Testimony In Support of SJM 7
Provided to the Senate Committee on General Government and Small Business Protection
March 13, 2013

Chair Shields and Members of the Committee:

Executive summary:
In 2012 the U.S. Department of Labor threatened "hot goods" objections on Oregon farms, denying the farms due process, contacting and warning customers that the farmers' products might no longer be bought, shipped, or sold, and offering as the only alternative a blanket confession which did not enumerate any specific allegations. The confession form included a waiver of all rights to appeal, even if findings of fact or law later exonerated the farmer. In addition to the blank confession form, USDOL assessed one farm over $156,000 in fines and back wages it never substantiated, and demanded immediate payment. USDOL used a new statistical method for assuming wage violations it did not witness or provide any documentation of. USDOL's actions in Oregon have left growers with best practices in place in the impossible position of either under-paying top-producing employees or paying them for their full production and risking violating USDOL's arbitrary hourly production maximum.
SJM 7 encourages the president's administration to implement policies and procedures in the application of hot goods powers so that what we saw last summer never happens again.

Testimony:

In late July and early August 2012, agents of the United States Department of Labor (USDOL) began a series of surprise inspections at blueberry farms in the Willamette Valley. USDOL farm visits are an important tool for monitoring compliance with federal wage and hour laws, and are not unusual. What was unusual was the agents' nearly immediate use of USDOL's "hot goods" powers on these farms before an investigation had been completed.

When hot goods objections are issued, as the name suggests, it results in labeling items as products of a criminal enterprise. It was created to combat underpayment of workers and the illegal use of child labor in the garment industry during the Great Depression. In theory, the USDOL demonstrates that products were made but wage laws were not followed. It can then designate the items as hot goods, and can prevent the items from being sold until the employer reaches an agreement about whether and how much of an underpayment occurred.

Last summer, USDOL began using the term "hot goods" within hours of their farm visits. At least two farms in question had never had any federal wage violations, nor any state wage violations. These are multi-generational farmers, and pillars of their community with good practices and a clean record. Two of the three farms penalized by USDOL are members of Oregon Farm Bureau's FEELDS program, which is a best-practices consulting service for farm employers. The farmers all grow fresh market blueberries, one of the most delicate and perishable crops grown in Oregon. Blueberry harvest takes place over a relatively short period of time, meaning that in a few weeks a farmer's entire yearly income depends on timely harvest and shipment of the fruit.

Farmers were told by USDOL that they had "ghost workers" who did not appear on the payroll. No documentation of these alleged missing workers was provided. Rather than continuing the investigation and presenting evidence, USDOL instead initiated its version of hot goods on these farms in these steps:

Farmers were threatened with a hot goods objection if they did not sign a consent judgment and in one case, agree to pay penalties and back wages totaling more than $156,000 to the USDOL before the hot goods objection would be lifted and shipment would be allowed.

USDOL then called buyers of the blueberries to tell the buyers that the farmers were subject to a hot goods objection and that they should stop receiving, selling, or shipping any product from these farms. USDOL presented a letter to the farmers saying in part, "We will lift our objection to shipment (of your blueberries) upon your agreement to the following terms: you must sign and return the consent judgment…"

The consent judgment requires the farmers to "waive service of process, answer, and any defense to the complaint filed herein; waive further findings of fact and conclusions of law; and agree to the entirety of this judgment without contest." The document states that the farmers, "waive their right to a hearing before the USDOL office of administrative law judges on these assessed civil money penalties."

The consent judgment states that the violations being penalized and the alleged employees to be compensated are listed in Exhibit A to the judgment. Exhibit A, at the time it was presented read in its entirety, "This information to be supplied at a later date."

It is Orwellian in the extreme to coerce a farmer to sign a confession, the substance of which will be filled in later, and by signing waives his right to any remedy if facts or law later exonerate him. The alternative presented to the farmer was that his perishable blueberries would be blocked from shipment or sale and allowed to rot. In other words, his entire year's income on that crop would be lost if he chose to defend himself. Beyond the damage to the farm done by the excessive penalty, there is reputational harm for the farmer. Buyers of blueberries may well stop buying product from a farm as a direct result of the phone call from USDOL alone, irrespective of the final outcome of the matter. This was the case in 2011 in a Michigan where USDOL used hot goods powers, and a farm's major customer no longer would do business with the farm afterward.

In meetings and phone calls with Oregon Farm Bureau, USDOL's response to questions about its procedures and criteria for use of hot goods was, and remains, a Catch 22 logic circle. Questions are answered with either, "We judge these matters on a case-by-case basis," or, "We cannot comment on the facts of a particular case."

How did USDOL determine there were underpaid "ghost workers" at these farms? They set a never-before applied production standard for blueberries and assumed that any berries picked above these levels must have been picked by ghost workers. In one case a farm was told that any amount beyond 50 pounds per hour per person indicates a ghost worker. At another farm USDOL said the threshold is 60 pounds per hour. One USDOL employee called anything over 50 pounds per hour, "Michael Phelps numbers." No basis for USDOL's creation or application of this hourly number has ever been offered.

A survey of farmers found that many of top employees can and do pick well over 60 pounds per hour on a sustained basis. A wage study conducted by a recently-retired USDOL farm inspector found sustained picking rates of over 80 pounds per hour common. The study was conducted with the same employees on one of the farms USDOL penalized. The wage study was conducted on a third picking on the same variety being harvested during the USDOL visit. The best employees were documented to reach levels of 100 pounds per hour in this study.

USDOL has not responded to a formal inquiry about its assumptions about maximum hourly production by employees. Without clarification, farmers risk triggering USDOL's statistical ghost worker threshold if they pay their top employees the full amount owed under piece-rate picking arrangements. It should be noted that it is common for blueberry harvest employees to earn $15-$20 or more per hour on this piece rate basis. Some earn much more.

Seven months later, Farm Bureau is not aware that a single "ghost worker" has been identified, and not one penny of alleged back wages now sitting in USDOL's coffers has been paid to any employee. USDOL's outreach to workers appears limited to an English-only press release issued at 4:30 p.m. the Friday of Labor Day weekend. Two years from the date it received these alleged back wages, USDOL may keep all moneys collected but not distributed to employees.

Oregon Farm Bureau believes wage and hour laws and other employee protections are essential and employers must comply with them. We believe USDOL has a legitimate and important role in communicating these standards and investigating complaints and enforcing the law when violations are proven through due process.

But to be a credible regulator, USDOL must offer due process, evidence of violations, and penalties commensurate with the alleged violations. USDOL has a full range of tools and remedies available to it, including criminal prosecution. Assessing civil money penalties and back wages are legitimate tools that do not require threats of hot goods orders. Farmers, tied to the land of their parents and grandparents, are not a flight risk. There were no employees identified as being owed back wages, so there was no urgency in collecting money ostensibly on their behalf in these Oregon cases. USDOL also has the discretion to assess penalties and back wages and give farmers up to two years to pay. There was no reason to give these farms only days to pay the full amounts assessed.

Farm Bureau is organized in all 50 states and Puerto Rico. Through this network, we have learned that half of the reported 2012 uses of hot goods by USDOL in the nation were in Oregon over that single week last summer. These USDOL farm inspections were not complaint-driven. There was no probable cause. These farms had spotless records. We believe California, which has more than ten times the number of farm employees Oregon, had a single use of hot goods powers by USDOL in agriculture in 2012.

The outrage sparked by USDOL's use of hot goods in this way, under these circumstances in Oregon, has crossed party lines and has been decried in urban and rural communities alike. USDOL still has not answered questions posed by six members of the Oregon Congressional delegation (Sen. Wyden, Sen. Merkley, Rep. DeFazio, Rep. Walden, Rep. Schrader, and Rep. Bonamici). While it took USDOL only a handful of days to impose one of its harshest penalty schemes (criminal prosecution is the only remedial action more severe than hot goods), it cannot explain its actions to members of congress to their satisfaction more than seven months

later. The congressional letters and letters from BOLI Commissioner Brad Avakian and Oregon Department of Agriculture Director Katy Coba are attached.

News coverage spotlighting USDOL's improper use of hot goods in Oregon has included a page one exposè in the *Oregonian* (attached) and led to an editorial board piece titled, "Hot goods order spoils trust in the blueberry field." The *Bend Bulletin* and *Capital Press* have also reported on, and published editorials decrying USDOL's actions.

Hot goods is a nuclear option. It should be a last resort in cases of repeated or truly egregious violations. It should not be the first resort. And it should not be applied in an arbitrary and capricious manner without any policy or procedural transparency or safeguards. USDOL hurt farmers, hurt workers, and eviscerated its own credibility with its misuse of hot goods powers in Oregon last summer. SJM 7 is an important step in encouraging the president's administration to ensure that what happened last summer in Oregon is never repeated.

We have assembled key documents for your review at www.oregonfb.org/usdol.

Thank you for your consideration of our views on this important matter.

Congress of the United States
Washington, DC 20515

August 17, 2012

The Honorable Hilda L. Solis
Secretary, U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Dear Madam Secretary:

In the last two weeks, we have received reports about Department of Labor (DOL) activities on Oregon farms which raise significant questions. Specifically, we have been made aware of three issuances of "hot goods" orders (HGO) by DOL to sanction violations of the Fair Labor Standards Act (FLSA) since August 2nd. Depending on the case, these HGOs can prevent perishable farm products from being shipped off-farm, and effectively shut down harvest activity while the order is in place. We absolutely do not condone violations of the FLSA. However, in a phone call with Congressman Kurt Schrader and DOL representatives on Monday, August 13th, 2012, the DOL asserted that a HGO could only be considered after thorough investigation, due process opportunities for response by the employer, and a finding that the violations were willful, egregious, and/or repeated. Indeed, DOL's website states that restraining the shipment of goods is to be used after a thorough process:

> "When all the fact-finding steps have been completed, the employer and/or the employer's representative will be told whether violations have occurred and, if so, what the violations are and how to correct them. If back wages are owed, the employer will be asked to pay the back wages and the employer may be asked to compute the amounts due.... In the absence of an employer voluntarily correcting the violations, the Wage and Hour Division may seek to restrain the shipment of the goods."

We are concerned that Oregon farmers have presented us with a narrative and supporting documentation that indicates that DOL may have abandoned the normal due process mechanisms and remedies in favor of a significant sanction. In one case, a farmer was told that the HGO would only be lifted after a large sum was paid to DOL and after he signed a consent judgment. The consent judgment included a waiver of any recourse if findings of fact or law later exonerated him. It required a waiver of the right to contest the finding. All this took place before the farmer was ever informed in writing what the alleged violations were.

We are not asking you to address these specific cases and cannot verify their credibility, but rather, we are writing to ask you for additional clarification of DOL procedures and practices for issuing HGOs on agricultural enterprises and enforcing the FLSA, including:

Is it the policy of the DOL to not disclose alleged violations to employers before issuing hot goods orders?

What test or standard is the DOL using to determine the need for a hot goods order?

Why does the DOL ask employers to waive rights for future findings of fact or law in its consent judgments?

What opportunity is there for an employer to respond without having his/her perishable crop under threat?

On farms and elsewhere throughout the economy, DOL serves a vital function in communicating and enforcing rules and laws to protect all working people. Statutes and rules give the Department the tools necessary to apply remedies commensurate with the severity and/or frequency of violations of the law. It is our hope that the fairness and due process provided by law is available to all employers and employees alike.

Please consider this request consistent with all applicable laws and regulations. We thank you for your consideration and look forward to your response.

Sincerely,

Kurt Schrader
Member of Congress

Ron Wyden
U.S. Senator

Jeff Merkley
U.S. Senator

Peter DeFazio
Member of Congress

Greg Walden
Member of Congress

Suzanne Bonamici
Member of Congress

Farm Bureau and state officials blast 'heavy handed' federal labor investigations

Published: Wednesday, August 29, 2012, 5:36 PM

 By Eric Mortenson, The Oregonian

Oregon Federal labor investigators stopped shipments of valuable blueberries while investigating labor practices at Oregon farms.

In late July, investigators with the U.S. Department of Labor visited three blueberry farms in Marion County and announced finding "widespread" record-keeping and minimum wage violations at each.

Farm labor law investigations are often contentious, especially involving fruit pickers working on a "piece rate" basis rather than an hourly wage. But these cases took an unusual turn as the labor department's Wage and Hour Division staff in Portland dropped the hammer.

In a move Oregon's congressional delegation and the Oregon Farm Bureau say was unprecedented and deeply unfair, the department invoked a "hot goods" provision of labor law that prohibited shipment of the berries. Labor officials also notified wholesalers that berries from the farms would be subject to the order and should not be processed or shipped.

Suddenly, the growers were stuck holding perishable berries worth hundreds of thousands of dollars. The labor department offered a way out: Pay a fine and back wages and sign a consent judgment admitting wrong and agreeing not to contest the order even if subsequent information exonerated the farms.

Greg Ditchen, a third-generation Silverton farmer whose B&G Ditchen Farm paid the $169,816 in back wages and penalties, called the department's action "extortion." Half his crop was at risk and there was no time to offer a defense or pursue other legal options.

"They put a hot goods order on our fruit, and after they had the money they said we had to sign a paper saying we were wrong," Ditchen said. "We had to make a business decision and sign the paper."

A second farm, E&S Farms Inc. of Woodburn, paid $11,301 in back wages and a $10,500 penalty. Earlier this month, the Department of Labor said Pan-American Berry Growers of Salem signed a consent order to pay $41,778 in back wages and a $7,040 civil penalty.

A retired federal Wage and Hour Division investigator who reviewed two of the cases for an attorney representing the farmers said the agency's action was hasty and alarmingly incomplete.

"They put a noose around the neck of these farmers right off. That is not what Wage and Hour is

about," said Manuel Lopez of Eugene, who was a labor investigator for 27 years.

Oregon officials are furious. The state's labor commissioner, agriculture director and most of the state's congressional delegation asked the labor department to explain its action.

Labor Commissioner Brad Avakian was the most direct. In an Aug. 15 letter to the federal agency, he said seizing perishable crops probably violates the constitutional search and seizure and due process rights of farmers "who have yet to be found guilty of anything."

Avakian asked the department to immediately cease using the "hot goods" provision, which refers to a clause in the 1938 Fair Labor Standards Act originally intended to halt abuses in the garment industry.

Avakian said the department should use an enforcement tool that "does not result in irreparable harm prior to full investigation and a fair process of adjudication."

In an Aug. 17 letter, the congressional delegation said the federal Department of Labor "may have abandoned normal due process mechanisms." Use of a "hot goods" order is reserved for cases in which farm labor violations are "willful, egregious and/or repeated," the letter said.

Senators Ron Wyden and Jeff Merkley signed the letter, as did representatives Kurt Schrader, Peter DeFazio, Greg Walden and Suzanne Bonamici.

Oregon Agriculture Department Director Katy Coba also complained, saying hot goods orders are "being issued as a first step in the compliance process instead of the last resort."

"This appears to be a very heavy handed approach," she said in an Aug. 15 letter to U.S. Labor Secretary Hilda L. Solis.

U.S. Labor spokeswoman Deanne Amaden said the department is "not in a position to discuss cases in greater detail right now," but may have a more detailed response within two weeks.

Enforcement action involving the Fair Labor Standards Act are intended to protect workers and level the playing field for employers, she said.

Tim Bernasek, a Portland attorney representing B&G Ditchen Farm and E&S Farms, said the signed consent judgments may limit his clients' appeal options. Along with the Farm Bureau, he hopes to continue discussions with the Labor Department and halt the use of hot goods orders in future investigations.

Dave Dillon, the Farm Bureau's executive vice president, said labor investigations can be sorted out over time.

"Farmers are not in a business that's going to pack it up in a truck tonight and head to another state," he said. "What's the urgency of saying stop your whole business until you admit guilt, pay a fee and have no due process?"

Farm labor law is complicated. Fruit and berry pickers often are hired and supervised by contractors, but Oregon farmers nonetheless bear responsibility in a system that requires them to carefully track employees, hours worked and wages paid. If an investigation shows they messed up, through carelessness or otherwise, they can expect to pay back wages and fines.

Most harvest workers prefer to work on a "piece rate," or per-pound basis, because they can make more money than settling for the fixed, minimum wage. It is a farmer's obligation, however, to track hours and picking totals to ensure workers earn at least the federal minimum wage of $7.25 an hour. The law has exceptions and exemptions that further complicate matters.

In some cases, two or more workers -- often family members -- will pick on the same ticket. Attorneys and the Farm Bureau discourage that practice, because it complicates record-keeping.

In the Ditchen Farm case, documents indicate blueberry pickers earned 33 cents per pound. A worker picking two buckets an hour, for example, approximately 28 pounds, would earn the equivalent of $9.24 an hour. Farmers and others say the best pickers can earn $30 an hour or more.

Bernasek, the attorney, said labor investigators concluded anyone picking more than 60 pounds an hour at the Ditchen farm must have had someone else picking with them, and docked the farm for back wages due those workers. But Bernasek suggested such "ghost workers" are unidentified and may not exist, and said back wages collected on their behalf will never be distributed.

Lopez, the former labor investigator, said he did a one-hour time study at the farm involving 17 pickers. The workers picked from 112 to 196 pounds in an hour, well over the department's 60-pound standard.

"They didn't do a complete investigation," he said.

Lopez said the Ditchen farm may have committed some "record keeping" violations, but said the hot goods order wasn't necessary.

Greg Ditchen, the farm owner, said he's never been in trouble before and may use only mechanized harvesters in the future.

"It's not the labor," he said, "it's the people who come out and tell us we're doing wrong."

--Eric Mortenson

Oregon

Bureau of Labor and Industries
Brad Avakian
Commissioner

August 15, 2012

The Honorable Hilda Solis
Secretary
United States Department of Labor (USDOL)
200 Constitution Ave. NW
Washington, DC 20210

Re: Cessation of the Hot Goods Provision

Dear Secretary Solis,

Oregon's Bureau of Labor and Industries, including its Farm Labor Unit, is our state's sole law enforcement agency protecting workers from wage and hour as well as civil rights violations. In addition, we work closely with our agricultural employers, educating them on how to comply with state and federal employment laws. Our mission is to aggressively protect Oregon workers through an enforcement process that respects the legal rights of all parties involved.

I know that USDOL has recently threatened or used the "hot goods" provision in Oregon to address suspected farm worker wage and hour violations. Further, I understand USDOL has plans to make much greater use of this method in Oregon.

I am concerned both by the use of the "hot goods" provision with agricultural operations and that USDOL has implemented any method in Oregon without first considering joint efforts with our agency. We can be a valuable resource and always welcome a substantive conversation before you begin operations within our state.

The "hot goods" provision has been an effective enforcement tool since its passage in the 1938 Fair Labor Standards Act. More than a law to protect workers, it was established as a law to prevent unfair competition from employers who artificially decrease costs through substandard wages and working conditions.

As originally intended, the "hot goods" provision has been applied to the garment industry and other similar sectors that produce non-perishable goods. The interstate sale of suspected "hot goods" in these industries can be restrained without the result of destroying the value of the goods. In this sense, the potentially offending employer has incentive to correct its actions in order to continue its profitable transactions – which enables future proper payment of wages.

(continued)

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Applying the "hot goods" provision to perishable goods presents significant problems. Seizing items that will quickly spoil creates leverage by potentially destroying the value of the goods. If the goods spoil, however, the incentive for the employer to correct its action is largely lost as is the ability to gain income from the goods to pay proper wages. The intent of the law is, therefore, not realized.

More importantly, the likelihood of the conversion of perishable goods before the employer's actions are fully investigated and the employer is found in violation, raises serious Fourth Amendment search and seizure as well as Fourteenth Amendment due process issues.

Protecting vulnerable workers is a necessity, as is protecting the rights of any party involved in the enforcement process. It is the conclusion of the Oregon Bureau of Labor and Industries that the seizure of perishable items on Oregon farms under the "hot goods" provision likely violates the constitutional rights of farmers who have yet to be found guilty of anything.

I invite you to meet with us to discuss a way of addressing suspected wage and hour violations in Oregon that effectively protects workers while maintaining the fair process we use in our enforcement actions. Until then, I ask that USDOL immediately cease using the "hot goods" provision to seize perishable goods on Oregon farms and instead use an enforcement tool that does not result in irreparable harm prior to full investigation and a fair process of adjudication.

Sincerely,

Brad Avakian
Commissioner
Oregon Bureau of Labor and Industries

cc: Governor John Kitzhaber
U.S. Senator Ron Wyden
U.S. Senator Jeff Merkley
U.S. Representative Earl Blumenauer
U.S. Representative Peter DeFazio
U.S. Representative Greg Walden
U.S. Representative Kurt Schrader
U.S. Representative Suzanne Bonamici
Director Katy Coba, Oregon Department of Agriculture

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August 15, 2012

The Honorable Hilda L. Solis
Secretary, U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Dear Secretary Solis:

I am writing this letter to request a meeting with you to clarify reports that I am receiving from growers in Oregon who have been investigated by the United States Department of Labor (USDOL), issued civil penalties and in some cases have had their crop seized and embargoed using a provision called a "Hot Goods" order. It is my understanding that a "Hot Goods" order prevents perishable farm products from being shipped off-farm, and effectively shuts down harvest activity while the order is in place.

The immediate issue is not that USDOL is visiting farms to assess compliance with USDOL regulation but the manner in which the compliance activities are being conducted. The reports I am receiving indicate that the USDOL compliance activities may not provide due process for the grower, and that the "Hot Goods" orders are being issued as a first step in the compliance process instead of the last resort in the process to gain compliance. This appears to be a very heavy handed approach.

I have been told that in one case, a grower was informed in writing that they had an apparent FLSA violation and that the violation rendered their farm product "hot goods" for the purposes of the FLSA. In turn the grower was told that in order to avoid interruption in the future movement of their perishable farm products that they would need to sign a consent judgment, deposit a large sum of money in an escrow account and waive any recourse against the USDOL should the violations be reversed. In addition the grower was not provided with any written documentation of the alleged violations. In short, it appears the USDOL visited the farm, found apparent FLSA violations, issued a hot goods order which stopped the movement of their perishable farm product, and stated in writing to the farmer that the only way to get the "Hot Goods" order lifted was too waive their rights for due process, pay a large sum of money into escrow and admit to all the violations without knowing the specific infractions.

This is only one report, but it appears that the process that is being described to me does not seem to fit with any recognizable government administrative process and does not follow the process as outlined on the USDOL website.

It is important that agriculture producers follow all the appropriate USDOL regulations. The question at hand is whether growers are being given due process if there is a violation and that the steps to correct violations are well understood without the threats and forced admission of guilt.

I request you meet with the state of Oregon so we may better understand the process used by the USDOL and verify that it is an appropriate means to assure compliance with the FLSA, an outcome that we all support.

Sincerely,

Katy Coba
Director

c. Oregon Congressional Delegation
Governor Kitzhaber
Labor Commissioner Avakian

HOUSE COMMITTEE ON AGRICULTURE

SUBCOMMITTEE ON
CONSERVATION, ENERGY AND FORESTRY

SUBCOMMITTEE ON
LIVESTOCK, DAIRY AND POULTRY

HOUSE COMMITTEE ON SMALL BUSINESS

SUBCOMMITTEE ON
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(RANKING MEMBER)

SUBCOMMITTEE ON
CONTRACTING AND WORKFORCE

The 112th Congress
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February 22, 2013

Mary Beth Maxwell
Acting Deputy Administrator
US Department of Labor
Wage and Hour Division
Washington, D.C. 20210

Dear Acting Deputy Administrator Maxwell:

Thank you very much for your response, dated February 8th, 2013, to my inquiry on behalf of my constituent Bob Ditchen of B&G Ditchen, LLC in Silverton, OR. I appreciate the Wage and Hour Division's (WHD) mission and the importance of its work to enforce the Fair Labor Standards Act (FLSA). Allow me to state clearly that I do not in any way condone violations of the FLSA. Employers that violate the FLSA should absolutely be held accountable for their actions. I do, however, feel strongly that WHD's enforcement tactics must ensure a fair process for all parties involved.

In an effort to better understand both WHD laws and regulations including the actions of the Oregon office of WHD, I have some follow up questions to your response regarding my constituent, Mr. Ditchen:

1. You note that, "Once the WHD has determined that goods were produced in violation of the Fair Labor Standards Act, the employer is notified that the goods are 'hot,' and a request is made for the employer to *voluntarily* agree not to ship or move the goods until the issues of noncompliance are resolved."

   According to the enclosed timeline provided by my constituent, no effort was made by WHD employees to notify them that the HGO provision was voluntary. More specifically, I have been informed that in phone conversations, emails and written correspondence with WHD employees, no mention of the word voluntary occurred.

   It is my understanding that in different regions of the country, growers are notified in writing that compliance is voluntary and in the Oregon region it was not.

   What is WHD's policy on notifying growers that this process is voluntary? What explains this difference?

2. In your response, you note that WHD did disclose the details of the alleged violations to Mr. Ditchen.

   On what date did WHD disclose the details of the alleged violations? Was this notification made subsequent to Mr. Ditchen signing a consent judgment and after repeated requests for these details?

   What is WHD's policy on disclosing details of alleged violations? How can WHD work to better ensure that growers are afforded due process under the law?

3. You state that the specific violations result from the grower allowing multiple pickers to pick berries on one piece-rate ticket. It was explained to Mr. Ditchen and his attorney that WHD has determined that it is not possible for one person to pick more than 60 pounds of blueberries in one hour.

   How did WHD arrive at this figure? Is this a national standard? If not, why not?

4. It is my understanding that Mr. Ditchen utilized a contractor to supply labor for his harvest. As the enclosed timeline notes, the contractor is the party that maintained payroll records and picking tickets for the workers, not Mr. Ditchen. I have also been informed that the labor contractor has not been contacted by WHD in relation to this case.

   Has WHD interviewed the labor contractor in this case? And if so, is it possible to provide Mr. Ditchen with the results of that interview?

5. You note that a grower does indeed have the opportunity to argue in federal court that they have not committed FLSA violations. My understanding is that Mr. Ditchen and his attorney feel that WHD forced their hand by notifying Mr. Ditchen's customers in the distribution chain before any admission of guilt or proof of alleged violations had been provided. The resulting public scrutiny of FLSA violations could have had the effect of ending Mr. Ditchen's relationship with his customers in the distribution chain.

   Furthermore, the fresh market nature of the product would not have allowed ample time for WHD to seek the injunction and for Mr. Ditchen to make his case in court before the product spoiled. I have been told the value of the crop that was frozen was in excess of $1 million, and its loss likely would have caused the farm to go under.

   How can WHD work to ensure growers are not unfairly pressured into signing consent judgments and allowed due process under the law?

6. I understand the purpose of the consent judgments is to bring much needed finality to cases involving FLSA violations. However, it is my understanding that in three cases in Washington during the summer of 2011, the consent judgments signed between growers and WHD did allow for an administrative process that would have afforded growers the opportunity to provide information rebutting WHD's allegations.

It is my understanding that this administrative process was not included in the consent judgment they signed during the summer of 2012.

Why was this due process not provided to Mr. Ditchen?

Thank you again for your responses to both my general inquiry and my inquiry on behalf of Mr. Ditchen. My hope is that in the future, alleged FLSA violation can be investigated and adjudicated in a manner that is fair to both workers and employers. I look forward to your responses to my questions above.

Please consider this request in accordance with all applicable laws and regulations. Should you have any questions or concerns, please contact Trevor Sleeman in my Salem district office by calling (503) 588-4054 or at trevor.sleeman@mail.house.gov.

Sincerely,

Kurt Schrader
Member of Congress

KS/ts
Enc.

Monday, July 30th, 2012
1:00 pm: USDOL WHD inspectors arrive at B&G Ditchen Farms in Silverton, OR. Inspectors included Victor Russell, Julieanna Elegant, Jeff Genkos, Ed Sifuentes, and unnamed others. B&G Ditchen's farm labor contractor, Manuel Urendas, was also present. Inspectors questioned Manuel's workers in the field about sexual harassment and wages. Workers were prevented from leaving the field. Manuel and Jeff Genkos discussed workers' picking capabilities. Manuel reported that many workers can pick 60+ pounds per hour. Jeff Genkos disagreed. The inspectors took no copies of records; however, they did take photos of workers in the field.

Tuesday July 31st, 2012
USDOL WHD inspectors Victor Russell and Julieanna Elegant showed up to B&G Ditchen Farm's offices and met with Carol Ditchen, Greg Ditchen, and Bob Ditchen. The inspectors took copies of the hourly payroll records of the farm employees.

Wednesday, August 1st, 2012
Jeff Genkos verbally placed a Hot Goods Order (HGO) on the farm and restricted all future shipping based on a verbal announcement of violation. Jeff Genkos contacted B&G Ditchen, LLC's buyers (Cal Giant) and placed an HGO upon them.

Tuesday, August 2nd, 2012
Tim Bernasek, attorney for B&G Ditchen, called Jeff Genkos to discuss concerns about the investigation. Without providing details of the alleged violations, Mr. Bernasek was told that an HGO was being issued and would not be lifted until B&G Ditchen paid a penalty and agreed to have a Consent Judgment entered against it. Mr. Bernasek was led to believe the penalty payment would be placed in an escrow account where it would sit until he had an opportunity to review the findings and potentially challenge them through regular administrative/legal processes. No details concerning the amount of the penalty were provided. On that same day, B&G Ditchen received a written HGO declaring the inspectors found "apparent" violations. A list of the violations was not provided.

Friday, August 3rd, 2012
B&G Ditchen was ordered to pay a penalty without being told how much the penalty was by USDOL. Communication by USDOL on penalty amount was made after 5:00 pm on August 3rd, after bank hours.

Saturday, August 4th, 2012
Arrangements were made to pay the penalty of $169,816 for "apparent" violations, so B&G Ditchen could ship their berries on the proceeding Monday. Payment was to be made directly to USDOL, a change from initial indications that money would be placed in an escrow account.

USDOL stated that once payment was received, all objections (HGO) would be lifted. This has been documented in email correspondence between USDOL Portland Director Jeff Genkos and legal counsel representing the growers.

Payment was to be made before any written documentation of what the violations were had been provided to the farm. At this point, there were no opportunities to appeal findings, provide

information that would substantiate claims that the USDOL had made were incorrect or correct, and/or remedy any violations that had occurred.

Monday, August 6th, 2012
Payment of $169,816 was made to USDOL. USDOL then reneged on agreement to lift HGO after payment had been made by insisting that the HGO would be lifted only when a consent judgment was signed (which had still not been provided to B&G Ditchen's legal counsel). B&G Ditchen was scheduled to ship harvested blueberries still at the farm, but unable to because of the HGO. The approximate value of the goods held at the farm or in the distribution chain because of HGO was $1.5 million.

Tuesday, August 7th, 2012
DOL provided the Consent Judgment it was requiring be entered before it would lift its HGO. The Consent Judgment included a waiver of any recourse if findings of fact or law later exonerated the farm. It required a waiver of the right to contest the finding. It included seven pages detailing penalties. The Consent Judgment notes that the violations triggering all these remedial actions are included in an exhibit attached to the document. That exhibit, the lynchpin for the entire proceeding, includes only these words: "This information to be supplied at a later date." The actual exhibit containing the information concerning violations was not provided until 5:30 pm. The Consent Judgment was signed and delivered later that evening. The HGO was still not lifted that day.

Wednesday, August 8th, 2012
HGO was lifted.

Additional information:
The employees working at B&G Ditchen were employees of a labor contractor. Only the farm operation itself received communication from USDOL, paid penalties, and had their commodity seized in the distribution chain. The labor contractor, who maintains the payroll records and picking tickets for the employees has not been contacted by USDOL or asked for any records.

By MITCH LIES

Capital Press

MEDFORD, Ore. -- The Oregon Board of Agriculture has joining the state Department of Agriculture in protesting the U.S. Department of Labor's use of "hot goods" orders on perishable crops.

The board is sending a letter opposing the tactic to U.S. Secretary of Labor Hilda L. Solisand and Oregon's congressional delegation.

ODA Director Katy Coba previously voiced the department's opposition in a letter to Solis, the delegation, Gov. John Kitzhaber and state Labor Commissioner Brad Avakian.

Hot goods orders are issued by the U.S. Department of Labor's Wage and Hour Division to prevent crops that it alleges have been produced in violation of the Fair Labor Standards Act from entering retail and processing chains.

Three Oregon farms this summer agreed to pay the Department of Labor $210,000 in back wages and penalties to release their blueberry crops.

The Oregon Farm Bureau has called DOL's tactics "coercive."

Four Washington farms have agreed to fines in the last two years after the agency invoked the hot goods provision.

Board of Agriculture Chairman Doug Krahmer said the board will pattern its letter after Coba's Aug. 15 letter.

"The reports I am receiving indicate that the USDOL compliance activities may not provide due process for the grower," Coba said. "This appears to be a very heavy-handed approach.

"I have been told in one case, a grower ... was told that in order to avoid interruption in the future movement of their perishable farm products that they would need to sign a consent judgment, deposit a large sum of money in an escrow account and waive any recourse against the USDOL should the violations be reversed," she wrote. "In short ... it appears that the only way to get the 'hot goods' order lifted was to waive their rights for due process, pay a large sum of money into escrow and admit to all the violations without knowing the specific infractions."