UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REYMUNDO ZACARIAS MENDOZA, *et al.*, Plaintiffs, v. HILDA SOLIS, in her official capacity, *et al.*, Federal Defendants, and MOUNTAIN PLAINS AGRICULTURAL SERVICES, *et al.*, Defendant-Intervenors.	Civil Action No. 11-1790-BAH

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

It is undisputed that the Department of Labor and its Secretary, Hilda Solis, (collectively, DOL) issued the challenged Training and Employment Guidance Letters (TEGLs) without notice and an opportunity for public comment. As plaintiffs (collectively, the workers) explained in their memorandum in support of summary judgment, none of the exceptions to the notice-and-comment requirement of the Administrative Procedure Act (APA) applies to the TEGLs. In its opposition to the workers' motion, DOL argues, in a general reprise of its opening brief, that the TEGLs are interpretive or procedural rules that do not require notice and comment. DOL also argues that partial vacatur and a 120-day timeline for a new rule are not appropriate remedies. In their opposition to the workers' motion, Defendant-Intervenors Mountain Plains Agricultural Services and Western Range Association (collectively, MPAS) primarily argue that the challenged TEGLs do not significantly change the terms of employment for H-2A herders from

the terms set by the predecessor "special procedures," so the TEGLs are exempt from the APA's notice-and-comment requirements.

The arguments urged by DOL and MPAS are without merit. In the discussion below, the workers first address DOL's primary argument that the TEGLs are either interpretive or procedural rules. Where applicable, they also address MPAS's similar arguments. The workers then address why MPAS's attempt to justify the substance of the TEGLs is irrelevant. The workers end by addressing DOL's opposition to the workers' proposed remedy: partial vacatur of the TEGLs and a 120-day deadline for a notice-and-comment rulemaking, where necessary, to replace the TEGLs.

As the following discussion makes clear, the workers' motion for summary judgment should be granted.

ARGUMENT

I. The TEGLs Are Not Interpretive Rules.

A. The H-2A legislative rule authorizing "special procedures" does not render the TEGLs interpretive.

DOL asserts that the TEGLs are interpretive rules because the TEGLs flow from existing statutory and regulatory provisions, in particular, 20 C.F.R. § 655.102, which permits the agency to adopt "special procedures" in some circumstances. Doc. 33 at 2-5. DOL disputes the workers' contention that the TEGLs effectively amend the H-2A legislative rules, arguing that the workers misconstrue "the relationship between the statutory requirement [directing DOL to certify that employing H-2A workers will not adversely affect the wages and working conditions of U.S. workers] and the legislative rule authorizing the use of special procedures." *Id.* at 4. MPAS makes a similar argument, asserting that because 20 C.F.R § 655.102 authorizes the use of "special procedures," the TEGLs are necessarily interpretive even if they add substantive

standards to the existing statutory and regulatory scheme and apply to all H-2A herder jobs. Doc. 35 at 23-24. This Court should reject both DOL's and MPAS's arguments.

First, 20 C.F.R. § 655.102 does not, as DOL contends, just "allow[] the agency some flexibility in gathering wage data . . . in situations where wage data is not readily available." Doc. 33 at 5. Rather, in reliance on its authority under 20 C.F.R. § 655.102, DOL has struck the requirement from the H-2A legislative rule that employers pay an AEWR or prevailing wage, whichever is higher, *see* 20 C.F.R. § 655.120(a), and through the TEGLs replaced it with a requirement that employers pay H-2A herders a prevailing wage calculated using a methodology not approved by the H-2A legislative rules. *See, e.g.*, Doc. 31 at 9-10. DOL, again in reliance on 20 C.F.R. § 655.102, has also used the TEGLs to effectively amend other portions of the H-2A rules, such as those involving whether employers must keep track of workers' hours, Doc. 27-1 at 23; pay workers at least twice a month, *id.*; and recruit through newspaper advertising, Doc. 31 at 11-13. DOL does not even attempt to explain how these latter provisions interpret, rather than amend, the H-2A regulations. *See* Doc. 33 at 2-5.

Second, DOL does not attempt to reconcile its position that 20 C.F.R. § 655.102 renders the TEGLs interpretive with *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989), which the workers discussed in their memorandum in support of summary judgment, Doc. 27-1 at 23. Unlike DOL, MPAS attempts to address *Picciotto*, but misconstrues the case. *See* Doc. 35 at 24-25. *Picciotto* forbids an agency from "grant[ing] itself a valid exemption to the APA for all future regulations . . . simply by announcing its independence in a general rule." 875 F.2d at 347. *Picciotto* held that a regulation, similar to 20 C.F.R. § 655.102, authorizing the Park Service to add reasonable conditions when issuing specific demonstration permits could not be used to make such additional conditions generally applicable to all demonstrators in a particular

park without first complying with notice-and-comment procedures. *Picciotto* contrasted its holding with a scenario in which the agency informally adds conditions to a *particular* permit. The court reasoned that because "the APA does not specify procedures for informal agency decisions such as whether or not to permit a particular demonstration, the Park Service would not be acting inconsistently with the APA by announcing its procedures for approving permits on individualized terms." *Id.* Under *Picciotto*, DOL might be able to use the authority found in § 655.102 to apply special procedures to particular H-2A labor certification applications. But just as the Park Service could not evade the APA's notice-and-comment requirement when it issued a rule generally applicable to all demonstrators in a particular park, DOL cannot escape the notice-and-comment requirement when issuing rules that apply generally to all labor certification applications for herder jobs.

B. DOL's and MPAS's attempts to distinguish *CATA* and *National Association of Manufacturers* are unavailing.

The remainder of DOL's argument that the TEGLs are interpretive rules does nothing more than draw irrelevant or erroneous distinctions between this case and two other cases cited by the workers. DOL attempts to distinguish *Comite de Apoyo a los Trabajadores Agrícolas v. Solis*, 09-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) (*CATA*), by arguing that "[u]nlike the issue in *CATA*, the action that Plaintiffs challenge in this case is not a purported legislative rule setting prevailing wage levels, but guidance documents that implement a pre-existing statutory and regulatory requirement." Doc. 33 at 3. As the workers have made clear, however, the TEGLs are legislative rules that exempt employers from paying an AEWR and provide a wage methodology for herders that is distinct from the one required by the H-2A regulations. *See* Doc. 27-1 at 7-10, 20-22; Doc. 31 at 5-11. In other words, the TEGLs set wages, which is precisely the kind of agency action at issue in *CATA*. DOL also contends that the invalid rule in *CATA*

was derived from an "open-ended statutory provision that did not mention wage obligations." Doc. 33 at 3. DOL disregards the fact that 8 U.S.C. § 1188(a)(1)(B), on which the agency relies, requires only that DOL certify that employment of H-2A workers "will not adversely affect the wages and working conditions of workers in the United States similarly employed." Like the statutory provision at issue in *CATA*, § 1188(a)(1)(B) does not specifically set forth employers' wage obligations. Finally, DOL argues that, unlike in *CATA*, here a legislative rule—20 C.F.R. § 655.102—permits DOL to adopt "special procedures" for determining wage rates. As described above in the discussion of *Picciotto*, 875 F.2d at 347, this argument is precluded by circuit law.

Likewise, DOL has no persuasive basis for distinguishing *National Association of Manufacturers v. DOL*, No. 95-715, 1996 WL 420868 (D.D.C. July 22, 1996). DOL contends that, in that case, the agency created new substantive duties for H-1B employers that were not contemplated by the statute, and that, in this case, the TEGLs simply implement "[t]he statute and regulation requir[ing] the issuance of an adverse effect wage rate, or alternative." Doc. 33 at 3-4. But the TEGLs do not simply implement 8 U.S.C. § 1188(C)(4) or 20 C.F.R. §§ 655.120(a) and 655.122(l). Rather, they effectively amend the H-2A legislative rules, and, by extension, cannot validly interpret a statute that the H-2A legislative rules have already interpreted in a contrary way. The TEGLs are, therefore, legislative and require notice-and-comment rulemaking.

MPAS also attempts to distinguish *CATA* and *National Association of Manufacturers*, Doc. 35 at 20, but adds only a single argument not advanced by DOL. MPAS argues that the workers' reliance on *CATA* and *National Association of Manufacturers* is misplaced because the rules challenged in those cases did not continue agency practices that had previously been in

effect. As described in Section E, *infra*, MPAS's argument is inapposite because there is no authority for excusing an APA violation just because a predecessor rule also violated the law.

C. MPAS's reliance on *General Motors* is misplaced.

Similar to DOL, MPAS argues that if the challenged TEGLs repeat substantive provisions in underlying statutes or legislative rules, the TEGLs are interpretive rules exempt from notice and comment. Doc. 35 at 12 (citing *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561 (D.C. Cir. 1984)). MPAS errs in claiming support from *General Motors*, because the underlying statutes and legislative rules do not set forth the substantive standards in the TEGLs.

In *General Motors*, the D.C. Circuit noted that "[a]n interpretative rule simply states what the administrative agency thinks the statute means, and only reminds affected parties of existing duties," 742 F.2d at 1565 (citations and internal quotation marks omitted), as opposed to a legislative rule, by which an agency "intends to create new law, rights, or duties," *id.* The court held that an EPA rule was interpretive because it "did not create any new rights or duties; instead, it simply restated the consistent practice of the agency in conducting [automobile] recalls pursuant to section 207(c)" of the Clean Air Act. *Id.*

MPAS claims support from *General Motors* by asserting that the TEGLs interpret, with respect to herder wages, the Fair Labor Standards Act (FLSA) provision exempting herders from federal minimum wage and maximum hour requirements, 29 U.S.C. § 213(a)(5)(E), and, with respect to range housing, 8 U.S.C. § 1188(c)(4), the provision of the Immigration and Nationality Act (INA), as amended by the Immigration Control and Reform Act (IRCA), requiring that DOL issue regulations establishing standards for range housing. But neither the FLSA nor 8 U.S.C. § 1188(c)(4) sets the wage or range housing rules for herders. Rather, those standards are set by

the TEGLs. Thus, because the TEGLs create substantive rights and duties with respect to herders that are not found in any underlying statute, the TEGLs are legislative rules.

MPAS makes the same argument with respect to the legislative rules regarding special procedures, 20 C.F.R. § 655.102, and range housing, *id.* § 655.122. But just as with the FLSA and 8 U.S.C. § 1188(c)(4), the legislative rules cited by MPAS do not provide substantive standards that the TEGLs interpret; rather, the substantive standards are provided by the TEGLs.

D. MPAS is incorrect that the TEGLs are rendered interpretive by Congress's recognition that herding is unique.

MPAS argues that because certain statutes and legislative rules acknowledge that open range herder jobs have unique characteristics, any rule designed to address such characteristics logically flows from those statutes or legislative rules and is, therefore, interpretive. Doc. 35 at 21. The workers have already responded to this argument by showing that, regardless whether the underlying statutes and legislative rules recognize that herding jobs have unique characteristics, the standards set by the TEGLs are legislative because the TEGLs are the only source for the substantive standards. The TEGLs set the standards for herder housing, wages, recruitment, and other employment benefits; the TEGLs do not simply interpret the statutes and legislative rules that have recognized that herding jobs have some unique characteristics. Thus, the TEGLs are legislative rules that should have been subject to notice-and-comment rulemaking.

E. MPAS's theory that the previous "special procedures" render the TEGLs interpretive is illogical and unsupported by precedent.

Relying on a theory distinct from DOL's, MPAS argues in three slightly different ways that previous iterations of the "special procedures" render the challenged TEGLs interpretive, and therefore excuse DOL from engaging in notice-and-comment rulemaking. Specifically,

MPAS contends that the TEGLs are interpretive because they repeat substantive provisions in earlier "special procedures" for herders, and thus constitute restatements of the agency's consistent practice. Doc. 35 at 12-15. MPAS also argues that in the absence of the TEGLs, predecessor "special procedures" would have continued to provide similar substantive standards for herder employment. *Id.* at 15-21. Thus, according to MPAS, the TEGLs must be interpretive rules because they do not sufficiently alter the regulatory landscape by imposing new burdens. Finally, MPAS argues that any ambiguity as to whether the TEGLs are interpretive should be resolved in DOL's favor because interested parties had the opportunity to comment, during the 2008 and 2010 H-2A rulemakings, on earlier versions of the herder "special procedures" that were already in effect. *Id.* at 11-12 (citing DOL, Employment & Training Administration (ETA), Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110-01 (Dec. 18, 2008); DOL, ETA, Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6885 (Feb. 12, 2010) (hereinafter, 2010 H-2A Final Rule)). Regardless of form, MPAS's argument with respect to earlier iterations of the "special procedures" should be rejected.

1. Even if the challenged TEGLs mirror aspects of prior "special procedures," that fact does not exempt the TEGLs from the notice-and-comment requirement.

MPAS argues that the TEGLs are interpretive rules because they repeat substantive provisions that were in prior iterations of "special procedures" for herders, Doc. 35 at 12 (citing *Gen. Motors Corp.*, 742 F.2d 1561), but MPAS ignores that the predecessor "special procedures" were not issued following notice and comment. *General Motors* does not support MPAS's argument that DOL may disregard the notice-and-comment requirements of the APA so long as the new rules address the same issues addressed in prior rules that were also issued without

notice and comment. MPAS's argument boils down to a claim that there is a "grandfather clause" exempting rules from the requirements of the APA if they are the latest in a series of rules issued in violation of the Act. *General Motors* provides no support for such a theory, and MPAS cites none.

MPAS's argument also rests in part on a misunderstanding of the workers' claim. MPAS states that "the rules challenged by Plaintiffs were in place well before the 2011 TEGLs went into effect," Doc. 35 at 13, but the only rules challenged by the workers *are* the 2011 TEGLs. The workers bring a procedural challenge to DOL's issuance of the 2011 TEGLs without notice and comment; they do not challenge the substance of the rules set forth in the TEGLs.

2. It is irrelevant whether similar standards under the predecessor "special procedures" would apply in the absence of the TEGLs, and, in any event, the predecessor "special procedures" were similarly invalid.

MPAS also argues that the TEGLs do not fill a regulatory void, and so are interpretive, because predecessor special procedures would have provided similar substantive standards for herder employment in the absence of the TEGLs. Doc. 35 at 15-16. MPAS's argument fails because the TEGLs are the only current source of substantive rules for herder housing, and they effectively amend the H-2A legislative rules that otherwise set the standards for H-2A workers' wages, frequency of pay, timekeeping, hours, and recruitment. *See* Doc. 27-1 at 6-11; Doc. 31 at 11-13. None of the cases cited by MPAS provides support for MPAS's contention to the contrary. *See* Doc. 35 at 16-21. And as discussed in greater detail *infra*, it does not matter whether the TEGLs impose significant changes over the predecessor "special procedures" because those prior rules were also issued without notice and comment and were invalid. The relevant fact for the purpose of this case is that the TEGLs impose obligations that are not found

in either the underlying statute or in any regulation that was subject to notice-and-comment procedures.

3. Neither the challenged TEGLs nor any of the predecessor "special procedures" were subject to notice-and-comment rulemaking, so any ambiguity as to whether the TEGLs are interpretive should not be resolved in DOL's favor.

MPAS argues that because the challenged TEGLs are the latest in a series of special procedures for the labor certification of H-2A herders, any violation of the APA's notice-and-comment requirements should be excused. Specifically, MPAS emphasizes that predecessors to the TEGLs—the "special procedures" issued in 2001 and 2007—were extant at the time of the 2008 and 2010 H-2A rulemakings. Doc. 35 at 11. Because the proposed rulemakings that led to the 2008 and 2010 H-2A rules retained the regulation allowing DOL to issue special procedures for herders (now codified at 20 C.F.R. § 655.102), MPAS contends that interested parties could have commented on the predecessors to the challenged TEGLs by addressing the substance of those predecessor rules in the context of commenting on the proposal to retain the regulation now codified at § 655.102. Based on this convoluted two-step process, MPAS claims that "all of the rules challenged by Plaintiffs were subject to two rounds of notice and comment rulemaking." Doc. 35 at 11. As a result, it argues that any ambiguity as to whether the TEGLs are interpretive should be resolved in DOL's favor.

MPAS's theory is flawed on multiple levels. First, the challenged TEGLs were never subject to notice and comment, nor were the predecessor special procedures, and it is no answer to plaintiffs' contention that DOL violated the law to say that the agency has a history of doing so. Second, an opportunity to comment on § 655.102 cannot cure the lack of notice and an opportunity to comment on the substance of the TEGLs (or the substance of their predecessor rules for that matter). Section 655.102 provides that DOL can "establish, continue, revise, or

revoke special procedures for processing certain H-2A applications," but it does not set forth any of the substantive terms included in the TEGLs, such as rules for herder housing, wages, recruitment, and other employment benefits.[1] Indeed, the workers are not challenging DOL's authority under § 655.102 to issue special procedures; rather, the workers assert that if DOL uses that authority to issue legislative rules it must comply with the notice-and-comment requirement of the APA.

MPAS cites *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980), as authority for its theory that the TEGLs should be considered interpretive "because the purposes underlying [5 U.S.C.] § 553 were served during the 2008 and 2010 rulemaking proceedings," even though the TEGLs were never subject to notice and comment. Doc. 35 at 12. MPAS misreads *Batterton*. *Batterton* explains that notice-and-comment procedures are intended to ensure public participation and fairness when governmental authority is delegated to agencies, and reference to this principle can be useful in determining whether a rule is legislative or interpretive. 648 F.2d at 703. But *Batterton* does not hold that a rule is interpretive so long as interested parties had an opportunity to comment on a predecessor rule by making reference to it in connection with

[1] It is unclear to what extent MPAS's argument rests on the last sentence of 20 C.F.R. § 655.102, which provides that "Special Procedures in place on the effective date of this regulation will remain in force until modified by DOL." As noted above, even if the public had an opportunity to comment on 20 C.F.R. § 655.102 at a time when predecessor "special procedures" were in place, that opportunity does not cure the TEGLs' procedural defect. But even assuming that notice and an opportunity to comment on 20 C.F.R. § 655.102 are relevant to the validity of the TEGLs, MPAS cannot rely on the last sentence of that regulation, which did not appear in the notice of proposed rulemaking that led to the 2010 H-2A Final Rule. *See* DOL, ETA, Temporary Agricultural Employment of H-2A Aliens in the United States, 74 Fed. Reg. 45,906, 45,909, 45,940 (Sept. 4, 2009) (proposed rule). The last sentence was instead adopted by the 2010 H-2A Final Rule without explanation. *See* 2010 H-2A Final Rule, 75 Fed. Reg. at 6885. As a result, even assuming that 20 C.F.R. § 655.102 is relevant to the validity of the TEGLs or earlier "special procedures," the public had no notice that the last sentence of 20 C.F.R. § 655.102 would be adopted in the 2010 H-2A Final Rule, and, therefore, had no reason to comment on it.

comments on the regulation from which the authority to make such rules is drawn. In this case, even assuming that DOL properly relies on its authority through § 655.102 to issue blanket "special procedures" for herder jobs, this authority does not relieve DOL of its statutory obligation to provide notice and an opportunity for public comment when those "special procedures" amount to legislative rules.

II. The TEGLs Are Not Procedural Rules.

DOL argues that the TEGLs are procedural rules that are not subject to the APA's notice-and-comment requirement. DOL first suggests that the workers' contrary position is based on an outdated legal standard that assesses whether a rule has a substantial impact on parties. *See* Doc. 33 at 6. DOL is wrong. The workers have consistently relied on the legal standard described in, among other cases, *Electronic Privacy Information Center v. U.S. Department of Homeland Security*, 653 F.3d 1 (D.C. Cir. 2011) (*EPIC*), the D.C. Circuit's most recent case addressing procedural versus substantive rules. *See* Doc. 27-1 at 17-19. As the workers stated in the memorandum supporting their motion for summary judgment, a substantive rule "'alter[s] the rights or interests of parties.'" *Id.* at 17 (quoting *EPIC*, 653 F.3d at 5 (internal quotation marks omitted)); *see also EPIC*, 653 F.3d at 5-6 (stating that whether a rule is substantive or procedural "depend[s] upon whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA" (internal quotation marks omitted)). The TEGLs fit that bill. *See* Doc. 27-1 at 17-19.

DOL next asserts that this case is distinguishable from the facts of *EPIC* on two grounds. Doc. 33 at 6-7. First, the agency argues that the TEGLs do not invade a significant privacy interest, whereas the airline screening rule held to be substantive in *EPIC* did. *Id.* at 6. But *EPIC* did not hold that a rule has to invade a significant privacy interest to be substantive.

Rather, in *EPIC*, the D.C. Circuit concluded that a rule requiring invasive airline screening technology was substantive because it raised "sufficiently grave" concerns of the public, including but not limited to privacy interests. *EPIC*, 653 F.3d at 5 (internal quotation marks omitted). The TEGLs likewise raise grave concerns regarding workers' rights and interests. Second, DOL argues that it has used the procedures in the TEGLs for more than twenty years, while the passenger-screening rule at issue in *EPIC* marked a significant departure from earlier screening procedures. Doc. 33 at 6-7. In other words, DOL argues that under *EPIC*, whether the TEGLs impose a substantive obligation on the public should be gauged by comparing them to previous iterations of the "special procedures." DOL is mistaken. In *EPIC*, the D.C. Circuit assessed whether the challenged screening rule imposed a substantive obligation on airline passengers by comparing it to the preexisting "requirement that a passenger pass through a security checkpoint," and "prohibition against boarding a plane with a weapon or an explosive device." 653 F.3d at 6. In so doing, the court used as comparators those obligations already imposed by statute and regulation, not by an earlier rule issued without notice and comment. *See id.* at 3 (citing 49 U.S.C. §§ 44901(a), 44902(a)(1); 49 C.F.R. § 1540.105(a)(2)). *EPIC* thus indicates that whether the TEGLs are substantive depends on their impact on regulated parties as compared to obligations already imposed by IRCA and the H-2A legislative rules, not by the previous iterations of the "special procedures."

DOL also contends that *Batterton*, 648 F.2d 694, is inapplicable to this case because the TEGLs, unlike the rule at issue in *Batterton*, "do not concern the payment of financial benefits under a Congressional program." Doc. 33 at 7. That distinction is accurate but irrelevant. *Batterton* held that an agency's selection of a statistical methodology to determine unemployment rates was a substantive, not procedural rule, because the methodology affected

how federal funding would be allocated to state and local training and job programs. 648 F.2d at 708. The court stated that "[a]lthough the methodology itself may look procedural," the key "question is whether the agency action jeopardizes the rights and interests of parties." *Id.* Because the adopted methodology impaired Maryland's financial interest in federal funding, the rule was substantive. *Id.* The same is true here. For example, the TEGLs adopt a wage methodology that goes beyond the obligation imposed by IRCA and that is inconsistent with the methodology used in the H-2A legislative rules. The TEGLs impair workers' financial interest in wages and other valuable terms of employment. The TEGLs are, therefore, substantive and require notice and an opportunity for public comment.

III. MPAS's Attempt to Justify the Merits of the TEGLs' Substantive Provisions Is Inapposite Because the Workers' Challenge Is Procedural.

MPAS devotes the last eight pages of its memorandum in opposition to defending the merits of the employment terms for herders set forth in the TEGLs. *See* Doc. 35 at 25-32. This discussion is largely irrelevant, because the workers do not challenge the substance of the standards set by the TEGLs; rather, the workers challenge DOL's issuance of the TEGLs without first providing notice and an opportunity for public comment. To be sure, the workers explained in their opening brief that the standards for herders set by the TEGLs without notice and comment are far inferior to the standards for other H-2A workers set by rules issued after notice and comment. Doc. 27-1 at 6-11. But in order to prevail on their procedural challenge, the workers need not show that if the TEGLs had been subject to notice and comment, the results would have been more favorable for them. *See, e.g.*, *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002) (explaining that a plaintiff asserting a procedural violation "never has to prove that if he had received the procedure the substantive result would

have been altered"). It is enough that notice-and-comment procedures might have led to such a result.

IV. This Court Should Vacate the TEGLs in Part and Order a New Rule Within 120 Days.

In its opposition to the workers' motion for summary judgment, DOL argues that vacatur of each TEGL's Attachment A is inappropriate and that a new rulemaking will require at least 270 days. *See* Doc. 33 at 7-9. This court should reject DOL's argument, vacate Attachment A of each TEGL, and order the agency promptly to conduct a new rulemaking after notice and an opportunity for public comment.

DOL contends that even partial vacatur is inappropriate because it would lead to substantial disruption in the agency's H-2A herder program. *See id.* at 8.[2] Focusing on the necessity of the TEGLs' wage provision, DOL contends that U.S. Department of Agriculture (USDA) Farm Labor Survey data, which is used to set other H-2A workers' wages, could not be used to set wages for herders. DOL's position stands in stark contrast to the H-2A legislative rules, which implicitly contemplate using USDA Farm Labor Survey data to set herders' wages. Under 20 C.F.R. § 655.102, DOL has the authority to "revoke special procedures" at any time, at which point the plain terms of the H-2A legislative rules, which apply to the H-2A program generally, would apply to herders. Those rules define the AEWR with respect to the USDA

[2] DOL admits in this regard that without the TEGLS there would be no "appropriate wage regime for adjudicating H-2A [herder] applications." Doc. 33 at 8. This admission undermines the agency's contention that the TEGLs merely flow from existing statutory and regulatory requirements or alter the manner in which parties present themselves to the agency. In other words, the disruption that DOL predicts if the TEGLs are partially vacated is not consistent with the insignificant role that DOL assigns them. In contrast, under the workers' position, the TEGLs are legislative rules and—with the exception of the TEGLs' housing provisions, for which the workers do not seek vacatur—the existing H-2A regulations would supply the appropriate legal standards for frequency of pay, wages, recruitment, hours, and timekeeping. Thus, vacatur of each TEGL's Attachment A need not be disruptive. *See* Doc. 27-1 at 26-28.

Farm Labor Survey. *See id.* § 655.103(b). In any event, DOL does not discuss with particularity why vacatur of any other portion of each TEGL's Attachment A would disrupt the H-2A herder program. Instead, it relies generally on the long history of the "special procedures" to argue that this Court could not "restore any apparent *status quo ante*." Doc. 33 at 8. But aside from the TEGLs' housing standards, *see* Doc. 27-1 at 26 (describing why workers do not seek vacatur of each TEGL's Attachment B), the H-2A legislative rules already supply the legal standards that would govern herders in the absence of the TEGLs.

DOL's contention that it would be unable to meet a 120-day timeframe for the issuance of a new rule should also be rejected. *See* Doc. 33 at 8. That time period is sufficient for the agency to comply with the notice-and-comment requirement of the APA and Executive Order 13,563's recommended comment period of at least 60 days. Exec. Order 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, § 2(b) (Jan. 18, 2011). Moreover, when a rulemaking is governed by a court-imposed deadline, the agency need only schedule its rulemaking "to the extent practicable" to accommodate OIRA review. Exec. Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51,735, § 6(a)(3)(D) (Sept. 30, 1993).

CONCLUSION

The Court should grant the workers' motion for summary judgment, declare the TEGLs invalid under the APA, vacate the TEGLs in part, and order DOL to issue new rules after notice-and-comment rulemaking.

Respectfully submitted,

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