SUMMARY OF CONCERNS ABOUT THE SUBSTANCE OF DOL'S
NPRM (RIN 1205-AB55) TO SUSPEND THE H-2A PROGRAM REGULATIONS
74 Federal Register 11408 (March 17, 2009)

NCGA filed comments in response to DOL's March 17, 2009 NPRM listing several concerns with the procedural irregularities in the Department's rulemaking, including an unreasonably short comment period, unreasonable restrictions prohibiting public comments on the substance of proposed rules, and apparent violations of the Administrative Procedure Act (APA) and other related statutes and Executive Orders.

In a April 20, 2009 meeting with the Office of Information and Regulatory Affairs (OIRA), I renewed those concerns about the NPRM, as well as concerns with OIRA's handling of a DOL Interim Final Rule (IFR) on the H-2A program, and further explained how those procedural violations by DOL prevented us and other H-2A employers from being able to meaningfully evaluate and participate in the DOL rulemaking. Subsequent to that meeting, DOL published the IFR extending the transition application procedures and providing a 30-day comment period on that relatively short and simple rule. By contrast, DOL offered only a meager 10-day public comment period for the massive and complex NPRM Suspension Proposal of March 17. DOL has provided no reasonable justification for such a striking disparity in comment periods.

As of April 28, 2009, the OMB/OIRA website indicates that a DOL Final Rule implementing the NPRM to suspend the H-2A regulations is under review by OIRA. We once again renew our numerous concerns about this irregular rulemaking process and its adverse affect on us and other H-2A employers. In addition, we note that as part of the March 17 NPRM, DOL explicitly directed the public not to comment on (and said it would not consider comments on) the substantive regulatory provisions it was proposing to promulgate. As noted above, that DOL instruction combined with the unreasonably short public comment and other procedural violations, including a lack of essential data and analysis in the NPRM prevented us and other H-2A employers from being able to meaningfully and fully evaluate the impact of the DOL proposed rule changes.

Notwithstanding those significant obstacles, several commenters, including NCGA, listed concerns about adverse effects that would result from a suspension and reinstatement of the old regulations, as well as the adverse effects

associated with individual regulatory provisions in the NPRM. Below is a summary of just some of the major concerns with the NPRM cited by us and others who filed comments with DOL.

1. Public Comments Overwhelmingly Oppose a Suspension of the Current Regulations

   According to data on regulations.gov, DOL received approximately 1000 comments on the March 17, 2009 NPRM. Of those comments, it appears that fewer than 20 support the suspension. Therefore, approximately 99% of the public comments oppose suspending the current rules and reinstating the old rules.

   a. There is virtually no public support for DOL's proposed suspension of the current H-2A regulations and no support from those who actually have to comply with the regulations.

   b. Almost all of the comments opposed to the suspension were submitted by those who are subject to the regulations - employers who operate under the program requirements in order to hire seasonal farm workers and comply with strict immigration laws. Notably, some State Workforce Agencies (SWAs) who administer parts of the H-2A program also opposed the suspension because they find the new rules work better for employers and workers.

   c. Virtually all of the very few comments in favor of the suspension were submitted by state employees/ agencies and public advocacy groups. The SWAs receive funding from the federal government to carry out their statutory responsibilities and often complain that DOL does not provide them sufficient funds, so it is nothing new that they would support suspending the current rules. A couple of other comments in favor of the suspension came from public advocacy organizations who have sued the Department to invalidate the current regulations, so it is no surprise they would support a suspension of those rules or any other action that would invalidate them.

2. Public Comments Overwhelmingly Demonstrate that the Current Regulations Operate Much Better than the Old Regulations DOL wants to Reinstate

a. As detailed in the comments, H-2A employers have found that DOL processing of H-2A applications is more consistent, predictable, and less prone to delay under the current regulations than the old regulations.

b. The current regulations contain important protections for U.S. and H-2A workers that are not present in the old regulations, including substantially increased fines for employer violations and a prohibition on shifting certain costs to workers. The current regulations also contain important due process and procedural safeguards for employers that are not present in the old regulations. Removing those improvements will result in fewer protections for workers and employers than they presently enjoy.

c. Several commenters noted that, in contrast to the Suspension NPRM, the current rules are a careful and measured balance of interests reflecting the input of more than 11,000 public comments and were developed through proper APA procedures in a process that lasted more than 18 months.

d. As several commenters explained, the improvements in the H-2A program that are reflected in the current rules have attracted new employers to the program and in the process have improved protections for U.S. workers from unfair competition by illegal workers and raised levels of compliance with important immigration and worker protection laws and regulations.

3. The Public Comments Overwhelmingly Reject DOL's Rationale for the Suspension and Demonstrate the Suspension will Create Chaos for H-2A Workers and Employers

a. As detailed in the comments, reverting to the outdated regulations will not decrease confusion and uncertainty as DOL claims – it will actually cause it. DOL acknowledges in the NPRM that it is considering rewriting the H-2A regulations again later this year. Thus, the public could be subject to three different H-2A regulatory regimes in fewer than 12 months. Thus, changing the H-2A rules now, just to change them again in a few months does nothing to decrease confusion. As hundreds of comments explain, reverting to the outdated regulations will unquestionably result in increased uncertainty, delay and cost for H-2A employers. The potential for harm is nearly limitless when considering lost crops, yields and profits due workers arriving late, or not at all, because of the chaos created by these cavalier actions of the current Department of Labor.

b. The comments contain numerous examples of employers that have made business decisions for 2009, including securing contracts, loans, etc., based on the requirements contained in the current regulations. As noted in the public comments, altering the regulations at this late date through this flawed process to impose different obligations on employers would result in significant additional compliance costs.

c. Thousands of employers have already hired H-2A workers under the current regulations and imposing a new regulatory regime with different standards and responsibilities will result in H-2A workers who work side-by-side being subject to different standards. As noted by numerous commenters, suspending the current rules will result in massive recordkeeping problems and confusion about which standards and requirements are applicable to which workers. Compliance will be a nightmare and liability will be staggering.

d. Numerous comments point out that DOL's claim that it needs to revise the regulations in light of a recent increase in unemployment is unfounded. A relatively high (or low) unemployment rate has absolutely no effect on DOL's statutory responsibilities for administering the H-2A program. The statute governing the H-2A program requires that employers first test the labor market for available U.S. workers before an H-2A worker can be hired – regardless of the current unemployment rate. Furthermore, the law requires employers give a hiring preference to U.S. workers even after H-2A workers arrive at a farm.

e. As noted above, numerous comments by H-2A employers explained that, contrary to DOL's claims, DOL processing of employer applications is actually more timely and predictable under the new rules than under the old rules DOL proposes to reinstate. DOL and employers made the transition to the new regulations with relative ease due to the explanation and training provided by the previous administration, as well as having the regulated public participate in the rulemaking process.

f. Several commenters in the logging industry explained that suspending the current H-2A regulations will result in them having no access to the temporary foreign workers they traditionally rely upon to operate their business. There is simply no legal means for these employers to meet their workforce needs and

continue their small businesses if they are thrown back into the H-2B program, which has already allocated all available visas for the year.

In conclusion, the nearly 1000 public comments overwhelmingly oppose the rationale for and the substance of DOL's NPRM to suspend the current H-2A regulations and replace them with outdated 20-year-old H-2A regulations. The overwhelming number of substantive and procedural objections to this rulemaking suggests that OMB/OIRA should not approve DOL's attempt to finalize the NPRM. If DOL seeks to propose regulatory changes to the H-2A program, those changes should be part of an open and transparent rulemaking process conducted in accordance with applicable statues and Executive Orders and that provides the public with a meaningful opportunity to comment on and shape the content of those regulations.

If OMB/OIRA approves DOL's attempt to finalize the suspension, that suspension should not take effect for a minimum of 60 days after publication of the final suspension. Such a drastic change in the regulations governing the H-2A program would require extensive modifications of business practices and would require more than the typical 30-days allotted for parties to prepare before the rule becomes effective. As noted in numerous comments filed on the NPRM, DOL failed to articulate any compelling reason to depart from the normal rulemaking process and requirements of the APA. Thus, there is no good cause to shorten the typical 30-day effective date and given the extensive evidence on the record of the hardships the suspension would cause, including for the numerous employers new to the H-2A program, the effective date should be 60 days after the final rule is published.
I hope you take my comments, and the overwhelming majority of others on the record who agree with my position, under careful consideration and require DOL to go through the well established and legal rulemaking process.
Thank you very much for the opportunity to present our concerns.

I am happy to take questions if you have any.