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.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Plaintiffs seek a temporary restraining order and preliminary injunction against Defendants Hilda L. Solis, in her official capacity as Secretary of the U.S. Department of Labor, the U.S. Department of Labor ("DOL"), Janet Napolitano, in her official capacity as Secretary of the U.S. Department of Homeland Security, and the U.S. Department of Homeland Security ("DHS").

The Plaintiffs bring this action for declaratory and injunctive relief related to *Temporary Employment of H-2A Aliens in the United States,* 74 Fed. Reg. 25972 (May 29, 2009) ("the Solis Final Rule"); *Temporary Employment of H-2A Aliens in the United States; Proposed Rule*, 74 Fed. Reg. 11408 (March 17, 2009) ("the Solis NPRM"); and *Withdrawal of Interpretation of the Fair Labor Standards Act Concerning Relocation Expenses Incurred by H-2A and H-2B Workers*, 74 Fed. Reg. 13261 (March 26, 2009) ("the Withdrawal"). The Solis Final Rule entirely rewrites a valid H-2A rule promulgated by the DOL under former Secretary Elaine L. Chao, *Temporary Agricultural Employment of H-2A Aliens in the United States: Modernizing the*

Certification Process and Enforcement Final Rule, 73 Fed. Reg. 77110 (December 18, 2008) ("the Chao Final Rule"). The Chao Final Rule, which took effect January 17, 2009, in turn replaced an H-2A rule, the major provisions of which were promulgated by the DOL in 1987 ("the 1987 Rule"). The Plaintiffs contend that the Solis Final Rule and the Withdrawal should be enjoined and declared to be in violation of the Administrative Procedure Act, 5 U.S.C. §701, *et seq.* ("APA"). In the alternative to enjoining the Withdrawal, the Plaintiffs seek a declaratory judgment that contracts and understandings entered into between farmers and H-2A workers and approved by the DOL between January 17, 2009, and March 26, 2009, are valid and in compliance with the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, and all other applicable laws and may be complied with as written.

STATEMENT OF FACTS

The Plaintiffs consist of (1) farmers, including Christmas tree farmers; (2) growers' associations whose membership consists of farmers; (3) farmer advocacy groups; and (4) forest products industry associations, whose membership consists of logging employers as well as employers who purchase and use lumber and wood pulp. The Defendants are governmental entities who enforce and apply the programs applicable to alien non-immigrant guestworkers under the so-called "H-2A" (agricultural) and "H-2B" (non-agricultural) programs.

The H-2A program replaced the prior H-2 program that had also provided a legal means by which agricultural employers could obtain the temporary services of foreign agricultural workers when U.S. workers were unavailable. The H-2A program was instituted in 1987 after the enactment of the Immigration Reform and Control Act ("IRCA") amendments to the Immigration and Nationality Act, 8 U.S.C. §1101, *et seq.* ("INA"). The name "H-2A" comes from the statutory provision that creates the program, 8 U.S.C. §1101(a)(15)(H)(ii)(a). The

purpose of the program was to provide non-immigrant alien labor for agricultural concerns ("farmers") in the United States. Under the program, farmers must apply to the DOL (as well as DHS and the State Department) and be approved to hire H-2A workers. The farmers must meet a number of stringent regulatory requirements regarding the wages paid, reimbursing or furnishing of certain transportation expenses, furnishing of housing, and the like. All of these terms are set forth in a contract (Agricultural and Food Processing Clearance Order, or "Clearance Order") that must be approved by DOL and is provided to the H-2A worker. The H-2A program was not designed to replace U.S. farm workers with H-2A workers: as a prelude to hiring an H-2A worker, farmers must make concrete efforts to find qualified U.S. workers and, among other requirements, offer a specified wage that is designed to ensure that U.S. workers' wages are not adversely affected by the use of H-2A workers (typically by paying the "Adverse Effect Wage Rate" ("AEWR")). Before an employer can proceed to hire H-2A workers, the DOL must first certify that there are insufficient U.S. workers available and that the employer's use of H-2A workers will not adversely affect the wages and working conditions of similarly situated U.S. workers. *See* 8 U.S.C. § 1188(a)(1)(A), (B). The H-2A program also guarantees to workers employment contracts, certain benefits including free housing, and other rights. For the farmers, the H-2A program creates access to legally authorized employees for their farms and provides some stability and security to the employment relationship.

The H-2A program had historically been plagued by severe processing and administration problems and criticized by both workers and farmers, although it does provide the only avenue to hire foreign agricultural workers when there insufficient numbers of U.S. workers available. One criticism of the 1987 Rule from the standpoint of farmers is that some of the requirements and processes were so cumbersome and prone to severe delay that they actually had

the perverse effect of discouraging farmers from participating in the H-2A program. *See, e.g.*, Notice of Proposed Rulemaking, *Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement; Proposed Rule*, 73 Fed. Reg. 8538, 8541-42 (Feb. 13, 2008) ("Chao NPRM"); Chao Final Rule, 74 Fed. Reg. 77111 (Dec. 18, 2008). NCGA has been requesting changes to the previous H-2A regulations since 1991.

The "Chao Final Rule." In August 2007, the Bush White House announced that the DOL would review the H-2A program and consider proposing changes to the program regulations. Even before the DOL formally proposed changes through the Chao NPRM, farmers, agricultural associations and farmworker advocates provided the DOL with suggestions for reforms to the H-2A regulations.

Then, on February 13, 2008, then-Secretary of Labor Elaine L. Chao issued the Chao NPRM, which specified a "re-engineering" of the existing H-2A regulations. 73 Fed. Reg. 8538. Among other changes, former Secretary Chao proposed a modernized process by which farmers could apply for H-2A workers, a reduction in duplication of efforts among the DOL and State Workforce Agencies ("SWAs"), a more accurate and precise method of setting Adverse Effective Wage Rates ("AEWRs"), increased protections for workers, and clarification regarding reimbursement of workers' inbound transportation and related expenses. The comment period was open for 60 days, and the DOL received approximately 11,000 comments from farmers, state labor agencies, academics, farmworker unions and advocacy organizations. On December 18, 2008, and after approximately six more months of deliberation, the DOL promulgated the Chao Final Rule that Secretary Solis has nullified.

From the standpoint of H-2A farmers, the Chao Final Rule contained a number of welcome improvements over the 1987 Rule. The H-2A application process is streamlined, removing the burdens of duplicative filing requirements and a tedious, time-consuming approval (or denial) process. The Chao Final Rule also clarified issues related to reimbursement of travel expenses, calculation of the applicable wage rate, handling of workers' compensation benefits when the H-2A requirement appears to conflict with applicable state law, ensured additional due process rights for applicants, improved worker protections, and many other issues, providing much-needed legal certainty to both farmers and workers. Finally, the Chao Final Rule also provided that logging guestworkers, previously included in the "H-2B non-agricultural" program, would henceforth be included in the H-2A program.

Christmas Tree Farmers. The Chao Final Rule provided that Christmas tree farmers were "agricultural" rather than "forestry" employers and therefore exempt from the overtime requirements of the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.* ("FLSA"), §203(f). (Forestry workers are generally non-exempt.) The Chao Final Rule was consistent with the only known court decision on the issue: *U.S. Dep't of Labor v. N.C. Growers Ass'n,* 377 F.3d 345 (4th Cir. 2004) ("*NCGA*" or "the *NCGA* case"), which found that prior DOL opinions to the contrary conflicted with the clear language of the FLSA and therefore failed to meet the requirements for deference under *Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944). The Solis Final Rule abrogates the Chao Final Rule on this issue and, perhaps more importantly, directly contradicts the Fourth Circuit *NCGA* decision. Moreover, the Solis NPRM provided no rationale for changing the Christmas tree rule, depriving the public of notice and an opportunity for comment. *See* Complaint, ¶69.

The Forest Products Industry. The Chao Final Rule provided that logging guestworkers would be subject to the H-2A program. The forest products industry (which includes logging as well as "downstream" industries that use lumber and wood pulp products) is highly dependent on seasonal non-immigrant, primarily Canadian, guestworkers to harvest and transport forest products to consuming mills. Affidavit of Joel Swanton ("Swanton Aff."), ¶2. Before the Chao Final Rule took effect, logging guestworkers were admitted under the H-2B program. *Id.*, ¶3. The number of H-2B visas available for foreign workers to be admitted to work in the United States each year is subject to a federally mandated "cap." *Id.* In years past, Congress has exempted returning H-2B workers from the caps; however, that exemption provision expired, and during the summer 2008 harvest season, more than 600 Canadian loggers were denied re-entry into the United States because Congress had failed to extend the exemption and there were an insufficient number of visas to meet demand. *Id.*, ¶4. As a result, the forest products industry suffered a severe labor shortage and lost revenues, and the resulting artificial shortage of raw material created a supply crisis and drove costs to unsustainable levels for manufacturing facilities that used lumber. *Id.*

By March 17, 2009, the date that the Solis NPRM was published, the 2009 H-2B visa "cap" had been exhausted for two months. Swanton Aff., Exh. A. However, because the Chao Final Rule provided that logging workers would be classified as H-2A workers, this was not an issue, and in 2009 – for the first time in years – the logging industry has had enough workers to meet its needs. *Id.*, ¶6.

Unfortunately, it appears that 2009 will be the only year that logging employers will have enough workers unless this Court enjoins the Solis Final Rule. The Solis Final Rule provides that logging guestworkers will come under the H-2B program rather than the H-2A program. *See* 74

Fed. Reg. 25980-81, 26002, *et seq.* (May 29, 2009) to be codified at 29 C.F.R. §655.200, *et seq.* Because logging employers need more workers than there are H-2B visas authorized under the caps, they foresee devastating labor shortages in 2010 and beyond. *Id.*, ¶7-8.

Farmers. The Chao Final Rule was issued about the same time that farmers began their financial and business planning for the current year. *See* Affidavit of Lee Wicker ("Wicker Aff."), ¶4. Many of the Plaintiffs and other farmers procured loans (often using their homes, farmland, and equipment as collateral) and made other business commitments for the 2009 season based in substantial part on the substantive provisions of the Chao Final Rule, including its lower compliance costs, of which labor costs make up a significant portion. *Id.*. In many cases, crops had already been planted, and other irreversible commitments had been made. *Id.*

The Solis NPRM. In December 2008, while still a California Congresswoman, Hilda L. Solis publicly expressed hostility toward the then recently promulgated Chao Final Rule in a posting on her website. Then-Rep. Solis said,

> . . . This recent action by the Bush Administration is just the latest example of how out of touch the president is with working families, expecially with Latino families that make up a large portion of the farmworkers in this country. There is no question that the guestworker program needs significant overhaul but slashing wages [sic] and reducing basic rights for the most vulnerable workers in our country, especially hardworking Latino farmworkers, is not the answer.

See Affidavit of Robin E. Shea ("Shea Aff."), ¶2, Exh. A.

On or about March 13, 2009, Ms. Solis was sworn in as Secretary of Labor. Within hours, she had issued a press release indicating her intent to suspend the Chao Rule. *Id.*, ¶3, Exh. B. Then, on March 17, 2009, Secretary Solis issued the Solis Suspension NPRM, referred to as a "notice of suspension."

In actuality, this "notice of suspension" was a Notice of Proposed Rulemaking, subject to the requirements of the Administrative Procedure Act. The Solis NPRM did much more than just "suspend" a particular regulatory provision; it proposed to nullify the entire H-2A regulatory structure that was currently in place (the Chao Final Rule). Rather than simply "suspend" the Chao Rule, Secretary Solis *supplanted* it with an entirely inconsistent set of regulatory standards.

The Solis NPRM provided the public with only 10 days to comment on the proposed change, effectively preventing growers from commenting because the suspension was issued in the thick of many farmers' seeding and planting time. Wicker Aff., ¶7. Moreover, the Solis NPRM explicitly stated that the DOL would not consider any comments regarding the substance or merits of the 1987 Rule or the Chao Final Rule. *See* 74 Fed. Reg. at 11408. This prevented the DOL from receiving information directly relevant to the decision regarding which regulatory provisions should govern the H-2A program and had a chilling effect on interested parties who would otherwise have submitted comments. Although 11,000 interested parties submitted comments in response to the Chao NPRM, only 800 were able to comment on the Solis NPRM, and 99 percent opposed the proposed changes.

The Preamble to the Solis Final Rule says that the DOL reviewed but did not consider comments that discussed the merits of individual provisions of the Chao Final Rule or of the Solis NPRM. *See* 74 Fed. Reg. 25973. How the DOL managed to make these distinctions among comments, given that views about the merits of individual provisions are inextricably intertwined with views about what provisions should be changed, is not explained. Upon information and belief, the DOL used this artificial and arbitrary restriction to achieve the result it wanted: to nullify the Chao Final Rule without having to consider or address substantive and relevant information.

The Solis NPRM contained vague statements about DOL's rationale that were not supported by any specific facts and that appeared to contradict what information was available. For example, the Solis NPRM said that the DOL was unable to "implement the sequence of operational events" necessary to put the Chao Final Rule into effect, that the DOL and state workforce agencies ("SWAs") "may" lack sufficient resources to implement the Chao Final Rule, that it had "increasing evidence" that the Chao Final Rule would cause "disruption and confusion." *See* 74 Fed. Reg. 11409. The DOL provided no evidence, explanation or supporting facts for these conclusory statements, which prevented interested parties from providing meaningful comments that might call into question the factual basis for the DOL's conclusions.

The Preamble to the Solis Final Rule acknowledged the receipt of comments challenging the DOL's assertions, but failed to engage, much less rebut, them. For example, commenters pointed out that the lack of "resources" the DOL alleged would be more of a problem under the Solis Rule than under the Chao Final Rule because of the streamlined application process and lack of duplicative government effort in the latter. The DOL failed to address those comments. Commenters also pointed out that, contrary to the DOL's statements in the NPRM about insufficient funding, the DOL actually received approximately 50 percent more funding than the year before. The DOL's response was a conclusory assertion that the funding was "irrelevant." *See* 74 Fed. Reg. 25973.

Although the Solis Final Rule does not take effect until June 29, 2009, and will not apply to H-2A workers whose applications were filed between January 17, 2009, and that date ("the Grandfather Clause"), this will not help those Plaintiffs and farmers who apply for workers later in the year, or who apply for workers in "waves" throughout the season; nor will it help the loggers in October 2009 when they must apply for their 2010 work force under the inadequate H-

2B program. Indeed, for some farmers, their 2009 work forces will be governed by two very different, and even inconsistent, sets of rules that among other things could lead to significant labor strife resulting from workers performing the same work side by side, yet subject to differing standards and rates of pay. The Solis Final Rule will also subject the farmers themselves to inconsistent requirements, standards, obligations, and penalties. *See, e.g.*, Affidavit of Chris Maciborski ("Maciborski Aff."), ¶5. The DOL failed to adequately address this result of its regulatory changes. Moreover, the Grandfather Clause will do nothing to alleviate harm that will be suffered by farmers who made irreversible business commitments before March 17, 2009, in reliance on the Chao Final Rule.

The March 26, 2009 Withdrawal. The Chao Final Rule clarified a longstanding legal dispute related to reimbursement of H-2A workers' transportation and other travel-related expenses ("transportation expenses"), providing much-needed legal certainty to both farmers and workers. *See generally* Wicker Aff., ¶¶8-14. H-2A farmers have been subject to a number of "*ex post facto*" class and collective action lawsuits alleging that the farmers violated the minimum wage provisions of the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.*, by failing to reimburse inbound transportation expenses with the first workweek's pay, even though the 1987 Rule provided that the farmers were acting lawfully. Plaintiffs have generally been successful in these lawsuits, costing farmers millions of dollars in unanticipated liability. *See, e.g., Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002). NCGA and its members were also subject to one of these lawsuits. *See DeLuna-Guererro v. North Carolina Growers' Ass'n,* 370 F. Supp.2d 386 (E.D.N.C. 2005).

Although the Chao Final Rule provided that transportation expenses did not have to be reimbursed with the first workweek's pay but could be reimbursed at the 50 percent point of the

season, Secretary Solis summarily withdrew this interpretation. The Chao Final Rule included a reasoned analysis of this issue and was issued after notice and an opportunity for public comment, but the Withdrawal failed to contain or do either. These procedural defects render the Withdrawal invalid.

ARGUMENT

Standing. In this action, Plaintiffs have standing pursuant to Section 10 of the Administrative Procedures Act ("APA"), 5 U.S.C. § 702, which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." To establish standing under 5 U.S.C. § 702, Plaintiffs must simply demonstrate that the contested agency action will cause them an injury in fact and that the injury affects an interest "arguably within the zone of interests to be protected" by the statute at issue. *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998); *Alliance for Legal Action v. United States Army Corps of Engineers*, 314 F. Supp.2d 534, 542 (M.D.N.C. 2004) (holding that non-profit corporation had standing under APA to challenge Corps' issuance of permit allowing wastes to be deposited into wetlands upon alleging that project will increase stormwater runoff, which may cause flooding and reduce water quality). "A great or substantial injury is not required; an 'identifiable trifle' will suffice if is actual and particularized to the plaintiff." *Alliance for Legal Action*, 314 F. Supp.2d at 542 (internal citations omitted).

As set forth in detail in the Complaint and accompanying Affidavits, the Plaintiffs have established that the Solis Suspension Final Rule will cause them immediate injury due to their reliance on the Chao Final Rule and their dependence on H-2A workers, and that injury is within

the zone of interests protected by 5 U.S.C. § 702, which allows for, among other things, judicial review of agency rulemaking under 5 U.S.C. § 553, as well as the zone of interests protected by the H-2A provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a).[1]

Entitlement to Preliminary Injunction. A preliminary injunction is an equitable remedy designed to "preserve the status quo until the rights of the parties can be fairly and fully investigated and determined by strict legal proof and according to the principles of equity." *Washington County v. United States Dep't of Navy*, 317 F. Supp.2d 626, 631 (E.D.N.C. 2004) (internal citations omitted). In determining whether to grant preliminary injunctive relief, courts in the Fourth Circuit employ a "hardship balancing" test. *Id.* at 632 (citing *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977)). Under the balancing test, this Court should consider the balance of harms to Plaintiffs and Defendants, the likelihood of Plaintiff's success on the merits, and the public interest. *Id.*

Irreparable harm to the Plaintiffs. "The balance of irreparable harm to the plaintiff and the harm to the defendant if relief is granted is the most important aspect of the test." *Id.* (internal citations omitted). If there is a "decided imbalance of hardship" in the plaintiff's favor, then a showing of likelihood of success on the merits becomes less important. *Id.* (citing *Blackwelder*, 550 F.2d at 195). Federal courts have been willing to find irreparable harm in the farming context where the potential harm was irreversible. *See, e.g., Geertson Farms, Inc. v. Johanns*, 2007 WL 1302981 at *6 (N.D. Cal. 2007) (copy attached) (finding growers of conventional and organic alfalfa would be irreparably harmed if planting of "Roundup Ready"

[1] With respect to those Plaintiffs who are associations, these entities have representational standing to pursue their claims. *See Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (stating that an organization has representational standing when (1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit).

alfalfa[2] were not enjoined pending environmental impact statement regarding gene transmission and contamination because "[t]he contamination cannot be undone"); *Gamradt v. Block*, 581 F. Supp. 122 (D. Minn. 1983) (finding that farmers would be irreparably harmed if, among other things, government were allowed to deprive them without due process of property and income necessary to maintain farming operations and finding that it was not necessary for government to have actually instituted debt acceleration or foreclosure proceedings; mere threat was sufficient); *Borglin v. McFarland*, 1981 WL 88241 (Del. Ch. 1981) (copy attached) (enjoining defendant's construction of fence that would block plaintiff's access to farmland on ground that fence would make it impossible for plaintiff to "economically harvest the crop which is now almost ready for harvest"). Significantly, the *Geertson* court, although enjoining the farmer defendants from *future* planting of Roundup-Ready alfalfa because any environmental impact would be irreversible, said that it would be inappropriate to extend the injunction to farmers *who had already planted it*. *See Geertson*, 2007 WL 1302981 at *8, citing *Seattle Audobon Society v. Evans*, 771 F. Supp. 1081, 1087-95 (W.D. Wash. 1991) (enjoining future, but not existing, sales of timber allegedly produced in violation of environmental laws). *Cf. Competitive Enterprises Institute v. U.S. Dep't of Agriculture*, 954 F. Supp. 265 (D.C. Cir. 1996) (no irreparable harm to peanut farmer based on peanut quota where farmer had not yet planted peanuts in excess of the quota, remained free to plant additional peanuts regardless of quota, and only harm that he would suffer if quota were not lifted was that he would earn less money but would not lose money).

Moreover, although economic losses normally do not constitute "irreparable harm," they do when they are unrecoverable. In this case, the Plaintiffs will not be able to sue the federal government for their economic losses. *See, e.g., FDIC v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 1000, 127 L. Ed.2d 308 (1994) (federal court may not exercise jurisdiction against United

[2] "Roundup Ready" alfalfa was resistant to the herbicide Roundup, which is used to kill weeds.

States or one of its agencies unless defendant has clearly waived sovereign immunity). Nor will the Plaintiffs be able to recoup their losses from the H-2A workers because the Plaintiffs will be required by law to contractually agree to employment terms consistent with the requirements of the Solis Final Rule and the Withdrawal. Thus, their economic losses are unrecoverable, and this constitutes irreparable harm. *See, e.g., Baker Electric Cooperative, Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994) (finding irreparable harm where Native American tribe would potentially suffer economic losses that could not be recovered because of Eleventh Amendment sovereign immunity); *Holland v. Frank V. Carlow Irrevocable Trust*, 176 F.R.D. 416, 418 (D. D.C. 1997) (finding irreparable harm where trust from which plaintiffs sought recovery was likely to become insolvent); *Clarke v. Office of Federal Housing Enterprise Oversight*, 355 F. Supp.2d 56, 65-66 (D. D.C. 2004) (finding irreparable harm where plaintiff was unable to exercise right to restrict stock options and stock, and defendant would probably be immune from suit for monetary damages).

On the other hand, the tangible harm to the Defendants if injunctive relief is granted is minimal, assuming it exists at all. An injunction will merely leave the status quo as it has been since January 17, 2009. To the extent that the DOL would argue that the generally lower applicable wage and later reimbursement of transportation expenses would harm H-2A workers, such an argument would be meritless because the H-2A workers – unlike the Plaintiffs – can recover back wages and transportation expenses if the Defendants prevail. *See, e.g., United Farm Workers v. Chao*, No. 09-0062 (D. D.C. 2009) (copy attached).

Likelihood of success on the merits. Although less important at this stage given the Plaintiffs' showing of irreparable harm, the Plaintiffs can also establish a likelihood of success on the merits. An agency rule must be set aside if it is "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law." *See Owner-Operator Independent Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Administration*, 494 F.3d 188 (D.C. Cir. 2007), *citing* APA at 5 U.S.C. §706(2)(A). Agency action is arbitrary and capricious if "[1] the agency has relied on factors that Congress did not intend for it to consider; [2] [if the agency] entirely ignored important aspects of the problem; [3] [if the agency] offered an explanation for its decision that runs counter to the evidence before the agency; or [4] [if the agency reaches a decision] that is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867, 77 L.Ed.2d 443 (1983). Although the scope of the court's review of agency action is narrow, the agency must "explain the evidence which is available, and must offer a rational connection between the facts found and the choice made." *Id.*, 463 U.S. at 52, 103 S. Ct. at 2871, *quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 at 168, 83 S. Ct. 239 at 246, 9 L. Ed.2d 207 (1962). The Fourth Circuit has not hesitated to affirm judgments against agency action in circumstances similar to those here. *See, e.g., Ohio River Valley Environmental Coalition, Inc. v. Kempthorne*, 473 F.3d 94 (4th Cir. 2006) (affirming summary judgment for plaintiff); *Bedford Mem. Hosp. v. Health and Human Services*, 769 F.2d 1017, 1024 (4th Cir. 1985) (affirming two judgments against agency).[3]

[3] The Plaintiffs expect the DOL to cite two Fourth Circuit decisions from 1985 against one of the Plaintiffs in this case, the Virginia Agricultural Growers Association, Inc. ("VAGA"). However, both of these decisions are inapposite. In the first case, *Virginia Agricultural Growers Ass'n, Inc. v. Donovan*, 774 F.2d 89 (4th Cir. 1985), the plaintiffs were challenging the DOL's methodology for calculating the AEWR. It was undisputed that the DOL had the authority to set the AEWR for any given year, and the court found that the DOL had adequately explained its methodology and the reasons for adopting it. In the second case, *Virginia Agricultural Growers Ass'n, Inc. v. Dep't of Labor*, 756 F.2d 1025 (4th Cir. 1985), the plaintiffs had challenged a rule requiring H-2A farmers to continue to accept U.S. workers until the "50% point" of the season had been reached. However, the rule was within the scope of the DOL's statutory authority to ensure that employment of H-2A workers did not adversely affect U.S. workers, and it was adopted as a compromise between worker advocates and growers after a number of hearings were held involving interested parties. *See* 756 F.2d at 102-03. In short, neither of these cases involved the wholesale, summary nullification of a validly promulgated rule after an abbreviated comment period and unreasonable restrictions on the substance of comments that would be considered.

The Solis Final Rule suffers from numerous procedural and technical deficiencies, which highlight its arbitrary and capricious nature. Although a 10-day comment period is not a *per se* violation of the APA, it is insufficient in this context, where the DOL is seeking to revoke a rule that was promulgated properly and after a 60-day notice and comment period, and the receipt of more than 11,000 comments. Moreover, the 10-day comment period, coupled with the completely arbitrary "content" restriction, deterred input from farmers and their advocates and allowed the DOL to make after-the-fact capricious rejections of comments it received. *Cf.* APA, 5 U.S.C. §553(c) (agency promulgating a rule must consider "relevant material"). In addition, the Preamble's discussion of the reasons supporting the DOL regulatory changes, including the"sequence of operational events," "lack of resources," "disruption and confusion," and "processing delays," indicates that the DOL relied on data not subject to public comment and, in addition, gave no serious consideration to any comments offering counter evidence and opposing the Solis NPRM. Finally, as noted in many of the public comments, the failure of the Solis NPRM to comply with various statutory and executive order requirements applicable to a rulemaking deprived the public of relevant information about the Department's position and rationale and the opportunity to provide relevant information in response..

Although misnamed a "suspension," the Solis Final Rule is in actuality a complete nullification or revocation (slightly mitigated by the Grandfather Clause) of the validly promulgated Chao Final Rule and a promulgation of an entirely different regulatory regime. Thus, the Solis Final Rule had to be issued in compliance with all of the pertinent requirements of the APA. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-42, 103 S. Ct. at 2866 (revocation of a validly promulgated regulation is not the same as a failure to act in the first instance;

revocation must be supported by "reasoned analysis")[4]. If the agency fails to provide such a reasoned analysis, the court should not create one for it, *id.*, 463 U.S. at 43, 103 S. Ct. 2867, nor should it allow the agency to advance a *post hoc* justification. *Id.*, 463 U.S. at 50, 103 S. Ct. at 2867. *Cf. Bedford Mem. Hosp. v. Health and Human Services*, 769 F.2d 1017, 1024 (4th Cir. 1985) (agency cannot make retroactive correction to invalidly promulgated rule).

In complying with its duty to provide an opportunity for notice and comment, the agency must make available *(before* receiving comments) "technical studies and data that it has employed in reaching the decision to propose particular rules." *Owner-Operators*, 494 F.3d at 199 (internal quotations omitted). "[T]he most critical factual material that is used to support the agency's position on review must have been made public *in the proceeding* and exposed to refutation." *Id.* (internal quotations omitted; emphasis in *Owner-Operators*). With respect to the alleged "processing delays" caused by the Chao Final Rule, the Solis NPRM provided absolutely no factual data in support, and the public therefore had no opportunity to evaluate the DOL data supporting the Department's position. The Solis Final Rule cited statistics that were obviously "hand-picked" (for example, citing "median" delays rather than average delays) and failed to provide the underlying data on which it relied.

With respect to the validity of the Christmas tree rule, the Plaintiffs respectfully refer the Court to the Fourth Circuit decision in *U.S. Dep't of Labor v. N.C. Growers' Ass'n, Inc.*, 377 F.3d 345 (4th Cir. 2004). The Fair Labor Standards Act, 29 U.S.C. §201, *et seq.*, exempts

[4] The Supreme Court in *Motor Vehicle Mfrs. Ass'n* did say that suspension of an existing rule pending further study would be permissible. *See* 463 U.S. at 50 n.15, 103 S. Ct. at 2870 n.15. However, in this case as already discussed, Secretary Solis has not merely suspended compliance with the equirements of the Chao Final Rule, but she has affirmatively and substantively reversed course. Secretary Solis has made it abundantly clear that her mind is made up, as evidenced by her December 2008 public comments and her March 13, 2009, press release, the procedural deficiencies and lack of rationale in the Solis NPRM, and the DOL's refusal in the Preamble to the Solis Final Rule to engage any of the legitimate criticisms of the DOL's stated rationale for "suspending" the Chao Final Rule. Moreover, the summary Withdrawal was not even mischaracterized by the DOL as a "suspension" but is patently a revocation of a valid interpretation issued after notice and comment.

agricultural employees from its overtime requirements. *See* 29 U.S.C. §203(f). The statutory definition of "agriculture" includes "cultivation, growing, or harvesting of any agricultural or horticultural commodities." *Id.* The definition excludes "forestry" unless it falls under certain exceptions not relevant to Christmas tree farming. However, because Christmas trees are clearly "commodities" (in that they are sold as products in themselves and are not used as supplies for other products) and are obviously "ornamental" and therefore "horticultural," they just as clearly fall within the statutory definition of agriculture. *See NCGA*, 377 F.3d at 352.

In the 1950's, the DOL began taking the position in Interpretive Bulletins that Christmas tree farming was "forestry." These interpretations were based on the state of the Christmas tree industry in the 1950's, during which time the trees were planted, provided with minimal cultivation, pest control, or pruning, and were then cut down and sold "as is" to customers. In other words, the process was similar to that used in forestry, except that the trees were harvested much earlier and that the trees were used as ornamental commodities. The Christmas tree industry has undergone significant changes beginning in the 1960's, and are treated to fertilizers, irrigation, regular scheduled pest control, and regular pruning and shearing into the familiar Christmas tree "conical" shape, before being harvested and sold. *See NCGA*, 377 F.3d at 355. Given the changes in the industry since the 1950's, and the fact that the DOL's position was conclusory and lacked the necessary "power to persuade," among other reasons, the Fourth Circuit found that the DOL's interpretation was not worthy of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 2d 124 (1944) and its progeny. *See NCGA*, 377 F.3d at 353-54. The Plaintiffs are not aware of any case law that conflicts with the *NCGA* decision.

The Solis Final Rule would reinstate the DOL's illegitimate interpretations by regulatory fiat. However, even under the more-deferential standard that applies to notice-and-comment rulemaking, a regulation may not exceed or conflict with the plain language of the enabling statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984). For the reasons already discussed, the DOL's position that Christmas tree farming is "not agriculture" puts the DOL in conflict with the FLSA, not to mention positions taken by other agencies that regulate farmers. Thus, the Solis Final Rule, which conclusorily states that Christmas trees are "non-agriculture," is arbitrary and capricious. *Cf. NCGA*, 377 F.3d at 354 (finding that DOL exclusion of Christmas trees from "agriculture," while including nursery trees, is "arbitrary").

The public interest. The public interest has been described as "preserving the *status quo ante litem* until the merits of a serious controversy can be fully considered by a trial court." *See Blackwelder, supra,* 550 F.2d at 197 (4th Cir. 1977) (reversing denial of preliminary injunction to plaintiff). The "public interest" element "is further enhanced where, as here, the private controversy may possibly vindicate public policy." *Id.* The public interest favors injunctive relief in this case for at least two compelling reasons: (1) this is a matter of labor policy that affects H-2A employers throughout the country; and (2) there is a public interest in promoting a regulatory process that gives fair hearing to interested parties and is based on a rational and "transparent" analysis of the relevant issues. *Cf. Clarke, supra*, 355 F. Supp.2d at 66 (public interest favors ensuring that governmental entity acts within its authority) and *Gamradt, supra*, 581 F. Supp. 525 ("[t]he public interest is to help citizens feel they have been dealt with fairly and to avoid erroneous deprivation of essential benefits" and "[T]here is no public interest in allowing an abuse of discretion to continue").

America's farmers, as the saying goes, "put food on our tables," and the forest products industry gives us shelter and a vast array of other necessities and luxuries. Taking steps to allow these industries to remain viable in our struggling economy unquestionably serves the public interest. Likewise, it is not an exaggeration to say that the forest products industry could collapse if it is required to revert to the inadequate H-2B program to procure its work force for 2010 and beyond.

For all these reasons, as well as those set forth more specifically in the Complaint and the accompanying affidavits, the Plaintiffs request that the Court preliminarily enjoin the Defendants from giving effect to the Solis Final Rule or the Withdrawal.

This the 9th day of June, 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** was served with the Complaint by certified mail in the United States Mail, postage prepaid, and addressed as follows:

HILDA L. SOLIS,
in her official capacity as
United States Secretary of Labor,
200 Constitution Avenue, NW,
Washington, DC 20210,

THE UNITED STATES DEPARTMENT
OF LABOR, 200 Constitution Avenue, NW,
Washington, DC 20210

JANET NAPOLITANO,
in her official capacity as
United States Secretary of Homeland Security,
Washington, DC 20528,

THE UNITED STATES DEPARTMENT
OF HOMELAND SECURITY,
Washington, DC 20528

This the 9th day of June, 2009.

/s/W. R. Loftis, Jr.
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