**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| REYMUNDO ZACARIAS MENDOZA, *et al.*,<br>Plaintiffs,<br><br>v.<br><br>THOMAS E. PEREZ, in his official capacity, *et al.*,<br>Federal Defendants,<br><br>and<br><br>MOUNTAIN PLAINS AGRICULTURAL SERVICES, *et al.*,<br>Defendant-Intervenors. | Civil Action No. 11-1790-BAH |

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR RULEMAKING SCHEDULE AND FOR VACATUR**

As this Court is aware, in the previous appeal of this case, the D.C. Circuit held that the Department of Labor and its Secretary (collectively, DOL) violated the Administrative Procedure Act (APA) by adopting two Training and Employment Guidance Letters (TEGLs) without notice-and-comment rulemaking. The TEGLs establish the terms and conditions of employment, including wages and housing benefits, that employers participating in the H-2A visa program must offer to sheepherders and open range livestock workers (collectively, herders). The D.C. Circuit remanded to this Court for development of an appropriate remedy. *Mendoza v. Perez*, 754 F.3d 1002, 1025 (D.C. Cir. 2014). It explained that this Court would need "to consider various factors including whether vacating the TEGLs would have a disruptive effect on the herding industry and how quickly [DOL] might be able to promulgate, pursuant to the procedural requirements of the APA, new H-2A regulations for herding operations." *Id.*

As explained in detail below, this Court should order DOL (1) within 120 days of this Court's order, to publish a final rule after notice-and-comment rulemaking to replace the TEGLs, and (2) to set an effective date for the final rule that is 30 days after the date of its publication. This Court should also order that the invalid TEGLs be vacated 150 days from the date of the Court's order to coincide with the proposed effective date of the new final rule.

## ARGUMENT

### I. This Court Should Order DOL to Publish a Final Rule Within 120 Days That Becomes Effective 30 Days Later.

Plaintiffs and federal defendants agree—and the D.C. Circuit's decision contemplates—that a new final rule, adopted by notice-and-comment rulemaking, is necessary to replace the invalidated TEGLs. *See* Doc. 48, Joint Status Report at 1; *Mendoza*, 754 F.3d at 1025. Specifically, as plaintiffs have explained, the TEGLs supply the only source of federal regulation for herders' mobile housing. Doc. 27-1, Pls.' Summ. J. Memo. at 10-11, 19-20, 26. Therefore, DOL has no choice but to adopt, in a rulemaking that includes notice to the public and an opportunity for comment, new mobile housing standards to replace those currently set forth in Attachment B of each TEGL. DOL could replace other portions of the TEGLs by applying existing H-2A regulations, codified at 20 C.F.R. part 655, to herding occupations, or by adopting unique standards for the herding industry. *See* Pls.' Summ. J. Memo. at 28; *see also Mendoza*, 754 F.3d at 1024-25 ("In the absence of the TEGLs, petitions for certification of H-2A herders would be subject to the standards found in 20 C.F.R. part 655 . . . ."). A new rulemaking must set forth DOL's choice in this regard and any unique standards that DOL intends to apply to herding occupations.

Plaintiffs ask this Court to order DOL to issue a final rule, after notice and an opportunity for public comment, within 120 days of this Court's order. The final rule should take effect 30 days after the rule's adoption.

**A.** The need for a rapid rulemaking is clear. The TEGLs—like the H-2A regulations in 20 C.F.R. part 655—set standards by which DOL certifies that "(1) there are not sufficient qualified and willing U.S. workers to fill open positions and (2) hiring foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers." *Mendoza*, 754 F.3d at 1007 (citing 8 U.S.C. § 1188(a)(1)). Yet the TEGLs have been held invalid. Accordingly, their ongoing application precludes DOL from adequately testing the U.S. labor market to determine whether U.S. workers—including the plaintiffs—are available and qualified for herding positions and from ensuring that the importation of H-2A workers does not adversely affect similarly-employed U.S. workers, including by depressing U.S. workers' wages. Because avoiding the depression of wages and working conditions to U.S. and H–2A workers is of "critical importance," a short timeframe for a new rulemaking is in order. *Comite De Apoyo A Los Trabajadores Agricolas v. Solis* (*CATA*), No. 09-240, 2011 WL 2414555, at *5 (E.D. Pa. June 16, 2011) (so recognizing in the context of wages and ordering DOL to engage in notice-and-comment rulemaking with respect to the effective date of a rule governing the H-2B visa program and to adopt an amendment to a final rule within 45 days).

In addition, the TEGLs' practical impact on the public is substantial. The TEGLs exempt employers seeking certification of H-2A herders from requirements that they offer many of the minimum terms and conditions of work applicable by regulation to all other H-2A employers. *Mendoza*, 754 F.3d at 1009, 1011-12. As a result, each day that the TEGLs are in effect, they

impose a legally-invalid regime that alters workers' substantive rights, including the wages to which they are entitled.

**B.** DOL is capable of issuing a final rule within the time limit proposed by plaintiffs. In a case nearly identical to this one, Judge Louis Pollak of the Eastern District of Pennsylvania held that a guidance letter (similar to a TEGL) adopted to set the prevailing wage for H-2B visa workers constituted a legislative rule adopted without notice-and-comment rulemaking, and he invalidated a related prevailing wage regulation as arbitrary. *CATA*, 2010 WL 3431761, at *19, *25 (E.D. Pa. Aug. 30, 2010). Judge Pollak ordered DOL to adopt within 120 days of his order a final rule governing prevailing wage rates after notice and an opportunity for public comment. *Id.* at *25. Publication of a final rule within 120 days is even more feasible in this case than it was in *CATA* because DOL has already had months to begin preparing a proposed rule. In May 2014—even before the D.C. Circuit issued its decision—DOL's regulatory agenda indicated that the agency planned to issue a notice of proposed rulemaking to alter the wage methodology used to set herders' wages in the H-2A program. *See* DOL, Semiannual Agenda of Regulations 9-10, *available at* http://www.dol.gov/regulations/DOL-2014-0003-0001.pdf. Moreover, three months have passed since the D.C. Circuit invalidated the TEGLs, and more than a month has passed since the court of appeals denied defendants-intervenors' petition for rehearing en banc, thus ensuring that a rulemaking would be required. Under these circumstances, ordering DOL to issue a final rule within 120 days of this Court's order is reasonable.

An expeditious schedule is also warranted in light of the extended period of time that this case has already been underway. *See Rodway v. Dep't of Agric.*, 514 F.2d 809, 817-18 (D.C. Cir. 1975) (ordering agency to adopt a new rule implementing the food stamp program within 120

days and stating that "[i]n matters as vital as basic nutrition there is no excuse for delay, especially when this litigation has already dragged on for over three years").

In its earlier filings with this Court, DOL indicated that it could not meet a 120-day deadline for a final rule because of the agency's obligations under the APA and controlling executive orders. Doc. 33, Federal Defs.' Opp. at 9. Nothing in the APA, however, requires that an agency engage in a lengthy rulemaking process. The APA requires DOL to provide notice of the proposed rulemaking in the Federal Register, provide the public an opportunity to comment, and publish the final rule at least 30 days before the rule becomes effective, with limited exceptions. 5 U.S.C. § 553(a)-(d). Plaintiffs' proposal of a 120-day rulemaking period (which excludes the period between issuance of the final rule and its effective date) accommodates these statutory requirements.

Likewise, executive orders applicable to agency rulemaking are no impediment to a 120-day schedule. Executive Orders 12,866 and 13,563 state in precatory language that agencies "should" generally provide public comment periods of 60 days or more. *See* Exec. Order 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, § 2(b) (Jan. 18, 2011); Exec. Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51,735, § 6(a) (Sept. 30, 1993). The proposal advanced by plaintiffs would permit DOL to provide such a 60-day comment period if it so chooses. Moreover, the executive orders do not *require* a 60-day comment period or any other period of time for public comment. Indeed, Executive Order 13,563 states that a 60-day comment period is recommended only "[t]o the extent feasible and permitted by law." Executive Order 13,563, § 2(b).

Although DOL has indicated that it will need additional time for review by the Office of Information and Regulatory Affairs (OIRA) pursuant to Executive Order 12,866, *see* Doc. 33,

Federal Defs.' Opp. at 9, that review process also does not stand as a barrier to a 120-day schedule. By way of background, Executive Order 12,866 generally provides that OIRA, an agency housed within the Office of Management and Budget, will have 90 days to review any "significant regulatory action[]" proposed by another federal agency before the action is taken. Exec. Order 12,866, § 6(b). But Executive Order 12,866 expressly yields to a contrary court order: It states that where an agency action is governed by a "court-imposed deadline," an agency need only accommodate OIRA's preferred 90-day review period "to the extent practicable." *Id.* § 6(a)(3)(D).

**C.** This Court should order DOL to make the final rule effective 30 days after its publication in the Federal Register. The APA requires, except in limited circumstances, that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date." 5 U.S.C. § 553(d). Plaintiffs' proposal accommodates this statutory limitation on DOL's rulemaking authority.

The Court's order should set the effective date in light of past DOL practice under similar circumstances. In *CATA*, after the district court ordered DOL to publish within 120 days a new legislative rule setting the wage methodology for the H-2B visa program, the agency issued a rule but delayed the rule's effective date "by nearly a year." 2011 WL 2414555, at *3. Although the district court held that DOL had not violated the literal language of the earlier scheduling order, it recognized that the plaintiffs made "a strong argument that . . . DOL ha[d] not complied with the clear intent of the court's orders." *Id.*[1]

[1] The court ultimately invalidated the delayed effectiveness of the rule on the grounds that the agency had failed to engage in notice-and-comment rulemaking with respect to the rule's effective date and had based the date on unlawful considerations. *CATA*, 2011 WL 2414555, at *5.

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In sum, this Court should order the rulemaking schedule proposed by plaintiffs in light of the critical nature of the standards set by the TEGLs, the lengthy period of time that DOL has already had to begin preparing a rule, and the feasibility of promulgating a final rule within 120 days.

## II. This Court Should Vacate the Invalid TEGLs to Coincide with the Effective Date of the Final Rule.

Plaintiffs also ask this Court to order vacatur of the invalid TEGLs 150 days from the date of the Court's remedy order, which would coincide with the date on which DOL's final rule should become effective. As explained above at p.2, it is possible that, based on public comment, DOL will choose to eliminate certain exemptions for herding occupations now set forth in the invalidated TEGLs by reverting to the generally-applicable H-2A regulations at 20 C.F.R. part 655 for certifying herding industry positions. *See Mendoza*, 754 F.3d at 1024-25 ("In the absence of the TEGLs, petitions for certification of H-2A herders would be subject to the standards found in 20 C.F.R. part 655 . . . ."). Under those circumstances, while DOL may state in a final rule that certain special exemptions for herders no longer apply, the actual standards will be set forth in existing regulations under 20 C.F.R. part 655. To prevent confusion among workers and regulated employers, this Court should thus vacate the TEGLs, making clear that they have no further legal force or effect. Such action is called for by the APA. *See* 5 U.S.C. § 706(2) (requiring that a reviewing court "set aside agency action . . . found to be . . . without observance of procedure required by law"). Vacatur would also have the additional benefit of ensuring that DOL does not continue to rely on the TEGLs as a source of authority in the event that its rulemaking fails to address each aspect of herder certifications once governed by the TEGLs.

Referring to the standard set forth in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993), the D.C. Circuit noted that this Court would need to consider on remand "whether vacating the TEGLs would have a disruptive effect on the herding industry." *Mendoza*, 754 F.3d at 1025. Under *Allied-Signal*, the determination whether immediate vacatur is appropriate "depends on the seriousness of the order's [or rule's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." 988 F.2d at 150-51 (internal quotation marks omitted). *Allied-Signal* thus focuses on whether remand to the agency without vacatur is appropriate in light of the consequences of vacatur *before* an agency remedies its APA violation. *See Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 200 (D.C. Cir. 2009) (recognizing that the D.C. Circuit had described "remand without vacatur" as "allowing the rule to remain in place until [an] agency cures [the] defect" (internal quotation marks and alterations omitted)); *cf. A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (applying *Allied-Signal* factors to determine that immediate vacatur was inappropriate but nevertheless entering an order that an agency action would "be vacated automatically" after 90 days if the agency failed to adequately justify the challenged action). The *Allied-Signal* factors are inapplicable to plaintiffs' proposal, under which vacatur would occur on the date when DOL's final rule should become effective.

Even looking to the *Allied-Signal* factors, however, vacatur 150 days after this Court's order would still be appropriate. Failure to engage in notice-and-comment rulemaking is a serious deficiency—indeed, a "fundamental flaw"—for which eventual vacatur is both contemplated by the APA, 5 U.S.C. § 706(2), and appropriate under *Allied-Signal*. *Heartland Reg'l Med. Ctr.*, 566 F.3d at 199; *see also, e.g., Int'l Union, United Mine Workers of Am. v. Mine*

*Safety & Health Admin.*, 407 F.3d 1250, 1261 (D.C. Cir. 2005); *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005); *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 91 (D.D.C. 2007). Moreover, vacatur would have no disruptive effect because it would coincide with issuance of the final rule.

## CONCLUSION

For the foregoing reasons, this Court should order DOL to publish a final rule within 120 days of this Court's order, setting an effective date of 30 days after publication. The Court should also order vacatur of the TEGLs 150 days after the date of its order.

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Respectfully submitted,

/s/ Julie A. Murray

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