to how applications are processed, and the terms and conditions that apply. This argument is plainly wrong. It is this proposed suspension of the new rule in midseason by DOL that will cause massive disruption and confusion over how applications are processed, and the terms and conditions that apply. If the suspension goes into effect, busy growers will undoubtedly file applications under the new rule based on what they had learned, planned and prepared for after a year-and-a- half process reforming the program. The DOL National Processing Center will then undoubtedly reject the applications and ask for modification because of confusion over applicable rules, and that will

begin a devastating domino effect that will ultimately cause workers to be late and crops and profits to be lost.

As noted previously, the current rule is not producing confusion resulting in significant delays affecting production, and the program operates much better now than under the old rules. The Department's proposal will result in confusion, disruption and significant delays. We frequently experienced that result under the old rules DOL now wants to reinstate. DOL's proposal will result in workers arriving late and, critical and time sensitive work activities will go undone. Some production activities cannot wait when growing labor intensive agricultural commodities. The window of opportunity is often very narrow for planting, cultivating and harvesting. This action by DOL will directly lead to lower yields with no reduction in input costs, missed market maximization opportunities, crop loss in whole or in part, all of which can be devastating given the marginal profits growers earn. Growers will never be made whole because these damages can never be recaptured. Furthermore, grower's market share and future production contracts with their customers will be jeopardized because of the farmer's failure to meet their contractual obligations in 2009, as a result, in large part, of DOL's unilateral action. The Department's irresponsible behavior and cavalier attitude about the law governing rulemaking as well as the impact of this proposal on the regulated public not only jeopardizes jobs and stability on the farms this season, but well into the future. The Department's proposed action undermines the very rationale it cites in support of that action.

The Department's proposal to suspend the current regulations and reinstate the old regulations raises a whole host of other issues and results in substantial harm to the regulated community that the Department has not fully considered or explained. For example, reverting to the old regulations results in loggers being thrown back into the H-2B program which has a cap that limits the availability of visas. This will have a detrimental effect on logging operations in the U.S. Many employers each year who are unable to find sufficient numbers of U.S. workers are also shut out of the H-2B program because of the visa cap. For that reason and several others, as described in the preamble to the Final rule, the Department moved loggers to H-2A. If they are now moved back to H-2B, many logging employers will likely be unable to apply for workers

under that program because they have missed the application dates to have a chance – just a chance – at getting an H-2B visa. This could presumably affect the availability of wood for saw mills that will no doubt hurt the construction industry that is already on the brink of disaster. This will result in even more lost jobs for American workers. The Final rule also included important clarifications for Christmas Tree producers relating to the applicability of the Fair Labor Standards Act (FLSA) and their agricultural production. Removing that clarification and certainty by suspending the H-2A Final rules and reverting to the old H-2A rules could reinstate the uncertainty regarding those FLSA issues in many parts of the country. By suspending the current rules and reinstating the old rules the Department also seems to be rejecting its rationale for prohibiting the charging of recruitment fees to workers. After program users have adjusted their business model and practices to account for this new mandate, established contracts with agents, and in many cases expended tens of thousands of dollars, they will no longer be bound to follow this costly program requirement. But, prices for services have already been established and contracts with agents have already been finalized for the year based on the current program requirements. So now if the Department will require less of program users with regard to recruitment fees, that could result in lower costs for program users. But, program users are in many cases likely already locked into more costly compensation agreement with agents pursuant to the requirements of the Final rule. There is no logical reason for program users to expend more money than is required by law, but they now have private contracts requiring them to do just that if the Department proceeds with this action. The Department has failed to consider, analyze and explain the destabilizing effect and economic impact on employers, workers, small businesses and the economy as a result of all of these proposed changes.

In addition, the Department has not complied with the Paperwork Reduction Act by not providing the public with an opportunity to comment on the application form that will be in use following a suspension of the Final rule and reinstatement of the old rules. New forms were issued as part of the H-2A Final rule and suspension of that rule also suspends the forms that were redesigned as part of the rule. This is yet another example of the confusion and disruption the Department is actually causing, rather than allegedly alleviating, through this regulatory action. The Department cannot reinstate the old forms used in the H-2A program because they

are no longer approved by the Office of Management and Budget and the Department knows this. Is the Department intentionally laying the groundwork to destroy the H-2A program through a veiled, backdoor and malicious rulemaking process? Again, as with the rest of the substance of the regulations governing the H-2A program, the NCGA would like an opportunity to comment on specific provisions (and even forms) as part of the Department's proposal to change the applicable H-2A regulations. But according to the terms set by the Department in the Notice, any comments on these subjects will not be considered by the Department. This is unbelievable.

DOL undertook the lengthy rulemaking process to modernize the H-2A program in 2008 to make the program workable in response to unanimous agreement from growers and farmworker advocates that the H-2A program was badly broken. The Department did a good job addressing the statutory requirements of the enabling law to protect U.S. workers wages and working conditions from adverse effects and providing agricultural employers access to a workable program that offers them the opportunity to hire legal farmworkers and comply with labor and immigration laws. It is widely known that agricultural employers are among the most heavily regulated employers and that H-2A program participants have even more government scrutiny and oversight. We are extremely proud of the grower members of NCGA for leading the nation in progressive labor management practices and their high levels of compliance with immigration and labor laws.

The Department's current proposal will undermine the NPRM's stated objective of correcting the structural problems that made the H-2A unworkable and discouraged growers from participating in it. In fact, the current proposal could very well force many growers to continue or return to the untenable practice of hiring illegal workers because of the economic advantages that breaking the law will yield. It is well settled among growers and advocates, and the Department has repeatedly acknowledged, that more than 70%+ of seasonal agricultural workers are currently present in the U.S. in unlawful status. This is unacceptable for a number of reasons including, but not limited to, safe passage for workers, protection from smugglers and thugs, the full protection of laws that comes with workers not hiding in the shadows in fear, government

oversight, fair play, level playing field for growers, food safety and traceability, and food supply and security, all of which is intertwined with national security issues, and more.

The proposal to suspend the Final rule also adds another layer of pressure, uncertainty and additional burdens on growers on top of producing agricultural commodities in volatile and depressed markets. Growers have to deal with unpredictable weather, disease pressures, pests, markets, supply chains, input costs, and Federal regulation that is now, as a result of DOL's proposed actions, going to be highly confusing and disruptive to production and certainly more so than under the current rules. How much more can the farmers take? It is not surprising young Americans are leaving the farm as rapidly as possible. Do you blame them? And yet, every living human being on this planet needs the nourishment that farmers and farmworkers provide. It is a natural law that cannot be broken. Social scientists predict that global populations will soar in coming decades and with it the need for similar increases in life sustaining food.

American farmers are the most productive in the world, but it is a difficult and trying enterprise. Why do growers endure the overwhelming hardships? It is most certainly for their love of watching things grow and the land. With all the challenges and difficulties already involved in farming, the Federal government seems intent on making it worse with this proposal. It is abundantly clear that U.S. growers compete in a world market with producers in other countries that do not strain under the overwhelming burden of multi layered and complex legal and regulatory frameworks. This competition is unfair and there is little our farmers can do about it. But, our government can help farmers and this nation by promoting policies that ensure programs like H-2A contain commonsense requirements that respond to the needs of the modern agricultural economy. One thing is certain, Doctors and nutritionists exhort all the time that everyone needs to add more wholesome and nutritious fruits and vegetables to our diets. The most pressing question is where will the food come from? When the Administration pursues unwise policies like this proposed suspension, it is compounding the problem for America's farmers, pushing more food production off shore and increasing this country's reliance on foreign sources of food. We currently have an energy independence crisis. How long will it be before we have a food independence crisis? We can survive without enough oil, but not food!

The growers of NCGA understand the bigger political debate they are caught up in surrounding the immigration issue in this country. What NCGA growers do not understand is why our Federal government is constantly adding more requirements, record keeping, and penalties to an already over regulated industry. It seems, sometimes, like our leaders want to discourage the hardest working people in this country from producing food to feed this growing nation. We encourage the Department to leave the Final Rule in place until Congress finds the political courage to solve the perplexing and complicated immigration issue.

Our growers want nothing more than a chance to feed, clothe and house our families and this country and to pass that responsibility and legacy to the next generation of Americans. The Department's proposal will have a devastating effect on America's farmers and will threaten the ability of many growers who rely on the H-2A program to continue their operation as they have for generations. The Department must provide the public with adequate notice and a meaningful opportunity to comment before pursuing this or any other proposal that so significantly impacts the most essential industry in our country. The Secretary of Labor certainly has the prerogative to change the policy focus and objectives of the Department. But the Secretary cannot violate the law in pursuit of those changes in policy and regulations. The Department expects and requires growers to follow the law. Is it not reasonable for growers to expect the Secretary and the Department to do the same?

Thank you,

Stan Eury, Executive Director, on behalf of the Board of Directors,
North Carolina Growers Association.