

December 1, 2011

Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, D.C. 20210

**RE: RIN 1235-AA06 Child Labor Regulations, Order and Statements of Interpretation;
Child Labor Violations – Civil Monetary Penalties; Notice of Proposed Rulemaking and
Request for Comments**

Dear Sir or Madam:

These comments are filed in response to the above-captioned rulemaking. We appreciate this opportunity to comment on the department's proposal and to register with the department the harmful impact this proposal, if promulgated, would have on the agricultural sector, rural communities at large and farm and ranching families specifically. As a preliminary matter, we want to provide a general overview of our perspective on the subject, and in particular what we take to be the background of the department's proposal, following which we will provide comments on specific proposed hazardous occupation orders (HOs) and other aspects of the proposed rule.

Generally

The undersigned organizations, and the farmers and ranchers we represent, have no interest or desire in placing youth at risk on the farm. The undersigned organizations support existing provisions in the Fair Labor Standards Act (FLSA) that permit the department to establish appropriate standards for youth employment on the farm, restricting jobs in which youth may engage to those that are not "particularly hazardous." This point of view fundamentally differs from that in a report issued last year by Human Rights Watch¹ (HRW), a report specifically cited by Secretary of Labor Hilda Solis² last year when she announced the Department of Labor would embark on this rulemaking. The press statement issued by the department reads in part:

The Human Rights Watch report released today documents the many dangerous jobs that U.S. farm worker children perform. It details the long hours many of them work and the negative impacts on their health, education and well-being. I commend Human Rights Watch for focusing on this issue of critical importance. We simply cannot – and this administration will not – stand by while youngsters working on farms are robbed of their childhood.

¹ See <http://www.hrw.org/node/90125/section/1>

² <http://www.dol.gov/opa/media/press/ilab/ILAB20100616.htm>

The position of DOL, adopted even before proposing regulations, is disturbing because it reflects a bias at the outset against youth employment in agriculture. There is a distinct lack of balance in the HRW report as to the merits of working in agriculture – merits that have long been recognized in our country and that continue to enjoy the support of Congress and many states. Clearly, there are certain occupations in agriculture – as in other sectors of the economy – that are not appropriate for youth at a certain age. But a blanket prohibition on youth employment in agriculture has never been approved by Congress and the FLSA has drawn a distinction for more than 70 years between employment in agricultural and non-agricultural jobs. Our organizations individually and collectively acknowledge and support appropriate restrictions for some youth at given ages working on farms.³ Unlike HRW, however, we recognize that youth employment on farms and ranches in certain occupations can be positive, enriching and rewarding. This perspective is shared by educators, organizations involved in developing future agricultural leaders, rural communities, agricultural leaders in Congress and many others.

That is why we are concerned that DOL, by placing an implicit imprimatur on the HRW report, appears to have adopted the perspective of those who wish to ban youth employment in agriculture altogether.⁴ We do not agree with DOL's contention that the report "documents the many dangerous jobs that U.S. farm worker children perform." HRW states that its report is based on interviews with 59 children under age 18, a review of secondary sources, discussions with individuals in various public and private positions, some telephone interviews, and discussions or interviews with more than 140 people total.⁵ Those interviewed are either anonymous or pseudonymous. HRW does not state whether identical survey questions were used or asked, provide the qualifications of those conducting the interviews, whether the samples were representative, or, in instances in which translators were required, how it ensured the questions were accurately posed and replies accurately recorded. DOL is obviously relying on this report. Yet, the department fails to meet its obligations under the Administrative Procedure Act (APA) to provide the public with this required information. Further, the HRW report makes broad charges that appear to be without foundation or documentation, as also required by the APA. For instance, the report says: "Children working in agricultur[e] typically make less than the minimum wage. Their pay is often further cut because employers underreport hours, and they are forced to spend their own money on tools, gloves, and drinking water that their employers should provide by law."⁶ Our organizations do not condone unlawful conduct. We emphatically believe, moreover, that DOL should not summarily accept as documentation broad, general charges that illegal activities are typical in the industry. In our experience, most agricultural employers obey the law. They do not "typically" pay less than the minimum wage, either to children or to other workers. These charges are simply not true. We find it disappointing that DOL would accept such characterizations without challenge, would endorse such a report, and would base a sweeping regulatory effort on such spurious charges. For DOL

³ For example, the American Farm Bureau Federation, one of the signers of these comments, has policy which states: "We support enforcement of federal child labor laws designed to prevent underage children from working in all industries. We support existing FLSA provisions, which specify and provide opportunities for young people of the proper age to perform certain agriculture jobs."

⁴ In its report, for instance, Human Rights Watch says that it "calls on the U.S. Congress to amend the Fair Labor Standards Act to apply the same protections for children working in agriculture as already apply to all other working children."

⁵ *Fields of Peril*, page 14

⁶ *Ibid.*, page 6

to rely upon a work of advocacy as a basis to regulate is wholly inconsistent with its obligations under the APA and gives short shrift to the limits of its authority as outlined in the Fair Labor Standards Act.

Furthermore, the issues raised in the HRW report are not new. Indeed, HRW published a similar report⁷ in 2000 and at that time noted that Rep. Tom Lantos “for the past twelve years” (i.e., presumably since 1988) had sponsored legislation to amend the FLSA and to address perceived weaknesses in the treatment of youth employment in agriculture. A specific bill advocated by HRW (the CARE Act) appears to have been introduced in the House of Representatives initially in 2005 and has been reintroduced in each of the last three Congresses.⁸ The legislation would amend the FLSA to prohibit children under age 18 working in agriculture unless permitted by the secretary (the current secretary co-sponsored the legislation in the 109th and 110th Congresses). It is noteworthy that, although this legislation has been introduced and reintroduced in four successive Congresses, it has never been brought up for a vote or even been the subject of a legislative hearing; moreover, this has occurred in a period when the House of Representatives was controlled by Republicans and Democrats – signaling that neither political party has given the matter a priority. Additionally, the legislative proposal lacks bipartisan or even regional support,⁹ and the only fair inferences to draw from its legislative history are that Congress has declined to move on the legislation because it does not endorse the policy changes it would effect and that Congress continues to support the provisions in existing law, which permit youth employment in agriculture.

The legislative history is important to note because DOL’s authority to regulate in this area is derived strictly from what it has been granted by Congress, and Congress has not changed these provisions of the FLSA. In fact, Congress has had proposals before it to make changes and, yet, declined to take those up – even while the National Institute for Occupation Safety and Health (NIOSH) report, on which DOL purportedly bases much of its proposal, has been publicly available to Congress for nearly a decade. If DOL wishes to amend its regulations in this area, it must provide a firm justification as to why it is doing so and in a manner consistent with its existing authority under the FLSA. Given those facts, we believe the only appropriate position for DOL to take is to reaffirm existing HOs and not attempt to assert itself into a policymaking role where it has no authority merely because it disagrees with congressional judgment on this issue.

It is regrettable that DOL singles out the HRW report in its statement of May 2010 (and appears to take the same perspective in this regulatory proceeding) because this advocacy piece is not a balanced representation of what occurs in the agriculture sector. We acknowledge HRW’s right to advocate for its own point of view, but the department should not tout such an advocacy piece as an objective view of the agricultural sector or an accurate depiction of all youth employment in agriculture. In no sense does the report provide a basis for the department embarking on more restrictive regulations in this area. For DOL to do so renders the process an arbitrary and

⁷ *Fingers to the Bone: United States Failure to Protect Child Farmworkers*, © 2000 Human Rights Watch

⁸ H.R. 3482 (109th Congress); H.R. 2674 (110th Congress); H.R. 3564 (111th Congress); H.R. 2234 (112th Congress)

⁹ In the 111th Congress, H.R. 3564 had 107 cosponsors, none of them Republicans. Of those sponsoring it, nearly half (48) came from only 3 states – California (30), Texas (10) and New York (8).

capricious rulemaking. We earlier alluded to some assertions in the report. Following, taken nearly at random, are just a few other statements that are typical of the document:

- *Hundreds of thousands of children under age 18 are working in agriculture in the United States.*¹⁰ *...conservative estimates make clear that hundreds of thousands of children are working as hired laborers in agriculture, making up a significant proportion of the country's estimated 2.3 million employed workers who are below age 18.*¹¹

It is difficult, if not impossible, to reconcile HRW's assertion of "hundreds of thousands of children under age 18 working in agriculture" with publicly accepted data. DOL, in its notice of public rulemaking (NPRM), specifically states: "Although articles and studies concerning young hired farm workers have been issued by many diverse groups¹²...there is consensus that estimating the number of young hired farm workers is difficult because of the gaps in available data. Adequate data concerning younger hired farm workers does not exist."¹³ Later in the NPRM, the department states that the "number of farm workers affected by this proposal is quite small – there are only approximately 56,000 hired farm workers under the age of 16...."¹⁴ The National Agricultural Statistics Service (NASS), an agency within the Department of Agriculture (USDA), publishes quarterly data on hired workers. While it does not break down the data by age, it provides a far different perspective from the HRW report. The latest chart available [Chart 1 below], issued earlier this year, shows that the total number of hired workers in agriculture is less than 1 million.

- *The long hours and demands of farmwork result in high drop-out rates from school.*¹⁵

HRW cites no studies to substantiate this claim. In the absence of documentation, it is impossible to accept the accuracy of this statement.

- *While many child farmworkers are U.S. citizens, the entire family may fear deportation if the parents are undocumented or hold short-term agricultural visas.*¹⁶

¹⁰ *Fields of Peril*, page 5

¹¹ *Ibid.*, page 16

¹² The department here cites HRW as one such group.

¹³ *Federal Register*, page 54842

¹⁴ *Federal Register*, page 54870

¹⁵ *Ibid.*, page 5

¹⁶ *Ibid.*, page 10

The only short-term agricultural visa program authorized and operated by the U.S. government is the H-2A program. H-2A workers are generally not permitted to bring dependent children with them to the U.S. It is nearly impossible to envision a scenario in which an H-2A worker (who is in the country legally with the proviso that he has no intention of immigrating) would be accompanied by his child, who is a U.S. citizen and also engaged in farm work, and the “entire family,” including the visa holder (viz., the parent, who is a legal nonresident), would “fear deportation.”

Chart 1



Source: National Agricultural Statistics Service, available at http://www.nass.usda.gov/Charts_and_Maps/Farm_Labor/fl_qtrwk.asp

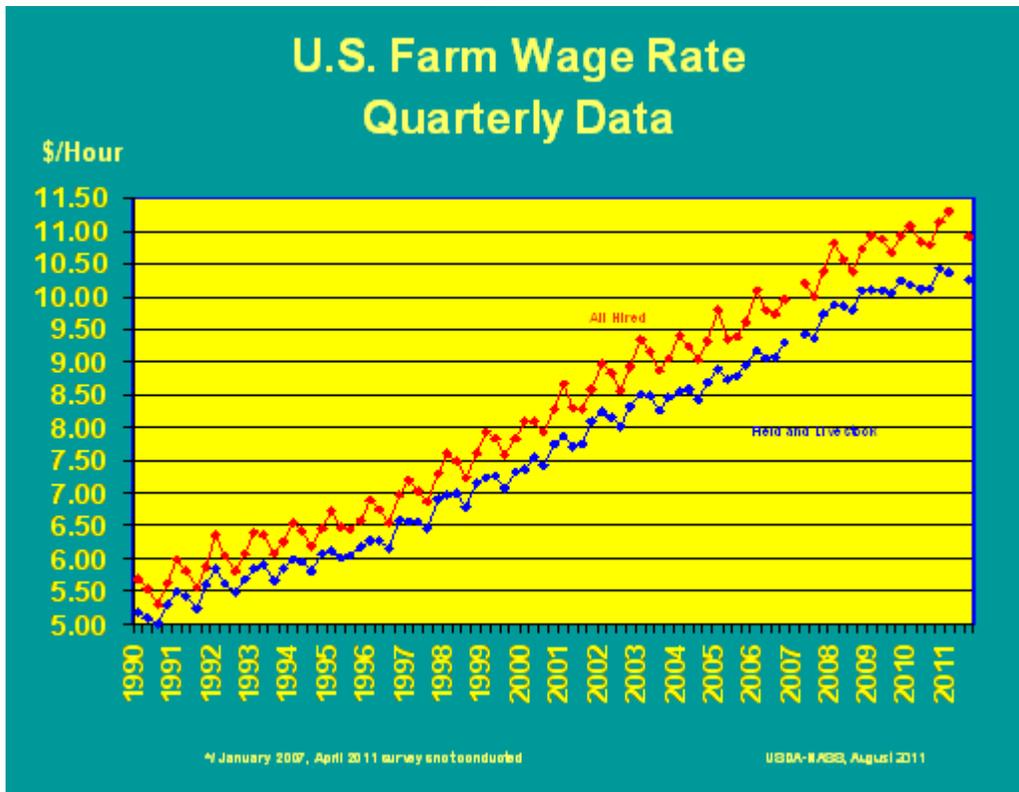
- *Like adults, many children in farmwork earn less than federal minimum wage¹⁷ ...Although government data suggest that crop workers on average make slightly above minimum wage, these figures are likely inflated.¹⁸*

¹⁷ Ibid., page 26

¹⁸ Ibid., page 28

HRW does not cite a basis by which such figures “are likely inflated.” However, NASS does publish data on wage rates for hired farm workers. Chart 2 below shows that wages for hired farm workers continue to rise and, in the latest quarter available, averaged nearly \$11 per hour, approximately 50 percent above the minimum wage. While the figure for field and livestock workers is somewhat less, it is still above \$10 per hour – not “slightly above” the minimum wage.

Chart 2



Source: National Agricultural Statistics Service, available at: http://www.nass.usda.gov/Charts and Maps/Farm Labor/fl_qtrwg.asp

- *This number [i.e., physician-diagnosed pesticide poisonings among U.S. agricultural workers] represents only a small fraction of actual pesticide poisonings as many cases are never reported.*¹⁹

HRW provides no basis for this claim, yet it is instructive to examine the assertion. The report alleges that a number is (a) “only a small fraction” of a (b) number that is unknown. Curiously, HRW footnotes the assertion by stating that “Officials in EPA’s Office of Pesticide Programs told Human Rights Watch that they were unable to estimate

¹⁹ Ibid., page 49

farmworkers' overall pesticide exposure.” Who in HRW made such an estimate, of which the number is only a small fraction and how that fraction was determined, are not disclosed in the report.

As stated earlier, we do not begrudge HRW or any group for lobbying for the positions it espouses. But DOL, by its own statement, appears to have adopted this viewpoint from the outset. That bias, we believe, has tainted the department's thinking and resulted in a legally flawed proposal that violates the APA. For example, in published materials (included as Attachment A to these comments), DOL has enunciated principles it has used in drafting this proposed rule. One principle is to “bring as much parity as possible to the non-agricultural and agricultural child labor standards.” No such “principle” exists in the FLSA, nor has Congress directed the department to pursue implementation of such a principle in its regulations. DOL cannot act in a manner contrary to the FLSA without violating the FLSA itself and the APA. In fact, just the opposite is the case: the FLSA makes a clear, distinct difference between youth employment in agricultural and non-agricultural settings. The FLSA does not contain, nor has Congress ever approved, a directive to DOL to establish “as much parity as possible” between the two sectors. Congress has approved youth employment in agriculture excepting those jobs the nature of which the secretary finds “particularly hazardous.” As a result of its initial bias, the department, in this proposal, has gone beyond its authority and sought to eliminate as much as possible – based on the “parity” principle it is pursuing – the ability of youth to work in agriculture. If – as suggested by the press release issued in May 2010 – the department has made up its mind in advance that youth working in agriculture are “robbed of their childhood,” then it is bound to come to a conclusion that is at odds with the law and its statutory authority. Such an effort is misguided; is inconsistent with the statute and APA; would be harmful to the education and character formation of youth and to farming and rural communities; and we firmly believe it is fundamentally in conflict with congressional intent.

As stated earlier, we believe the most appropriate course for DOL to follow is to withdraw the rule and to re-visit its analysis of the agriculture HOs so that it truly focuses on those that are particularly hazardous. In our comments below, we outline our views on specific issues raised by the proposed rule.

Treatment and Interpretation of Parental Exemption

We have strong concerns about DOL's enunciation of how it intends to interpret the exemption for children working for their parents or persons standing in place of their parents on farms owned or operated by their parents or persons standing in place of their parents. The department claims that “None of the revisions proposed in this NPRM in any way change or diminish the statutory child labor parental exemption in agricultural employment contained in FLSA section 13(c)(1).”²⁰ A similar allusion is contained in materials disseminated by the department²¹ wherein the department states, “The parental exemption is statutory and DOL does not have the authority to change it through regulations. It is unchanged in this NPRM.”

²⁰ *Federal Register*, page 54841

²¹ See Attachment A

The department states an indisputable fact (viz., that it cannot by regulation change a statutory provision), but in so doing, obscures that, in fact it, is attempting to alter how it interprets the law in a significant way. It cites discussion on the floor of the House of Representatives from 1937, contending that this debate demonstrated that “Congress...intended that the parental exemption be applied quite narrowly, limiting their application to parents and those standing in place of a parent.”

The discussion referenced by the department dealt with the term “custody” in the underlying legislation and the amendment adopted to replace it with the phrase “one who stands in the place of a parent.” Clearly, the House of Representatives made a conscious decision not to employ the term “custody” because, in the words of Rep. Lanzetta, “Using the word ‘custody’ broadens the limits to the point where children may be ‘farmed’ out for the sole purpose of employment.” The debate continued, however:

Mrs. Rogers of Massachusetts: I believe if the phrase ‘in loco parentis’ were put in there it would take care of the situation.

Mr. Sirovich: And would include guardians, too?

Mrs. Rogers of Massachusetts: And guardians, yes, in loco parentis; otherwise I fear there might be very grave abuses in the employment of children. But the gentleman from Wisconsin meant that only parents or guardians in loco parentis should be exempted; and I know that is the will of Congress.

There is nothing in this colloquy that justifies DOL’s assertion that nieces, nephews or other family members fall outside the protections Congress envisioned for family farms. Farming occurs almost exclusively in rural communities, where it has traditionally been a way of life for extended family to participate in operating the farm. This is truer today, when family and estate planning have operated in such a way as to alter the ownership patterns and operational plans of farms. Often, in order to keep the farm in the family, relatives will enter into joint operating agreements, partnerships, limited liability corporations or other entities in order to assure the continued operation of the farm and the involvement of siblings and their heirs. This aspect of family farm life has never adhered to a regulatory framework that diagrams tasks and jobs into daily or weekly timeframes or that schedules visits from family members for periods of more than a month in order to validate some bureaucratic interpretation of the law.

Indeed, DOL’s perspective as enunciated in the NPRM is inconsistent with its own history of enforcing the law.

The NPRM states that, “Where the ownership or operation of the farm is vested in persons other than the parent, such as a business entity, corporation or partnership (unless wholly owned by the parent(s)), the child worker is responsible to persons other than, or in addition to, his or her parent, and his or her duties would be regulated by the corporation or partnership, which might not always have the child’s best interests at heart.”²² The NPRM goes on to state:

²² *Federal Register*, page 54841

The Department has, for many years, considered that a relative, such as a grandparent or aunt or uncle, who assumes the duties and responsibilities of the parent to a child regarding all matters relating to the child's safety, rearing, support, health, and well-being, is a 'person standing in the place of' the child's parent.... It does not matter if the assumption of the parental duties is permanent or temporary, such as a period of three months during the summer school vacation during which the youth resides with the relative. This enforcement position does not apply, however, in situations where the youth commutes to his or her relative's farm on a daily or weekend basis, or visits the farm for such short periods of time (usually less than one month) that the parental duties are not truly assumed by that relative."

There is no evidence that DOL has interpreted or enforced the exemption in this manner and we find no statutory basis that it should start this now. The history of young relatives working in agriculture across the country has been well established for decades and for the department at this date to reinterpret the law in a manner of its own choosing is wholly inconsistent with congressional intent.

DOL's own written policy on this issue clearly shows that the NPRM is a new policy that contradicts decades of practice.

In the *Field Operations Handbook* dated May 16, 2002, DOL explicitly spells out how it interprets these provisions of law, and that documentation contradicts the department's statement in the NPRM. Specifically, the manual reads:²³

(d) "Owned by" the parent or person standing in place of the parent includes part ownership as a partner in a partnership or as an officer of a corporation which owns the farm if the ownership interest in the partnership or corporation is substantial.

(e) "Operated by" the parent or person standing in the place of the parent means that they exert active and direct control over the operation of the farm or ranch by making day-to-day decisions affecting basic income, work assignments, hiring and firing of employees and exercising direct supervision of the farm or ranch work. Ranch managers, therefore, who meets [*sic*] these criteria could employ their own children under 16 on the ranch they operate without regard to the provisions of the HO/A.

Thus, the *Field Operations Handbook* explicitly contradicts DOL's statement in the NPRM wherein the department "interprets the term 'parent or person standing in the place of the parent' to mean a human being and not an institution or facility, such as a corporation, business, partnership, orphanage, school, church or a farm dedicated to the rehabilitation of delinquent children." DOL has lumped together a disparate group of entities: siblings who establish an LLC (i.e., a business partnership) to operate a farm inherited from their parents would enjoy the exemption, and we believe all children of those with a partnership interest would fall under the exemption. We believe such a normal, customary business arrangement, as happens in agriculture all across the country, is a far cry from an "orphanage" or "church" that might

²³ *Field Operations Handbook* – 5/16/02., Rev. 648, Chapter 33, Child Labor – FLSA, Chapter 33d (Children Employed in Agriculture), section 33d03

operate some farms and hire individuals for tasks. They should not be treated the same and we urge the department to maintain the integrity of the family farm exemption approved by Congress.²⁴ Moreover, the department provides little justification for its interpretation other than the HRW report and two citations to letters from DOL personnel that have no legal authority and were not provided in the public record to enable public comment.

Accordingly, we urge DOL not to abridge congressional intent by narrowly interpreting the family farm exemption. It should be read as Congress intended – for all family farms to continue to operate as they have for generations.

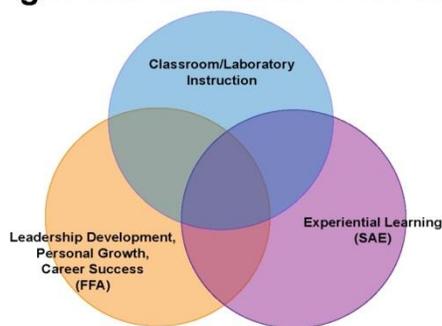
Student Learner Exemption

Another area of concern is the Student Learner Exemption. The existing provisions of the FLSA provide an exemption for students enrolled in vocational training in agriculture. Today, those programs are referred to as school-based agricultural education and are a part of career and technical education. Nearly 1 million students are enrolled in these programs across the United States and its territories. Some 7,500 such programs are available primarily through public high schools, and instruction is provided by 11,000 highly qualified teachers certified to teach agriculture. These programs play a critical role in educating young people and introducing them to careers in agriculture and agricultural science.

Since its inception nearly a century ago, the model of delivering high-quality, effective instruction in agriculture has been centered around three integral components. First is the *classroom/laboratory* setting, in which students receive formal academic, hands-on instruction related to agricultural science. Such courses are organized sequentially and offer students opportunities to explore myriad career options as they learn science, technology, engineering and mathematics (STEM) through the applied context of agriculture, food and natural resources. Safety education has always been, and continues to be, an important part of the classroom and laboratory instruction.

²⁴ We do draw the department’s attention, however, to explicit language in the Fair Labor Standards Act (29 U.S.C. 203) that defines a “person” as “an individual, partnership, association, corporation, business trust, legal representative, or any organization group of persons.” According to the U.S. Supreme court, in determining to what extent the Fair labor Standards Act could be interpreted and how the plain language of the act must be followed, “Congress could have expressly exempted from the Act employees engaged in producing goods for interstate transportation not leading to a sale or exchange. Congress also could have exempted employees engaged in producing munitions for use by the United States in war, rather than for sale or exchange by it. Congress might even have exempted all employees producing goods in any Government-owned plants. However, Congress stated no such exemptions. On the contrary, Congress included, by express definition of terms, employees engaged in the production of goods for interstate transportation.” (See *Powell, et al. v. United States Cartridge Co. Aaron et al. v. Ford Bacon & David, Inc. Creel et al. v. Lone Star Defense Corporation* 339 U.S. 497 ((70S.Ct. 755, 94 L. Ed. 1017), Nos. 96, 79, 58. Argued; and Submitted Dec. 8-9, 1949, Decided: May 8, 1950. An entity might qualify as a “person” without qualifying for the exemption. However, any “person” – including a business entity – standing in place of a parent still qualifies for the exemption.

Agricultural Education Model



The second component is *experiential learning*, also referred to as supervised agricultural experience, or SAE. This part of the program takes place predominately outside of the classroom and school, but it is supervised by the agricultural instructor. Supervised agricultural experience programs come in many forms, including entrepreneurship, placement (at a job site), research and service-learning. While historically many of our students come from farms, today a large number, roughly two-thirds, do not have that opportunity. These students are very interested in learning about agriculture. The experiential learning programs, especially in job placement settings, provide invaluable opportunities for students to learn the application of what is taught in the classroom/laboratory environment. A recent review of SAEs showed that one in three students received their experiential learning through placement experience.

The third component is *leadership, citizenship and personal growth* that is taught through the National FFA Organization (FFA). FFA, a student organization formerly known as the Future Farmers of America, not only helps students grow as leaders and productive citizens, it also provides students opportunities to maximize learning from both the classroom/laboratory and supervised agricultural experience environments.

Agricultural educators go above and beyond to help students succeed. They care deeply about their students, regarding their safety. That is why agricultural education programs place strong emphasis on teaching safety and ensuring that students understand how to apply these lessons in the real world.

A major concern with the proposed changes to the child labor regulations is that the changes proposed by the department will limit, if not eliminate, opportunities to teach students to be safe when working in agriculture. If the proposed rules go into place unchallenged, most of these learning opportunities, especially those that take place in the first two years of an instructional program, would be lost or seriously compromised. A recent sample of SAE data across several states indicated that 36 percent of first and second year agricultural education students were involved in agricultural placement type SAEs. We believe it is critical to allow the system to operate in order to continue to teach students to be safe while receiving relevant work experience in agriculture.

The school-based agricultural education community (students, teachers, parents, state supervisory staff and other industry stakeholders) and the supporting agricultural community have serious concerns about many aspects of the proposed rules. Because the majority of the students they serve begin their involvement in agricultural education at age 14, the proposed rules would severely limit or eliminate opportunities to participate in the experiential learning aspects of the program.

We appreciate the recognition of the education and training programs provided for students. The current regulations make this central to the application of the law; however, the proposed regulations and expanded HOs either do not include the student learner exemption, or they limit severely the opportunities for students enrolled in agricultural education programs to be involved. We believe it is more responsible to teach students to be safe, rather than to tell them, “Oh don’t do that, you might get hurt.”

Ultimately, we are concerned about the limits these rules place on the ability and opportunities for students to learn by doing. “Learning by doing” is a critical part of the preparation and education through which we prepare students for careers in agriculture and related occupations. Agricultural education teachers realize they have a responsibility to work with their students, provide supervision, deliver safety instruction and work with employers of students so that the SAE is educational, meaningful and safe. They also recognize the role they must play in working with the students’ parents, employers and student themselves to have well-documented training agreements that clearly identify appropriate agriculture HO and safety requirements.

We reiterate the commitment and concern we share for the safety of students. We believe that through education, safety instruction and supervision, they are provided safe learning environments that help them succeed in the field of agriculture. This is important to our communities, our states and the nation. We believe DOL’s regulations can and should continue to allow students to learn while they working in agriculture, and we believe this can be accomplished safely and in accord with the law.

In our following comments, we address specific HOs.

Hazardous Occupation Order #1

The department seeks to “retain and expand”²⁵ agriculture HO1 by removing the 20 power take-off (PTO) horsepower threshold; requiring that tractors operated by 14- and 15-year old student-learners be equipped with roll-over protective structure (ROPS), mandating seatbelt use by student-learners, requiring student-learners to have a valid state driver’s license if operating tractors on public roads, and prohibiting the use of most electronic devices.

In our view, this HO would effectively prohibit youth from operating tractors in most situations, even in instances when such operation is not particularly hazardous. Therefore, we believe it exceeds the department’s authority and ignores congressional intent. The practical effect of the revised HO would be to reduce legitimate opportunities for employment and training for youth on farms, making it more difficult to educate and train future farmers in agricultural practices.

²⁵ Attachment A, page 2

The department has noted in various places in the NPRM a lack of data and information²⁶ about youth employment in agriculture; unfortunately, it seems intent on expanding its regulatory reach regardless. Its expansion of HO1 is a case in point. The NPRM states:

The Department is concerned that the training and skill sets that youth must complete in order to receive certification under the limited exemptions contained in §570.72(b) and (c) – which allow 14- and 15-year-old hired farm workers to operate tractors and several types of farm implements and have not been modified since their creation in 1971 – are not sufficiently extensive and thorough to ensure the safety of young hired farm workers.²⁷

We would draw the department’s attention to the possibility that moving tractor and equipment training to public/private schools could reduce the operator safety training now provided under the 4-H/Extension programs. The California Equipment Operation and Maintenance core curriculum model provides an example of current “in-school” programs that have a very limited amount of safety training related to equipment operation. Under this program, operator training is accomplished with two pages of basic operation safety rather than the comprehensive approach used by the 4-H/Extension program.²⁸

The Department is concerned that twenty hours of classroom training is insufficient to provide a young hired farm worker with the skills and knowledge he or she would need to safely operate the diverse range of agricultural tractors and equipment in use on today’s farms.²⁹

Typical 4-H programs require a minimum of 20 hours plus a written test and a skills test.³⁰ Youth 14 years and 8 months can begin driving vehicles on the road with only four hours of classroom training and are only required to have 24 hours of classroom time to complete driver’s training – plus written and skills testing.³¹ The federal Occupational Health and Safety Administration does not specify any length of training time necessary for powered industrial truck (PIT) training, only that the 24 topic areas be covered. An operator may begin operation of a PIT immediately, without training, while “under the direct supervision of persons who have knowledge, training and experience to train operators and evaluate their competence.”³²

²⁶ cf. *Federal Register*, page 54842 (“Adequate data concerning younger hired farm workers does not exist.” “It is important to recognize certain inherent limitations of NAWS.” “Information on the demographic characteristics of workers on farms where the growers do not participate is not obtainable.”). Page 54843 (“The health effects of pesticides on children, as opposed to adult worker population, have not been adequately studied and data is limited.”)

²⁷ *Federal Register*, page 54850

²⁸ California High School, Advanced Cluster Curriculum

²⁹ *Ibid.*, page 54851

³⁰ New York State Safe Tractor and Machinery Operation Program Certification Guidelines

<http://nys4h.cce.cornell.edu/Documents/Staff/Program%20Management/Tractor%20Safety/Tractor%20and%20Machinery%20Guidelines%202008.pdf>

³¹ Michigan Department of State. Driver Programs Division

³² 29 CFR Part 1910.178(l)(2)(iii)

The Department is also concerned that there has been almost no monitoring by any government agency to ensure the integrity and effectiveness of these certification programs.³³

While DOL alludes to studies cited in the NIOSH report, it appears to cherry pick the results it wants. The NIOSH report is instructive:

Carrabba et al. [2000] recently conducted a study in Indiana to determine the impact of 4-H tractor safety programs on the behavior and attitudes of youth tractor operators [Carrabba et al. 2000]. The results of this study indicate that participants in tractor safety programs demonstrate a greater level of confidence in operating tractors, and that the programs appear to have a positive influence on the safe operating procedures of participants in the training. A study by Wilkinson et al. [1993], which evaluated the training certification programs in Wisconsin, found that youth who had completed a training program reported an increase in usage of tractors equipped with ROPS and were less likely to ride on a tractor as a passenger.³⁴

Thus DOL, while citing the NIOSH report (i.e., that the “effectiveness of these tractor safety training programs has not been adequately evaluated nationwide),³⁵ goes on to declare the need for more examination of tractor safety training programs while effectively banning the practice. DOL also asks for “public comment as to whether the child labor provisions should permit any hired farm worker under the age of 16 years to operate or assist in the operation of agricultural tractors or agricultural implements.”

Our organizations represent the diversity of American agriculture. We represent farm families, many of whom have made agriculture their livelihood for generations. As stated earlier, we do not support having youth engaged in inappropriate occupations on the farm. We do believe, however, based on our generations of experience that the existing HO is sufficiently protective of agricultural youth on the farm and should not be expanded to foreclose all youths under age 16 from operating tractors.

Hazardous Occupation Order #2

This HO is a combination of previous HOs #2 and #3. In principle, we believe some equipment may be inappropriate for operation by youth at certain ages and DOL may classify such equipment. As proposed, however, the rule is over-broad, mandating “restrictions on the operation of power-driven machinery consistent with those applied to non-agricultural employment.” The term “operating” includes “cleaning, oiling and repairing” of the equipment; “connecting or disconnecting an implement or any of its parts to or from such equipment;” or “any other activity involving physical contact associated with the operation or maintenance of the equipment.” The term “power-driven equipment” is defined by DOL to include “all

³³ Ibid., page 54851

³⁴ National Institute for Occupation Safety and Health (NIOSH) Recommendations to the U.S. Department of Labor for Changes to Hazardous Orders, May 3, 2002, page 70

³⁵ Federal Register, page 54850

machines, equipment, implements, vehicles, and/or devices operated by any other power source other than human hand or foot power.”³⁶

DOL’s proposal, taken on its face, will result in extreme prohibitions that far exceed the department’s regulatory authority. For example, we believe that neither the NIOSH recommendations nor the statutory language provides a basis to regulate simple devices such as a battery powered hand-held screwdriver, drill or flashlight. We do not believe that cleaning a refrigerator or a weather station is particularly hazardous, yet both would be prohibited under the “cleaning any powered equipment” provision. As the use of a water hose under pressure would be prohibited, any cleaning would need to be from a provided bucket of water, but the youth would not be able to draw the water from a tap as the tap is under pressure.

The HO states that “farm field equipment means implements, including self-propelled implements, or any combination thereof used in agricultural operations.” This would appear to include both powered and non-powered implements, and when a non-powered implement is connected to a powered implement or tractor, any physical contact would be prohibited.

DOL’s proposal, thus, would prevent a youth from placing picked fruit or vegetables on a wagon, from hauling hay or picking rocks. It would prohibit the youth from riding an asparagus cart, operating a wiggle hoe or utilizing a powered pruner.

The prohibition of having physical contact with a vehicle presumably would prohibit the hand loading or unloading of materials, tools or products onto pickups or trucks if the “operation” of the vehicle would include the preparation for operating.

We also are concerned about the proposed prohibition as it relates to irrigation equipment. As written, the rule would prohibit movement or contact with all (presumably powered) irrigation equipment including trickle, solid set, and even hose and wand watering of bedding plants. It would prohibit youth from running trickle lines with ATVs or even walking tree-to-tree or plant-to-plant to determine if a one-gallon emitter is working and, if not, replace it, or to determine if there are any breaks in the trickle line and install a connector. If they could replace it (presumably by having a person age 16 or older turn it off and first drain the line as it could be under pressure), they would not be able to use a battery powered cutting or tube expanding device, inasmuch as all powered devices are prohibited.

Perhaps most importantly, DOL here appears to be engaged in a regulatory sleight-of-hand. Earlier in the preamble, DOL says that it “places great value on the information and analysis provided by NIOSH.”³⁷ This HO, however, departs significantly from the NIOSH recommendation, which is to

Combine HO2 and HO3, and expand prohibition from lists of specific machines to machines that perform general functions...following the terminology used in current coding systems.

³⁶ *Federal Register*, page 54856

³⁷ *Federal Register*, page 54837

Here, however, DOL – without any justification and going well beyond the authority it possesses under the law – takes an enormous regulatory leap. It states:

The Department appreciates the NIOSH recommendations regarding the classification of equipment by function, but *believes that adopting general restrictions on the operation of power-driven machinery consistent with those applied to non-agricultural employment*, along with revising the student-learner exemption to permit the limited and supervised operation of certain power-driven equipment after proper training has been received, *would more adequately protect young hired farm workers.*³⁸ [Emphasis added]

DOL cannot on the one hand justify its far-reaching regulatory regime by claiming it is relying on NIOSH and then, without justification, abandon that report because it does not supply the department the justification it requires for adopting even more restrictive regulations. DOL further distances the NIOSH recommendations by using contracted third party modified recommendations not made by NIOSH.³⁹ The FLSA authorizes the secretary of labor to designate occupations for youth that are “particularly hazardous.” This is not a blank-slate to DOL to substitute its own judgment on how to “adequately protect young hired farm workers.” This is regulatory over-reach, not justified either by the statute or the NIOSH report.

Hazardous Occupation Order #3

This proposal by DOL prohibits “operating and assisting in the operation of hoisting apparatus and conveyors that are operated either by hand or by gravity.” Similar broad definitions of terms are employed in the proposal.⁴⁰

DOL here clearly exceeds its congressional mandate to identify occupations that are “particularly hazardous” and, in fact, might even contravene common sense. The department, in this HO, has actually turned the law on its head by prohibiting youth from being employed in occupations that utilize devices that actually *reduce* risk. For example, a hand cart is a mechanical device that applies leverage by hand and foot power to hoist or lift a load and lowers the load by gravity or by hand or foot. It is foolish for DOL to use a broad brush in an effort to “protect” youth and in so doing actually increase the risk of injury. We believe DOL would be more wise, and follow congressional intent far more closely, to designate specific devices – such as manlifts and boatswain-chair-type devices – that are prohibited, rather than to attempt to ban all activity. Such an approach is a sweeping arrogation of authority that was not granted to DOL by Congress.

³⁸ *Federal Register*, page 54856

³⁹ SiloSmashers, Inc. page 54837. For example see HO 10.

⁴⁰ *Federal Register*, page 54878, where “operating” is defined to include “tending, setting up, adjusting, moving, cleaning, oiling, repairing” the equipment.

Hazardous Occupation Order #4

DOL broadly expands the previous agricultural HO related to working with animals and does so in a way that greatly exceeds congressional intent – as well as the NIOSH report on which the department purportedly bases these new HOs. The impact of the HO on working with livestock would be to greatly reduce youths’ exposure to livestock and animal husbandry practices. Among the notable tasks the proposed HO would prohibit youth from performing are: engaging or assisting in animal husbandry practices that inflict pain upon the animal and/or are likely to result in unpredictable animal behavior, treating sick or injured animals, and herding animals in confined spaces such as feed lots or corrals or on horseback.

Here again, DOL ignores the NIOSH recommendation, which is to retain the existing HO. Instead, the department seeks to expand its regulatory reach by “incorporating the important and thoughtful recommendations of the National Farm Medicine Center.”⁴¹ Following this path, as DOL seeks to do, will lead to very broad regulatory prohibitions, potentially increasing liability for farmers and imposing excessive government controls on agricultural producers. We believe it exceeds DOL’s statutory authority and should not be pursued.

Moreover, the department appears to be attempting to codify into a labor regulation a veterinary standard without any supporting scientific studies or analysis to support what it means to “inflict pain”. The classification of certain animal husbandry activities as “inflict[ing] pain” is not within the scope of the department’s power. If there is any department in the federal government that regulates animal husbandry, that would be USDA. As with many sections of this NPRM, the department has again set forth a proposed standard with absolutely no analysis to support its position in violation of the APA.

For example, the NPRM says that the “National Farm Medicine Center noted that past and recent data indicate a significant number of animal-related injuries occur to youth when they are involved in the activities cited in its second recommendation [i.e., prohibiting youth from engaging or assisting in animal husbandry practices that inflict pain upon an animal and/or are likely to result in unpredictable animal behavior]. It also reports that ‘[h]orseback herding requires a person to monitor and anticipate the behaviors of two large animals simultaneously. No youth development data exists to suggest youth younger than 16 years have the cognitive ability to handle this responsibility.’”

We find it astonishing that DOL would rely upon a single recommendation of an organization that “no youth development data exists” to suggest youth under 16 years of age can herd animals on horseback. In fact, there is almost unlimited real-world experience on which to rely. This is an activity that has been performed for generations, both in America and in other nations. The test is not that there is an absence of injury in the task. Youth engage in many activities – competitive horseback riding, skateboarding, surfing, cycling – that can entail some risk, injury

⁴¹ *Federal Register*, page 54859

and, in extreme cases, fatality. To impose a federal prohibition on an activity that has a long, iconic history is regulatory over-reach.

We also draw DOL's attention to another pernicious aspect of this proposed HO. By using as a standard any activity that might "inflict pain," DOL, unwittingly or not, may be opening the door for animal rights activists to pursue their own agendas on the back of labor standards. We note that a lawsuit was recently filed by an animal rights organization, three marine-mammal experts and others alleging that several orca whales now held at SeaWorld are being held as slaves in violation of the 13th Amendment to the U.S. Constitution.⁴² The orcas have been named as plaintiffs in the suit and the general counsel of People for the Ethical Treatment of Animals (PETA) has been quoted as saying, "Slavery is slavery, and it does not depend on the species of the slave any more than it depends on gender, race, or religion."⁴³ Furthermore, we draw DOL's attention to the fact that this might well be a regulatory loophole some might use to further restrict not only youth employment but to further an animal rights crusade. As noted on one website, "Some scientists suggest that only primates and humans can feel emotional pain, as they are the only animals that have a neocortex – the 'thinking area' of the cortex found only in mammals. However, research has provided evidence that monkeys, dogs, cats and birds can show signs of emotional pain and display behaviours associated with depression during painful experience, i.e. lack of motivation, lethargy, anorexia, unresponsiveness to other animals."⁴⁴

Rather than expand its regulatory reach, we urge DOL to follow the NIOSH recommendation and retain the current HO without expansion.

Hazardous Order #5

The preamble states that "for purposes of this Ag H.O. *timber* means trees, logs, and other similar woody plants. However, this HO would not prohibit a hired farm youth from performing such tasks as carrying firewood or clearing brush."⁴⁵ As drafted, the HO may have the effect of mandating an outright prohibition of youth working on Christmas tree farms or in plant nurseries. It should be clarified to allow such occupations, which are not particularly hazardous. It also should be made clear that it does not prohibit youth from ordinary, non-hazardous activities connected with trees (e.g., pruning).

Hazardous Order #6

HO6 references 29 CFR Part 570.33(n)(4) that prohibits occupations "in connection with" construction (including demolition and repair). We are concerned this reference will prohibit the use of hammers and other hand construction tools in not only the repair and maintenance of any building, facility or other structure on a farm but also the use of hand tools entirely. Common tasks such as fence mending and painting, nailing a slat on an apple bin or carrying materials to a stall for repair would be prohibited. As the terms "in connection with" are used, we worry that

⁴² <http://www.peta.org/b/thepetafiles/archive/2011/10/25/peta-sues-seaworld-for-violating-orcas-constitutional-rights.aspx>

⁴³ Ibid.

⁴⁴ <http://www.wellcome.ac.uk/en/pain/microsite/culture2.html>

⁴⁵ *Federal Register*, page 54860

tasks such as pounding stakes in the ground to “build” stake support “structure” to support vegetable plants would also be prohibited. We disagree that all tasks “in conjunction with” construction are particularly hazardous.

Hazardous Order #7

DOL is overly broad in HO7 when it prohibits work at elevations greater than six feet. Falls occurring on the same level accounted for 19 percent of all workplace fall fatalities in 2009, while falls from ladders accounted for 20 percent.⁴⁶ In 2010, falls contributed to 6 percent of agricultural fatalities but 33 percent of all construction fatalities.⁴⁷ While 20-foot ladders have become obsolete for many tree fruit operations, the use of 8 to 12 foot ladders is still common. We believe modern production practices, such as high-density plants, have significantly reduced the fall potential for the most common use of ladders on farms.

We are concerned this HO would prohibit youth from working in many terraced vineyards and orchards, as well as work near collies, ditches, levees or in other hilly terrain areas.

Similarly, the proposed rule provides no qualifying language regarding “above another elevation.” As currently written, the rule would prohibit work locations such as hay lofts but also second-floor offices, mezzanines or any other location where stairs are used to ascend more than six feet regardless of walls, railings or other enclosing methods.

Without data related to the agricultural fall causal factors we disagree with this HO expansion to six feet.

Hazardous Order #8

This HO would prohibit occupations involving working inside any fruit, forage, or grain storage silo or bin. While we recognize that some such occupations could be particularly hazardous for youth, we believe, as proposed, DOL has established parameters that make the regulation too vague and encompassing. For instance, it is not clear what constitutes storage. Does forage storage apply to hay barns? Does it include livestock barns that may have a temporary “forage” storage, such as a pile of feed or hay? Would an un-sided empty fruit bin or hay storage structure be prohibited at all times or just when a bin or bale is present? Are pole barns that are normally used to store farm equipment but could be used to store overflow grain or fruit now a prohibited work area? Are empty bunker silos covered? Would “fruit storage” include a bushel crate or bin? If all fruit storages are prohibited, then a walk-in cooler at a farm stand, a 1,000-bushel cold room or a 20,000 cold storage would also be prohibited. Alternatively, the current standard applies to storages designed to maintain a hazardous atmosphere and to those areas recognized to present a hazard.

⁴⁶ U.S. Bureau of Labor Statistics, U.S. Department of Labor, 2011

⁴⁷ Fatal Occupational Injuries by Occupation and Selected Event or Exposure, 2010, U.S. Bureau of Labor Statistics, U.S. Department of Labor

The NIOSH report speaks to engulfment, exposure to silo gases, depletion of oxygen from cave-in or collapsed materials, toxic gases or oxygen deficiency. Common fruit storages, with the exception of controlled atmosphere (CA) storages that are already covered, do not present the hazards listed as a basis for work inside all of the listed storages. For a CA room to function the room must be air tight prior to establishment of the modified atmosphere. Seals such as rubber gaskets, mastic, gas tight tape or paint are used to seal the locked entry doors and any other penetrations to the room.⁴⁸ While the hazard, low oxygen, is present there is no entry to the room.

Common fruit storage generally maintains a refrigerated condition with normal ambient air conditions. Fruit respires, or ripens, near and after harvest. Any fruit surface build up of respiratory gases such as ethylene or carbon dioxide is detrimental to fruit quality; air movement and humidity are essential for fruit quality. Cold rooms are regularly used for short-term storage of fresh or packed fruit and include certain packing areas. Fourteen and 15 year olds are allowed to work inside fruit cold storages but not freezers under the revised Non-Agricultural Youth Standards.⁴⁹ The proposed rule far exceeds the Non-Agricultural Standards.

We believe DOL needs to clarify the HO to assure that it would only apply to those occupations that are particularly hazardous for youth.

Hazardous Order #10

We agree with maintaining the current Danger/Poison or Warning for registered agricultural pesticides that are used in accordance with the Agricultural Use Requirements box as required by the EPA Worker Protection Standard.⁵⁰

The EPA has established a significant review process, possibly the most extensive in the world, to determine the hazards associated with regulated agricultural pesticides. EPA designates the relative toxicity by the use of Signal Words: Danger/Poison; Warning; Caution; and Caution (optional).

Toxicity categories.

| Study | Category I | Category II | Category III | Category IV |
|-------------------|-----------------------------------|----------------------------|----------------------------|--------------------|
| Acute oral | Up to and including 50 mg/kg | >50 through 500 mg/kg | >500 through 5,000 mg/kg | >5,000 mg/kg |
| Acute dermal | Up to and including 200 mg/kg | >200 through 2,000 mg/kg | >2,000 through 5,000 mg/kg | >5,000 mg/kg |
| Acute inhalation* | Up to and including 0.05 mg/liter | >0.05 through 0.5 mg/liter | >0.5 through 2 mg/liter | >2 mg/liter |

⁴⁸ United Nations Industrial Development Organization, Controlled Atmosphere Storage

⁴⁹ 29 CFR Part 570.34(e) and (j)

⁵⁰ 40 CFR Part 170 – The Worker Protection Standard

| | | | | |
|-------------------------|---|---|--|--|
| Primary eye irritation | Corrosive (irreversible destruction of ocular tissue) or corneal involvement or irritation persisting for more than 21 days | Corneal involvement or other eye irritation clearing in 8-21 days | Corneal involvement or other eye irritation clearing in 7 days or less | Minimal effects clearing in less than 24 hours |
| Primary skin irritation | Corrosive (tissue destruction into the dermis and/or scarring) | Severe irritation at 72 hours (severe erythema or edema) | Moderate irritation at 72 hours (moderate erythema) | Mild or slight irritation at 72 hours (no irritation or slight erythema) |
| *4-hour exposure. | | | | |

Signal word as determined by toxicity category.

| Toxicity category | Signal word |
|-------------------|---------------|
| I | DANGER |
| II | WARNING |
| III | CAUTION |
| IV | None required |

Typical statements for acute oral toxicity.

| Toxicity category | Signal word | Statements |
|-------------------|---|---|
| I | DANGER-POISON Skull and crossbones required* | Fatal if swallowed. Wash thoroughly with soap and water after handling and before eating, drinking, chewing gum, or using tobacco. |
| II | WARNING | May be fatal if swallowed. Wash thoroughly with soap and water after handling and before eating, drinking, chewing gum, or using tobacco. |
| III | CAUTION | Harmful if swallowed. Wash thoroughly with soap and water after handling and before eating, drinking, chewing gum, or using tobacco. |
| IV | CAUTION (optional) | No statements are required. However, manufacturers may choose to use category III labeling. |

*For products containing $\geq 4\%$ methanol, EPA believes that in order to mitigate potential risk the following statement should be added to the label: "Methanol may cause blindness."

We caution the department, however, to ensure that any final rule not overstep the department's authority by prohibiting activities that are not particularly hazardous. For example, it appears that as currently written, the proposed rule might prohibit youth from washing their hands with typical antibacterial soaps as they contain disinfectants and/or sterilants or other substances used to kill, repel, or mitigate pests,⁵¹ and it meets the definition of the handler task of applying a pesticide.⁵² Additionally, employers complying with the federal Field Sanitation Standard⁵³ would need to replace all anti-bacterial materials with detergent soap. The proposed rule could affect the Occupational Safety and Health Administration's benefit determination that "a total of 214,319 expected parasitic cases [would be] reduced by 139,307; 20,280 gastrointestinal cases reduced by 12,776; 4,148 viral hepatitis cases reduced by 1,037 because of the new federal standard and state standards."⁵⁴

Hazardous Order #13

This HO would prohibit all work involved in the production and curing of tobacco. This restriction is overly broad and clearly goes beyond DOL's authority, which is only to restrict those occupations that are "particularly hazardous." We agree with comments already filed by Mark Purschwitz, Ph.D., Extension Professor and Agricultural Safety and Health Specialist with the University of Kentucky, which point out that there are occupations in the production and curing of tobacco which are not particularly hazardous. If it is the goal of DOL to assure that youth avoid situations in which they can contract green tobacco sickness (GTS), the department should tailor its regulation to address those situations, and not promulgate a blanket regulatory prohibition that exceeds its statutory mandate.

Request for Comments

In the NPRM, DOL states that it is "considering whether to create new Ag H.O. that would limit the exposure of young hired farm workers to extreme temperatures and/or arduous conditions and is asking for comment on this subject."⁵⁵ DOL goes on to state that:

An Ag H.O. could provide that youth under the age of 16 would not be permitted to work in agricultural occupations where the temperatures at which they are working exceed or drop below a certain temperature, factoring in such things as humidity, wind velocity, and the degree and duration of the physical exertion required by the work. It might also require that hours in direct sun be limited, if the temperature reaches certain thresholds for prolonged periods of time, and/or that workers be provided with shade, additional water supplies, more frequent breaks, the use of fans in shaded rest areas, or other options for relieving heat stress in certain

⁵¹ Congressional Research Service Report RL30022

⁵² *Federal Register* Pg. 54879

⁵³ 29 CFR Part 1928.110

⁵⁴ U.S. Department of Labor, Fact Sheet No. OSHA 92-25

⁵⁵ *Federal Register*, page 54865

circumstances. Comments are also requested about whether the payment of piece rates to young farm workers impacts their prolonged exposure to potentially harmful conditions.

We do not support creation of such a new agriculture HO and caution DOL in the strongest terms not to embark on such a regulatory expedition in the absence of convincing evidence on the public record that its position is justified and it is acting within the regulatory authority conferred on it by Congress. We amplify our concerns in the comments below.

1. DOL cites no documentation or evidence substantiating its view.

As noted earlier, DOL states that it “places great value on the information and analysis provided by NIOSH.”⁵⁶ Nowhere in its report, however, does NIOSH recommend an agriculture HO limiting exposure to “extreme temperatures and/or arduous conditions.” Neither in its revisions to the existing HOs nor in its recommendations for new HOs does NIOSH even raise this matter.

2. The seminal publication on this issue makes no mention or recommendation in this area.

Children and Agriculture: Opportunities for Safety and Health, a National Action Plan was published in April 1996 and was a prelude to later efforts, including the NIOSH report on which DOL purportedly rests its regulatory agenda. The report contained “the goal, 13 objectives, and 43 recommended action steps proposed by committee members.”⁵⁷ Nowhere in the National Action Plan is there a mention, much less a recommendation, to restrict youth from participating in the harvest of fruits and vegetables, much less an attack on the use of piece rates.

3. Later documents on this issue make no mention of this as a “particularly hazardous” occupation for youth.

In 2002, a subsequent report⁵⁸ cited as a document that “builds upon the 1996 National Action Plan”⁵⁹ similarly examined these issues. That report contained no such recommended agriculture HO on “arduous conditions” or “extreme

⁵⁶ Ibid., page 54837

⁵⁷ *Children and Agriculture: Opportunities for Safety and Health, A National Action Plan*, page 6. Available at <http://www.marshfieldclinic.org/proxy/mcrf-centers-nfmc-nccrahs-reports-nationalactionplan.1.pdf>

⁵⁸ *Childhood Agricultural Injury Prevention: Progress Report and Updated National Action Plan from the 2001 Summit*, published April 2002 by the Marshfield Clinic available at <http://www.marshfieldclinic.org/proxy/MCRF-Centers-NFMC-nccrahs-reports-summitreport.1.pdf>

⁵⁹ Ibid., Foreword to the publication

temperatures” or whether particular wage structures contributed to such conditions. It is noteworthy, however, that the report did contain a goal and objective that might have touched on this area.

The report included the recommendation that “exposure limits should be established to guide agricultural work assignments for children less than 18 years of age.”⁶⁰ None of its discussion, however, reflected the avenue down which DOL apparently wishes to proceed. The report noted that “workers are exposed to agrochemicals, organic dusts, gases, nitrates, volatile organic compounds, oils, and solvents. In addition to toxins, there are exposures to noise, vibration, and cumulative body strain.” Nowhere is temperature mentioned.

4. DOL’s approach is overly broad and arbitrarily vague.

It is a near impossibility for the regulated community to respond thoughtfully and substantively to a DOL request on an unstated, unspecified HO that might encompass restrictions based on “arduous conditions.” Any specific physical task might be characterized as “arduous,” but we remind the department that it does not have the authority to impose its own view on the sector. It is authorized solely to identify those occupations which are “particularly hazardous,” not ones which might be simply “arduous.”

Moreover, DOL has an obligation to the regulated community to state the hazardous nature of an occupation, how it seeks to address it and to spell out the HO in a manner that allows the agricultural community to respond substantively. In a meeting of stakeholders held at the USDA on Sept. 7, 2011, DOL officials of the department were explicitly asked whether they would propose an HO which farmers and ranchers would be allowed to evaluate and to which they would be allowed to respond or whether DOL might instead promulgate a final rule. The response of officials from the Wage and Hour Division was that they might well go directly to a final rule. Such an approach by the department would be an abuse of discretion and violate its obligations under the Administrative Procedure Act.

5. DOL appears to rely on the Human Rights Watch report for this initiative.

In the NPRM, the department states “As Human rights Watch documented in its May 2010 Report, *Fields of Peril: Child Labor in Agriculture*, pp.54-55, agricultural work naturally lends itself to occupational exposure to extreme heat and cold.”⁶¹ As discussed earlier in these comments, we do not believe the HRW report, whatever its merit as a work of advocacy, does not rise to such a level that it “documents” the need for additional regulation by DOL.

⁶⁰ Ibid., page 20

⁶¹ Federal Register, page 54865

6. DOL should not override existing state protections.

A number of states have in place existing regulatory or statutory requirements that must be met before youth can be employed in agriculture. California, for instance, has a number of strict standards protecting youth. One of the undersigned organizations⁶² submitted extensive comments to the department in August 2010 noting the protections afforded by states to youth working in agriculture. We do not believe DOL has established the need to regulate in an area which is already amply overseen by the states.

Non-agricultural Hazardous Order

We also wish to comment briefly on DOL's proposal⁶³ related to a prohibition on work in Farm-Product Raw Materials Wholesale Trade Industries. While it is not an agricultural HO, it does touch on the employment opportunities afforded to youths in rural and agricultural communities, and we wish to draw the department's attention to the overly broad proscription it is proposing and to urge that it be brought closer to conformity with DOL's authority under the law. We believe it is possible for DOL to meet its statutory responsibilities while still providing for acceptable employment opportunities for youths below the age of 18. For example, there are occupations located at country grain and terminal elevators, as well as the grain-handling activities of feed mills and grain processing plants, that we believe do not pose hazards that would foreclose the jobs for employment of youth under the age of 18. Such tasks might include general cleaning and related duties, administrative tasks in scale houses, or other responsibilities that do not encompass the threats of engulfment or entrapment. By recognizing these appropriate jobs, DOL would continue to allow employment opportunities for teens, particularly in summer and during times of harvest. Even though employees under 18 will be allowed to work in an office, we also recommend that the department further define what constitutes an "office."

We appreciate the opportunity to submit these comments to DOL and stand ready to work with you in any appropriate way to assure that youth seeking employment in agriculture are both protected from particularly hazardous occupations and are provided the employment opportunities Congress intended.

Sincerely,

Advanced Insurance Marketers
Agri-business Association of Iowa
Agricultural Retailers Association
AgStar Financial Services, ACA
American Farm Bureau Federation

⁶² See Attachment B, submission by American Farm Bureau Federation

⁶³ *Federal Register*, pages 54846-54848

American Feed Industry Association
American Horse Council
American Nursery & Landscape Association
American Seed Trade Association
American Soybean Association
Association for Career and Technical Education (ACTE)
Badgerland Financial
Citizens LLC
Colorado Association of Wheat Growers
Cooperative Elevator Co.
Cooperative Network
CropLife America
Dairy Farmers of America
Dairylea Cooperative Inc.
Falmouth Cooperative Co
Florida Fruit & Vegetable Association (FFVA)
G & R Van Driessche Farms
Great Lakes Packing Company
GreenStone Farm Credit Services
Idaho Dairymen's Association
Illinois Fertilizer and Chemical Association
Independent Professional Seed Association (IPSA)
Kansas Cooperative Council
Land O'Lakes
Maryland & Virginia Milk Producers
MBG Marketing/The Blueberry People
Michigan Agri-Business Association
Michigan Bean Shippers
Michigan Milk Producers Association
Michigan Sugar Company
Minnesota Crop Production Retailers
Montana Grain Growers Association
National All-Jersey
National Association of Agricultural Educators (NAAE)
National Association of State Departments of Agriculture
National Association of Supervisors of Agricultural Education (NASAE)
National Association of Wheat Growers
National Corn Growers Association
National Cotton Council
National Cotton Ginners Association
National Council for Agricultural Education (NCAE)
National Council of Agricultural Employers (NCAE)
National Council of Farmer Cooperatives
National Farm & Ranch Business Management Education Association (NFRBMEA)
National FFA Alumni Association
National FFA Foundation

National FFA Organization
National Grain and Feed Association
National Grape Co-operative Association, Inc.
National Milk Producers Federation
National Renderers Association
National Young Farmer Education Association (NYFEA)
Rocky Mountain Agri-business Association
Ohio AgriBusiness Association
Society of American Florists
South Dakota Agri-Business Association (SDABA)
South Dakota Grain & Feed Association
South East Dairy Farmers Association
Southern States Cooperative
USA Rice Federation
United FCS
United Fresh Produce Association
US Apple Association
Virginia Agribusiness Council
Washington Farm Labor Association
Welch Foods Inc
Western United Dairymen