

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

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|--|---|------------------------------|
| REYMUNDO ZACARIAS MENDOZA, <i>et al.</i> , |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| HILDA SOLIS, in her official capacity, <i>et al.</i> , |) | |
| |) | Civil Action No. 11-1790-BAH |
| Federal Defendants, |) | |
| |) | |
| v. |) | |
| |) | |
| MOUNTAIN PLAINS AGRICULTURAL |) | |
| SERVICES, <i>et al.</i> , |) | |
| |) | |
| Defendant-Intervenors. |) | |
| |) | |

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Reymundo Zacarias Mendoza, Francisco Javier Castro, Alfredo Conovilca Matamoros, and Sergio Velasquez Catalan (collectively, the workers) brought this action under the Administrative Procedure Act (APA), 5 U.S.C. §§ 553 and 702, against defendant U.S. Department of Labor and its Secretary, Hilda Solis, (collectively, DOL). The workers seek a declaratory judgment that DOL violated the APA by issuing Training and Employment Guidance Letters (TEGLs) without notice and comment. The workers also seek an order vacating and enjoining future use of the TEGLs unless they are adopted through notice-and-comment rulemaking.

The TEGLs set forth “special procedures” that DOL uses to certify the importation of foreign labor for sheepherder and open range production of livestock jobs

in the United States. The TEGLs establish the terms of employment, including wages and housing benefits, that employers must offer to foreign shepherders and open range livestock workers (collectively, herders) hired through a temporary agricultural guestworker system called the H-2A visa program. The terms of employment set by the TEGLs also apply to U.S. herders hired by employers that use the H-2A program. The terms set by the TEGLs for H-2A herders are far inferior to those required for other H-2A employers and workers. Because the TEGLs are substantive, legislative rules that have a binding effect, DOL's issuance of these rules without notice and an opportunity for public comment violated the APA.

As explained in detail below, the workers' motion for summary judgment should be granted, the special procedures vacated in part, and DOL enjoined from further use of the procedures without notice-and-comment rulemaking.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. The mechanics of the H-2A program

The H-2A visa program, named after the statutory provision of the Immigration and Nationality Act that describes the relevant visa category, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), permits agricultural employers to obtain work visas for and hire nonimmigrant foreign workers to perform temporary or seasonal agricultural work in the United States. Congress specified that H-2A visas can be issued only if the Secretary of Labor certifies that:

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188(a)(1). The jobs at issue in this case—sheepherding and the open range production of livestock—are covered by the H-2A program as agricultural work. *See* 26 U.S.C. § 3121(g) (as cross-referenced by 8 U.S.C. § 1101(a)(15)(H)(ii)(a)).

To obtain the necessary certification from DOL, an employer seeking permission to hire H-2A workers must file an application with DOL’s Office of Foreign Labor Certification (OFLC). 20 C.F.R. §§ 655.101, 655.130.¹ The application must contain, among other things, an employer’s declaration that it will offer certain minimum terms of employment to H-2A and U.S. workers that DOL has, by regulation, deemed necessary to avoid an adverse effect on the wages and working conditions of similarly employed U.S. workers. *See id.* § 655.130(a); DOL, ETA, Application for Temporary Employment Certification, ETA Form 9142 – APPENDIX A.2, *available at* http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142_Appendix_A2.pdf.

If the application is complete, DOL accepts it for consideration and instructs the employer to engage in efforts to recruit U.S. workers. 20 C.F.R. § 655.143(b)(2). The employer must actively recruit U.S. workers and offer them employment that includes specified terms such as certain rates of pay, transportation expenses, adequate housing, and workers’ compensation insurance. *Id.* § 655.122. Job offers to U.S. workers cannot provide less favorable benefits, wages, or working conditions than those offered to H-2A workers. *Id.* § 655.122(a). These requirements are intended to protect the jobs, wages,

¹ OFLC is a component of DOL’s Employment and Training Administration (ETA). It “provides national leadership and policy guidance and develops regulations and procedures to carry out [DOL’s] responsibilities” with respect to the importation of foreign workers for participation in the H-2A program. 20 C.F.R. § 655.103(b).

and working conditions of U.S. workers and to prevent the exploitation of vulnerable guestworkers.

The State Workforce Agency (SWA) serving the area of intended employment circulates an employer's job order and refers interested U.S. workers, if any, to the employer. *Id.* § 655.150. The job order, like the employer's application to OFLC for labor certification, "contain[s] the material terms and conditions of employment" offered by the employer. *Id.* § 655.103(b).

If DOL grants labor certification, the Department of Homeland Security (DHS) allots the employer a number of temporary work visas to bring in foreign laborers. 8 C.F.R. § 214.2(h)(5). The H-2A employer then arranges for U.S. consulates in a foreign country to issue visas to individual workers recruited by the employer. *See* U.S. DHS, U.S. Citizenship and Immigration Services, H-2A Temporary Agricultural Workers, <http://www.uscis.gov/portal/site/uscis> (select "Working in the U.S.," then "H-2A Agricultural Workers") (last visited Jan. 30, 2012). If an employer does not create a separate, written employment contract with each H-2A worker, then "the required terms of the job order and the certified Application for Temporary Employment Certification will be the work contract." 20 C.F.R. § 655.122(q).

B. H-2A employment terms set by regulation or by "special procedures"

DOL has issued, through notice-and-comment rulemaking, general regulations governing the H-2A program. Some of these regulations, including those described above, address the mechanics for the certification of foreign labor. But other portions of the regulations affect workers' substantive rights and employers' obligations by mandating the terms of job offers that H-2A participating employers extend to U.S. and

H-2A workers. These regulations are broad in scope, reaching requirements for wages, hours, housing, supplies, transportation, meals, and workers' compensation insurance. *See* 20 C.F.R. § 655.122.

Although the H-2A regulations cover all classes of temporary agricultural workers, they grant DOL "flexibility" to "establish, continue, revise, or revoke special procedures for processing certain H-2A applications." *Id.* § 655.102. In August 2011, DOL exercised this purported authority to issue "special procedures" for the labor certification of herder jobs by releasing two TEGLs. *See* TEGL No. 15-06, Change 1, Special Procedures: Labor Certification Process for Occupations Involved in the Open Range Production of Livestock Under the H-2A Program, 76 Fed. Reg. 47,243 (Aug. 4, 2011) (hereinafter, Open Range TEGL); TEGL No. 32-10, Special Procedures: Labor Certification Process for Employers Engaged in Shepherding and Goatherding Occupations Under the H-2A Program, 76 Fed. Reg. 47,256 (Aug. 4, 2011) (hereinafter, Shepherding TEGL).² Attachment A of each TEGL details so-called "special procedures" for labor certification of herders. Attachment B of each TEGL separately addresses standards for mobile housing provided to herders. Although the TEGLs were published in the Federal Register, they were not subject to formal notice and an opportunity for public comment.

DOL describes the TEGLs as "guidance." *See* Open Range TEGL, 76 Fed. Reg. at 47,244; Shepherding TEGL, 76 Fed. Reg. at 47,257. But, in fact, the special

² The H-2A regulations also grant OFLC "the authority to establish monthly, weekly, or semi-monthly adverse effect wage rates (AEWR)," discussed *infra*, for those "occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock." 20 C.F.R. § 655.102. OFLC has not done so for shepherders or workers involved in the open range production of livestock.

procedures enshrined in the TEGs carve out shepherders and open range livestock workers from otherwise generally applicable regulations for the H-2A program. *See* Open Range TEG, 76 Fed. Reg. at 47,244 (“Unless otherwise specified in [the TEG], applications submitted for [open range production of livestock] occupations must comply with the requirements for processing H-2A applications contained at 20 CFR part 655, subpart B.”); Shepherding TEG, 76 Fed. Reg. at 47,257 (same with respect to shepherders). As a result of this carve-out, herders hired by H-2A-participating employers have substantially fewer employment protections and benefits than their counterparts working in other jobs through the H-2A program, where the employment terms are set by regulations that were subject to notice-and-comment rulemaking. *See* DOL, ETA, Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884-01 (Feb. 12, 2010) (hereinafter, H-2A Final Rule).

1. Hours, frequency of pay, and timekeeping. To take advantage of the TEG standards, employers of H-2A herders must require employees to be on call 24 hours a day, everyday. *See* Open Range TEG, Attachment A, I.C.1, 76 Fed. Reg. at 47,245 (“If an application for an open range livestock worker does not include the requirement of being on call 24 hours per day, 7 days per week, the [National Processing Center] may not process the employer’s application under the special procedures”); Shepherding TEG, Attachment A, I.C.1, 76 Fed. Reg. at 47,259 (substantially similar language).³ In contrast, other H-2A workers are not required to work more than the number of hours

³ The minimum wage and maximum hour requirements of the Fair Labor Standards Act do not apply to workers “principally engaged in the range production of livestock.” 29 U.S.C. § 213(a)(5)(E).

specified in their contract for a workday, or on their Sabbath or Federal holidays. *See* 20 C.F.R. § 655.122(i)(1)(4).

Employers of H-2A herders are also not required to keep track of employee hours as other H-2A employers are. *Compare* Open Range TEGL, Attachment A, I.C.5, 76 Fed. Reg. at 47,246 (“Because the unique circumstances of employing range livestock workers . . . prevent monitoring and recording of hours actually worked each day as well as the time the worker began and ended each workday, the employer is exempt from reporting on these two specific requirements”), *and* Shepherding TEGL, Attachment A, I.C.6 (substantially similar language), 76 Fed. Reg. at 47,259, *with* 20 C.F.R. § 655.122(j)-(k). Moreover, they are permitted to pay workers on a monthly basis (by agreement of the worker), rather than the minimum bimonthly basis required by the H-2A regulations. *Compare* Open Range TEGL, Attachment A, I.C.6, 76 Fed. Reg. at 47,246, *and* Shepherding TEGL, Attachment A, I.C.7, 76 Fed. Reg. at 47,259, *with* 20 C.F.R. § 655.122(m).

2. Wages. The TEGLs permit H-2A employers to pay lower wage rates to herders than the wage rates set by the H-2A regulations. They authorize this variance by utilizing a prevailing wage methodology—roughly corresponding to the local “going rate” for a job given market forces—to determine a fixed wage for shepherders and open range livestock workers.⁴ *See* Open Range TEGL, Attachment A, I.A., 76 Fed. Reg. at 47,244 (“Because occupations involving the open range production of livestock are

⁴ The H-2A regulations, 20 C.F.R. § 655.103(b), define “prevailing wage” by cross-reference to 20 C.F.R. § 653.501(d)(4), which states merely that job orders for H-2A workers may not be circulated unless “[t]he wages and working conditions offered are not less than the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher.”

characterized by other than a reasonably regular workday or workweek, an employer must continue to offer, advertise in the course of its recruitment, and pay the monthly, weekly, or semi-monthly prevailing wage established by the OFLC”); *Shepherding TEG*, Attachment A, I.A., 76 Fed. Reg. at 47,257-58 (same language with respect to shepherders).

In contrast, the H-2A regulations require employers to pay what is called an adverse effect wage rate, or AEWR, if that rate is higher than the prevailing wage. *See* 20 C.F.R. § 655.122(l) (requiring that each job order accompanying an application for labor certification guarantee that “[i]f the worker is paid by the hour, the employer must pay the worker at least the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed, whichever is highest”); *see also id.* § 655.120 (stating that to “comply with its obligation under § 655.122(l), an employer must offer, advertise in its recruitment, and pay a wage that is the highest” among those listed in § 655.122(l)).⁵ In practice, the AEWR is almost always the highest of the wage rates. *See, e.g.,* H-2A Final Rule, 75 Fed. Reg. 6884-01, 6894 n.7 (noting that the AEWR applied to 90 percent of H-2A job petitions certified during specified period).

As DOL explained in detail in its most recent H-2A notice-and-comment rulemaking, the AEWR is a derived wage published annually by DOL using data from

⁵ Section 655.120 of Title 20 of the Code of Federal Regulations purports to exempt employers from the requirement of paying an AEWR, where it is the highest wage, if “a special procedure is approved for an occupation or specific class of agricultural employment.” 20 C.F.R. § 655.120(a).

the U.S. Department of Agriculture's Farm Labor Survey.⁶ *Id.* at 6891. Unlike a prevailing wage, the AEWR is a calculation intended "to approximate the equilibrium wage that would result absent an influx of temporary foreign workers." *Id.* The use of an AEWR is based on the theory that, absent the importation of foreign workers, a critical labor shortage would lead to a rise in wages over time. But, especially given the "physical distances and relative social isolation typical of many rural environments," this labor market adjustment process may be especially slow for agricultural work shortages. *Id.* at 6892. To respond to this slow, localized process, the AEWR "in essence" imposes "a prevailing wage concept defined over a broader geographic or occupational field." *Id.* at 6893. The AEWR thus "avoids adverse effects on currently employed workers by preventing wages from stagnating at the local prevailing wage rate when they would have otherwise risen to a higher equilibrium level over time." *Id.* at 6891-92. In short, it attempts to "put incumbent farm workers in the position they would have been in but for the H-2A program." *Id.* at 6891.

DOL requires the vast majority of H-2A employers to pay the AEWR because, as it recognized when it issued its most recent H-2A rules, "[a]ccess to an unlimited number of foreign workers in a particular labor market at the current prevailing wage would inevitably keep the prevailing wage lower than it would have been had it adjusted to an equilibrium wage" without the addition of foreign labor. *Id.* at 6895. But DOL ignored its own logic in issuing the challenged TEGs. The TEGs only require payment of the prevailing wage despite the fact that sheepherding and range production of livestock

⁶ The AEWR is "the annual average of combined crop and livestock workers' wages applicable for each state as reported by the U.S. Department of Agriculture's (USDA) Farm Labor Survey (FLS) reports." H-2A Final Rule, 75 Fed. Reg. at 6891.

operations are heavily dependent on H-2A workers, and that dependence has resulted in precisely the sort of stagnated and depressed prevailing wages that DOL predicted would occur.

For example, the prevailing wage for an H-2A shepherd in Colorado is \$750 per month. DOL, Agricultural Online Wage Library, <http://www.foreignlaborcert.doleta.gov/aowl.cfm> (select “Colorado” in the drop list for “Crop and Livestock Survey Reports”) (last visited Feb. 5, 2012). Thus, if a shepherd works eight hours per day, seven days per week, he earns only approximately \$3.00 per hour plus three employer-provided meals per day under the prevailing wage.⁷ This calculation does not even include the “on-call” time that is compensable in other professions. In contrast, the hourly AEWR for an H-2A field worker in Colorado—such as a worker picking fruit—is \$10.48 per hour. *See* DOL, ETA, Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2011 Adverse Effect Wage Rates, Allowable Charges for Agricultural Workers’ Meals, and Maximum Travel Subsistence Reimbursement, 76 Fed. Reg. 11,286-01 (Mar. 1, 2011).

3. Housing. Under the TEGs, H-2A herders who live in mobile housing are exempt from the housing standards that normally apply to the H-2A program. In general, the H-2A regulations require employer-provided housing to comply with Occupational Safety and Health Administration (OSHA) standards that are part of the Code of Federal Regulations. 20 C.F.R. § 655.122(d)(1). If OSHA does not issue standards specific to

⁷ One survey of 93 H-2A herders in Colorado found that herders typically worked far more than the above example. Sixty-two percent worked more than 80 hours a week, and 35 percent worked more than 90 hours. Jennifer J. Lee & Kyle Endres, *Overworked and Underpaid: H-2A Herders in Colorado 18* (2010), available at <http://users.frii.com/clsfcdsl/CLSoverworkedandunderpaid.pdf>.

“range housing” for herders, the regulations require housing to comply with “guidelines” issued by OFLC. *Id.* § 655.122(d)(2).

OSHA does not, in fact, issue standards that cover mobile housing for use on the range. *See* Shepherding TEGL, Attachment B, B.I, 76 Fed. Reg. at 47,261. The TEGLs supply those missing standards but set comparatively less rigorous requirements for range housing than the H-2A regulations mandate for other employer-provided housing. Range housing need not have running water, electricity, toilet facilities, or a minimum amount of square footage of living space for each worker. *Compare* Shepherding TEGL, Attachment B, II.B-D, F-G, 76 Fed. Reg. at 47,261-62, *and* Open Range TEGL, Attachment B, II.B-D, F-G, 76 Fed. Reg. at 47,246-47, *with* 29 C.F.R. §1910.142(b)-(g) (regulations applicable to H-2A housing that was built or under contract by the spring of 1980), *and* 20 C.F.R. §§ 654.405-407, 410-412 (regulations applicable to older H-2A housing, according to the terms of 20 C.F.R. § 654.401).

The special procedures also permit employers to self-certify that their mobile and fixed-site ranch housing meets applicable standards, only requiring that the SWA inspect such housing once every three years. Open Range TEGL, Attachment B, B.I, 76 Fed. Reg. at 47,246; Shepherding TEGL, Attachment B, B.1., 76 Fed. Reg. at 47,261. In contrast, H-2A employers are normally required to obtain an official SWA housing inspection for non-range housing each time they seek H-2A certification. *See* H-2A Final Rule, 75 Fed. Reg. at 6908.

II. Factual Background

Plaintiffs are four workers with experience in shepherding or in the open range production of livestock. Plaintiffs originally came to the United States as H-2A workers

but left the program because of abusive conditions. *See* Declarations of Reymundo Zacarias Mendoza, Francisco Javier Castro, Alfredo Conovilca Matamoros, and Sergio Velasquez Catalan, attached as Exhibits 1-4, respectively. Each plaintiff has a lawful immigration status and is authorized to work in the United States. Ex. 1 ¶ 8; Ex. 2 ¶ 6; Ex. 3 ¶ 6; Ex. 4 ¶ 7. Thus, plaintiffs are now “U.S. workers” as that term is used in the regulations governing labor certification of H-2A workers. *See* 20 C.F.R. § 655.103(b). Although each plaintiff desires to work as a herder, none of the plaintiffs will accept such work at the wages and working conditions set by the TEGs for H-2A workers. Ex. 1 ¶¶ 10-11; Ex. 2 ¶¶ 7-9; Ex. 3 ¶¶ 7-12; Ex. 4 ¶¶ 8-10. Plaintiffs assert that the special procedures set forth in the TEGs have had an adverse effect on their employment opportunities and that, but for this adverse effect, they would be working as herders. Ex. 1 ¶ 12; Ex. 2 ¶ 10; Ex. 3 ¶¶ 10-12; Ex. 4 ¶ 11.

Plaintiff Reymundo Zacarias Mendoza came to the United States as an H-2A worker from Peru, where he was a farmer. From July 9, 2009 to September 13, 2010, he worked as an H-2A shepherd near Evanston, Wyoming. His employers failed to provide him with sufficient food, and after he complained to DOL, he was fired. Ex. 1, ¶¶ 2, 5. After leaving his H-2A job, Mr. Zacarias Mendoza worked as a ranch hand tending cattle in Utah for an employer who also employed H-2A workers, and he has had a series of temporary jobs. *Id.* ¶¶ 6-7.

Plaintiff Francisco Javier Castro worked with livestock in his native Chile, and with sheep in Argentina, before coming to the U.S. as an H-2A shepherd. He left his H-2A shepherding job in March 2010 because of mistreatment by his employer. His employer failed to provide Mr. Castro with sufficient food, and withheld his documents

and wages. Ex. 2 ¶¶ 2-4. Since leaving his job as an H-2A shepherd, Mr. Castro has worked on a farm and at a meatpacking plant. *Id.* ¶ 5.

Plaintiff Alfredo Conovilca Matamoros was a shepherd in Peru before coming to the United States in March 2009 to work as an H-2A shepherd in Colorado. Ex. 3 ¶¶ 2-3. Mr. Conovilca Matamoros was mistreated by his employer who took his travel documents and refused to return them, denied Mr. Conovilca Matamoros personal access to his bank account, refused to let him talk to strangers, and failed to timely provide food, medical attention, and wages. *Id.* ¶ 4. Since leaving his job as an H-2A shepherd, Mr. Conovilca Matamoros has had a variety of jobs, including picking fruit alongside H-2A workers. *Id.* ¶¶ 5, 11.

Plaintiff Sergio Velasquez Catalan worked for many years tending sheep and cattle in Chile before come to the U.S. in April 2004 to work with cattle on the open range as an H-2A herder. Ex. 4 ¶¶ 2-3. After he arrived in the U.S., he found the conditions to be far inferior to what he expected. He left his employment as an H-2A herder because his employer was abusive, held his documents, and prevented him from leaving his housing and surrounding work area. *Id.* ¶ 4. Since leaving his H-2A job, Mr. Velasquez Catalan has worked various jobs, including as a ranch hand tending cattle. *Id.* ¶¶ 5-6.

The plaintiffs' experiences as H-2A herders are not anomalous. In addition to finding that Colorado herders worked excessively long hours, a survey of Colorado herders found that more than two-thirds of herders never had access to a functioning toilet, nearly three-quarters had no days off in the previous year, and more than one-third were paid less than once per month. Jennifer J. Lee & Kyle Endres, *Overworked and*

Underpaid: H-2A Herders in Colorado 5 (2010), available at <http://users.frii.com/clsfcdsl/CLSoverworkedandunderpaid.pdf>. Similarly, among seven shepherders who spoke with a New York Times reporter in 2009, “four said they had not been paid, despite being on the job up to eight months,” and “[v]irtually all the herders agreed that their working and living conditions were worse than in their home countries.” Dan Frosch, *In Loneliness, Immigrants Tend the Flock*, N.Y. Times, Feb. 1, 2009, available at <http://www.nytimes.com/2009/02/22/us/22wyoming.html?pagewanted=1>; see also Ivan Moreno, *Immigrant Shepherders Endure Harsh Work, Low Pay*, Assoc. Press, Jan. 14, 2010, available at <http://www.katu.com/news/business/81517562.html> (detailing harsh working conditions).

III. Procedural History

In August 2011, DOL issued its TEGL “special procedures” for the labor certification of shepherders and open range livestock production workers. Shepherding TEGL, 76 Fed. Reg. 47,256; Open Range TEGL, 76 Fed. Reg. at 47,243. The TEGLs superseded previous special procedures, also issued as TEGLs, that had been in effect for these classes of workers prior to the most recent H-2A notice-and-comment rulemaking in 2010. Like their predecessors, the August 2011 TEGLs exempted shepherders and open range livestock production workers from key substantive employment terms available to other H-2A workers, as described above.

The workers filed this lawsuit two months after the issuance of the current special procedures, alleging that DOL violated the APA by issuing the TEGLs without notice and an opportunity for public comment. Doc. 1. Mountain Plains Agricultural Services and Western Range Association intervened as Defendants. Doc. 17. On January 13,

2011, pursuant to the Court's January 4, 2012, minute order, DOL filed the administrative record. Doc. 22. The administrative record consists of the two TEGs at issue.⁸ The parties now simultaneously submit cross-motions for summary judgment.

STANDARD OF REVIEW

In the context of an APA claim, “[s]ummary judgment . . . serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.” *Alliance for Natural Health U.S. v. Sebelius*, 775 F. Supp. 2d 114, 118 (D.D.C. 2011). In this case, the Court must determine, as a matter of law, whether DOL issued the TEGs “without observance of procedure required by law,” specifically notice-and-comment rulemaking. 5 U.S.C. § 706(2)(d).

ARGUMENT

I. The TEGs Were Issued Without Notice and an Opportunity for Comment, in Violation of the APA.

Agency rules are generally subject to the APA's requirement of notice-and-comment rulemaking. 5 U.S.C. § 553. Pursuant to that requirement, before issuing a final rule, an agency must first give notice to the public of a proposed rule through publication in the Federal Register. *Id.* § 553(b). The agency must then “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” *Id.* § 553(c). After providing notice and an opportunity for public comment, the agency must “incorporate in the rules adopted a concise general statement of their basis and purpose.” *Id.* Although “[a]n agency need not address every

⁸ Because DOL has already lodged with the Court the two TEGs at issue (Doc. 22-1 and Doc. 22-2), and because the TEGs are published in the Federal Register, plaintiffs will not burden the docket by submitting additional copies. *See* Local Rule 7(n).

comment, . . . it must respond in a reasoned manner to those that raise significant problems.” *Reyblatt v. U.S. Nuclear Regulatory Comm’n*, 105 F.3d 715, 722 (D.C. Cir. 1997).

In this case, the workers and DOL agree that the agency issued the TEGLs without notice or opportunity for public comment. *See* Doc. 1 ¶ 18; Doc. 10 ¶ 18. Moreover, each TEGL clearly constitutes a “rule”: “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 551(4). The definition explicitly includes as a rule “the approval or prescription for the future of . . . wages . . . [or] facilities, . . . or practices bearing on any of the foregoing.” *Id.*

Thus, the issue is whether the TEGLs constitute legislative rules that should have been subject to notice-and-comment rulemaking,⁹ or whether they instead fit into the APA’s exception for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” that can be issued without notice and an opportunity for comment. 5 U.S.C. § 553(b); *see also Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 5 (D.C. Cir. 2011) (hereinafter, *EPIC*).¹⁰

⁹ Courts have often used the terms “legislative rule” and “substantive rule” in overlapping ways. Most recently, the D.C. Circuit used the term “legislative rule” in a general sense to refer to rules that do not fall into any of § 553’s exceptions. *EPIC*, 653 F.3d at 5, 11. It also used the term in a narrow sense to refer to rules that do not fall into the APA’s specific exception for “interpretative” rules. *Id.* at 6. In turn, it used the term “substantive rule” to refer to rules that do not fall into the APA’s separate exception for rules of “agency organization, procedure or practice,” i.e., procedural rules. *Id.* at 5. The workers adopt the same terminology here.

¹⁰ The APA also exempts rules from notice and comment when an agency finds “good cause” for doing so under limited circumstances and “incorporates the [“good cause”] finding and a brief statement of [its] reasons . . . in the rules issued.” 5 U.S.C. § 553(b).

As discussed below, none of the APA's exceptions to the notice-and-comment requirement apply to the TEGs. Rather, the TEGs exhibit all three hallmarks of rules for which notice and an opportunity for public comment are required. First, the TEGs alter workers' and employers' rights and interests, so they are substantive, not procedural, rules. Second, they are legislative, not interpretive, rules because they provide the basis for DOL actions and effectively amend the H-2A regulations. And third, the TEGs have a binding effect on employers and employees, and thus do not constitute general statements of policy. Because the TEGs were issued without notice-and-comment rulemaking, they are invalid.

A. The TEGs alter workers' and employers' rights and interests, so they do not fall into the APA's first exception for procedural rules.

A rule that does not fit within the APA's exception for procedural rules, 5 U.S.C. § 553, and is thus otherwise subject to notice-and-comment rulemaking, is a substantive rule. *See EPIC*, 653 F.3d at 5. The touchstone of a substantive rule is that it "alter[s] the rights or interests of parties." *Id.* (internal quotation marks omitted); *accord Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980).

Here, the TEGs set material terms of employment, such as wages and housing benefits. Those terms constitute substantive policy by affecting the promises that employers make to obtain labor certification and the corresponding protections afforded sheepherders and open range livestock workers. So, for example, while H-2A regulations require an employer to agree to pay and advertise an AEW if it exceeds the prevailing wage, the TEGs require only that employers agree to pay and advertise the latter.

DOL did not make such a finding when it issued the TEGs, and this case does not implicate the "good cause" exception.

The TEGLs, therefore, do not constitute a rule of agency organization, procedure, or practice, known generally as a procedural rule, that “is primarily directed toward improving the efficient and effective operations of an agency.” *Batterton*, 648 F.2d at 702 n.34. Although a procedural rule “may alter the manner in which the parties present themselves or their viewpoints to the agency,” it cannot “impose new substantive burdens.” *EPIC*, 653 F.3d at 5 (internal quotation marks omitted); *see also JEM Broad. Co., Inc. v. FCC*, 22 F.3d 320, 327 (D.C. Cir. 1994) (holding in the alternative that rules “depriv[ing] [broadcasting] license applicants of the opportunity to correct errors or defects in their filings” were procedural but emphasizing “[t]he critical fact” that the rules “did not change the substantive standards by which the FCC evaluate[d] license applications, e.g., financial qualifications, proposed programming, and transmitter location” (emphasis omitted)).

Here, the TEGLs go far beyond this kind of “agency housekeeping rule[.]” *Id.* at 328. The substantive effects of the TEGLs at issue—described in the workers’ declarations—are “sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA.” *EPIC*, 653 F.3d at 5-6 (internal quotation marks omitted). The TEGLs are thus analogous to circumstances “when railroads are directed to file proposed schedules of rates and tariffs with subscribers; when applicants for food stamps are subject to modified approval procedures; when drug producers are subject to new specifications for the kinds of clinical investigations deemed necessary to establish the effectiveness of drug products prior to FDA approval; and when motor carriers are subject to a new method for paying shippers.” *Batterton*, 648 F.2d at 708 (internal footnotes omitted); *see also EPIC*, 653 F.3d at 6 (holding that agency’s decision to use

advanced imaging technology to screen airline passengers was a substantive rule because it raised grave issues of “privacy, safety, and efficacy”). The same is true here.

B. The TEGs provide the basis for DOL actions and effectively amend the H-2A regulations, so do not fall into the APA’s exception for interpretive rules.

To determine whether a rule falls into the APA’s exception for interpretive rules, or is instead what is termed a legislative rule, the key question “is whether the new rule effects ‘a substantive regulatory change’ to the statutory or regulatory regime.” *EPIC*, 653 F.3d at 6-7 (quoting *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 34-40 (D.C. Cir. 2005)). If the rule spawns this kind of change, it is legislative. If it instead “clarifies a statutory term” or “reminds parties of existing statutory duties,” it is interpretive. *Nat’l Family Planning & Reprod. Health Ass’n, Inc. v. Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992).

Two factors indicating that a rule effects a substantive regulatory change and is, therefore, legislative are (1) “whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties,” and (2) “whether the rule effectively amends a prior legislative rule.” *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). In this case, the TEGs do both.

1. The TEGs serve as the legislative basis for agency action. The TEGs provide a basis for enforcement actions or agency decisions conferring benefits or ensuring the performance of duties, so they are legislative rules. *Id.* As described above (at 10-11), for example, the H-2A regulations require employers to provide housing that complies with OSHA standards. 20 C.F.R. § 655.122(d)(1). But OSHA does not issue

standards that cover mobile housing for shepherders and open range livestock workers, so this type of housing must instead comply with “guidelines” issued by the OFLC. *Id.* § 655.122(d)(2). The TEGs are those purported “guidelines,” serving as the only source of law to regulate range housing. They fill a regulatory void and are, therefore, legislative rules. *See Chamber of Commerce of U.S. v. OSHA*, 636 F.2d 464, 465, 469 (D.C. Cir. 1980) (holding that agency’s rule “declaring per se discriminatory the failure of an employer to compensate an employee representative for his walkaround time” with a safety inspector was legislative because the statute under which the rule was issued “neither prohibit[ed] nor compel[led] pay for walkaround time”); *Steinhorst Assoc. v. Preston*, 572 F. Supp. 2d 112, 122 (D.D.C. 2008) (holding that a rule could not be interpretive when “it impose[d] an obligation on a [property] owner at the expiration of [a housing] contract that was not previously part of [the statute]”).

Likewise, the TEGs provide the only basis on which DOL could grant labor certifications for herder jobs if an employer does not agree to pay the highest of the AEW, prevailing hourly wage, prevailing piece rate, collective bargaining rate, or Federal or State minimum wage. In the absence of the TEGs, the H-2A regulations would require the rejection of such applications. Because the TEGs provide the legislative basis for agency approval of labor certification applications, they are legislative rules under the test in *American Mining Congress*.

Two cases have considered the question whether DOL-imposed obligations on employers very similar to those at issue here are legislative rules. Both answered in the affirmative, focusing on the fact that the rules created standards not established by the applicable statute and regulations. In *Comité de Apoyo a los Trabajadores Agrícolas v.*

Solis, No. 09-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) (hereinafter, *CATA*), a district court considered a challenge to DOL regulations, issued through notice-and-comment rulemaking, that governed the H-2B visa program. *Id.* at *3. A companion to the H-2A program, the H-2B program is for non-agricultural guestworkers. The challenged H-2B regulations authorized the use of skill levels to make prevailing wage determinations for H-2B workers, but in practice, guidance letters issued without notice and comment set the methodology that the agency used to determine the “skill level” wages. *Id.* at *18. The court determined that the wage methodology adopted in the guidance letters was not an interpretive rule because it did not interpret any statutory or regulatory provision. To the contrary, the methodology was “entirely untethered from any other statutory or regulatory provisions, and . . . affirmatively create[d] the wages paid to H-2B workers.” *Id.* at *19. The court thus held that the guidance letters constituted legislative rules that were invalid without notice-and-comment rulemaking. *Id.* Like the guidance letters at issue in *CATA*, the TEGs in this case do not interpret anything; they are “entirely untethered” from the statutory provision authorizing the H-2A program and the regulations implementing it. For example, if, as the *CATA* court determined, the methodology for determining a non-agricultural worker’s wage requires notice and an opportunity for public comment, then surely DOL’s decision regarding the method for calculating wages for herders must be subject to notice and comment rulemaking as well.

Similarly, in *National Association of Manufacturers v. U.S. Department of Labor*, No. 95-0715, 1996 WL 420868 (D.D.C. July 22, 1996), the court held that rules similar to those at issue here, but governing the H-1B visa program for certain non-immigrants in

specialty occupations, were legislative. The court considered DOL's rule requiring employers to "compensate H-1B employees for hours not worked" and permitting DOL "to require full time compensation if [DOL] observed during a brief period that a part-time employee was working more than the hours listed" in a labor application. *Id.* at *13. It concluded that these "provisions create duties not previously required" and so "cannot credibly be considered . . . mere interpretations of prior rules." *Id.* Likewise, it deemed legislative a rule that employers "must have and document an objective system used to determine the wages of non-H-1B workers, and apply that system to H-1B non-immigrants." *Id.* at *14 (internal quotation marks omitted). The court rejected DOL's argument that this rule was a "mere interpretation of the statutory directive that the actual wage of H-1B employees must be equal to their non-H-1B colleagues." *Id.*¹¹ If requiring employers to compensate employees for hours not worked is a legislative rule, then certainly permitting employers not to pay employees for hours worked, or to pay them at lower rates than otherwise applicable regulations would require, is as well.

2. *The TEGs effectively amend the H-2A regulations.* Under the test in *American Mining Congress*, the TEGs also constitute legislative rules because they effectively amend the H-2A regulations, carving out shepherders and open range livestock workers for different and less favorable treatment than they would otherwise receive under the H-2A regulations. *See* Open Range TEG, 76 Fed. Reg. 47,244 ("Unless otherwise specified in Attachments A and B [of the TEG], applications

¹¹ In *National Association of Manufacturers*, DOL did not dispute that its rule requiring "the documentation of actual wages for all employees in a specific employment, H-1B and non-H-1B," was legislative. *Id.* at *13. The court thus did not analyze that aspect of the rule, which is analogous to the portion of the TEGs that exempts employers from otherwise applicable regulations requiring them to document employee hours and start and stop times of work.

submitted for these occupations must comply with the requirements for processing H-2A applications contained at 20 CFR part 655, subpart B.”); *Shepherding TEGL*, 76 Fed. Reg. at 47,257 (same). For example, in the absence of the TEGLs, employers of H-2A herders would be obligated to pay an AEW, keep track of workers’ hours, and pay workers at least twice a month. But under the TEGLs, employers need do none of those things.

This aspect of the TEGLs further demonstrates their legislative character, because a rule “cannot be interpretative if the regulatory framework it purports to interpret would yield the opposite result.” *Steinhorst Assoc.*, 572 F. Supp. 2d at 121; *see also City of Ida. Falls v. FERC*, 629 F.3d 222, 227-29, 231 (D.C. Cir. 2011) (holding that an agency’s use of an updated fee schedule to set rental fees charged to hydropower licensees was a legislative amendment to an earlier rule because the amendment used a methodology rejected by the earlier regulation); *Nat’l Family Planning*, 979 F.2d at 235 (stating that an agency’s “subsequent interpretation run[ning] 180 degrees counter to the plain meaning of [a] regulation gives us at least some cause to believe that the agency may be seeking to constructively amend the regulation”).

The fact that the H-2A regulations purport to grant the agency authority to create “special procedures” does not mean that the TEGLs merely interpret, rather than amend, the H-2A regulations. An agency may not “grant itself a valid exemption to the APA for all future regulations, and be free of APA’s troublesome rulemaking procedures forever after, simply by announcing its independence in a general rule.” *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989) (holding that regulation permitting agency to adopt additional conditions and time limits on demonstrations in national parks did not

release the agency from its obligation to conduct notice-and-comment rulemaking for a “condition” that was a legislative, not interpretive rule).

C. The TEGLs have a binding effect on the parties, so they do not fall into the APA’s exception for statements of general policy.

The TEGLs “present[] the course [that DOL] has selected and followed,” so they do not fall within the APA’s exception for a statement of general policy. *Batterton*, 648 F.2d at 706. As discussed above, the TEGLs represent DOL’s official course, and they have “present binding effect.” *EPIC*, 653 F.3d at 7 (internal quotation marks omitted). The TEGLs speak in terms of what employers must do to receive labor certification, and they limit the agency’s ability to certify requests for H-2A workers if employers do not comply. For notice-and-comment rulemaking otherwise to apply, “it is enough for the [TEGLs] . . . to be cast in mandatory language so the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences.” *Id.* (internal quotation marks omitted) (holding that agency’s procedures for screening airport passengers was binding, and therefore not a general statement of policy, where “a passenger is bound to comply with whatever screening procedure the [agency] is using on the date he is to fly at the airport from which his flight departs”). Such is the case here, so the APA’s exception for “general statements of policy” does not apply, and the TEGLs are subject to notice-and-comment rulemaking. 5 U.S.C. § 553(b).

II. The Department’s Failure to Conduct Notice-and-Comment Rulemaking Is Prejudicial.

Although this Court should take “due account . . . of the rule of prejudicial error” when reviewing the workers’ APA claim, 5 U.S.C. § 706, DOL’s “utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all

as to the effect of that failure,” *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002). Under these circumstances, the workers need not “indicate[] additional considerations they would have raised in a comment procedure.” *Id.* at 97. Nor must they show actual prejudice. *Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003); *see also McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988) (stating that imposition of the burden on an APA plaintiff to show harmless error “is normally inappropriate where the agency has completely failed to comply with § 553”).

The workers easily meet this low bar. The TEGs affect workers’ rights to wages, housing, and other employment benefits. If the TEGs were subject to notice-and-comment rulemaking, the H-2A and other workers and their advocates would have a formal opportunity to comment on the TEGs’ contents. DOL would have to explain on the record why it exempts vulnerable shepherders and open range livestock workers from protective standards applicable to other H-2A workers. DOL would also have to grapple with its conclusion that payment of an AEW, which “avoids adverse effects on currently employed workers by preventing wages from stagnating at the local prevailing wage rate,” H-2A Final Rule, 75 Fed. Reg. at 6891-92, is unnecessary to ensure that H-2A herders do “not adversely affect the wages and working conditions of workers in the United States similarly employed,” 8 U.S.C. § 1188(a)(1). In other words, DOL would have to explain why it does not require shepherding and open range livestock employers to pay the wage that “put[s] incumbent farm workers in the position they would have been in but for the H-2A program.” H-2A Final Rule, 75 Fed. Reg. at 6891. In the

absence of this kind of administrative reckoning, DOL's failure to engage in notice-and-comment rulemaking is surely not harmless.

III. Plaintiffs Are Entitled to Full Relief, Including Immediate Vacatur of Portions of the TEGLs.

The workers are entitled to a declaratory judgment that DOL violated the APA when it issued the TEGLs without notice or an opportunity for public comment. The workers also seek an order mandating that the DOL issue within 120 days a final rule, subject to notice-and-comment rulemaking that covers standards for mobile housing and, to the extent that DOL wishes to provide other exemptions from H-2A regulations for shepherders and open range livestock workers, any employment terms and conditions encompassed by each TEGL's Attachment A.

In the interim, the workers do not seek vacatur of Attachment B of each of the TEGLs, which provides standards, albeit meager, for mobile housing. Vacating this portion of the TEGLs would leave mobile housing unregulated by federal law: As explained above on pages 10-11, the underlying H-2A regulations specify that if OSHA does not issue standards for "range housing" for herders, which it has not, then range housing must instead comply with "guidelines" issued by OFLC. 20 C.F.R. § 655.122(d)(2). Since those guidelines are the TEGLs, vacating each TEGL's Attachment B would leave workers insufficiently protected until DOL issues new rules through notice-and-comment rulemaking.

But the workers do urge this Court to vacate immediately each TEGL's Attachment A, which addresses "special procedures" for the labor certification of shepherders and open range livestock workers. The decision to vacate "depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether [DOL] chose

correctly) and the disruptive consequences of an interim change that may itself be changed.” *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks omitted); *see also Sugar Cane Growers*, 289 F.3d at 98 (applying this standard to an agency’s unlawful issuance of a rule without notice and comment). Vacatur of each TEGL’s Attachment A is appropriate because (1) the issuance of the TEGLs without notice and comment was a serious deficiency, and the TEGLs’ terms are unlikely to withstand scrutiny on remand, and (2) current H-2A regulations will ensure that labor certification for shepherding and open range livestock jobs may continue without undue disruption.

The procedural irregularity at issue here—failure to engage in notice-and-comment rulemaking *altogether*—is a serious deficiency for which vacatur is appropriate. *See, e.g., Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1261 (D.C. Cir. 2005); *Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005). Moreover, it is highly unlikely that DOL will be able to justify the TEGLs on remand. As noted above, for example, the TEGLs’ use of a prevailing wage for herders is at odds with the very rationale that DOL used to mandate payment of an AEW, if it exceeds a prevailing wage, for other H-2A workers. Likewise, TEGL provisions authorizing monthly, instead of bimonthly, paychecks for shepherders and open range livestock workers “upon mutual agreement” between the employer and employee, Open Range TEGL, Attachment A, A.I.C.6, 76 Fed. Reg. at 47,246; Shepherding TEGL, Attachment A, A.I.C.7, 76 Fed. Reg. at 47,259, cannot be squared with the H-2A regulations’ non-waivable requirement—obviously motivated by

concerns over worker exploitation—that other H-2A employers must pay workers at least twice monthly.

In addition, vacatur of each TEGL's Attachment A will not leave the labor certification process unregulated or cause other substantial disruption. The H-2A regulations at 20 C.F.R. § 655, Subpart B, are sufficient to provide workable standards for herder jobs until DOL issues new rules. *See Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009) (concluding that vacatur of a deficient rule was proper where “cable operators w[ould] remain subject to, and competition w[ould] be safeguarded by, the generally applicable antitrust laws”). Under this scenario, H-2A herders would be entitled to hourly pay at the highest wage among the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate. 20 C.F.R. § 655.122(l). If DOL wishes to permit less frequent pay or lower wage rates, it will have to do so through notice-and-comment rulemaking.

CONCLUSION

For the foregoing reasons, this Court should grant the workers' motion for summary judgment by declaring the TEGLs invalid under the APA, vacating them in part, and ordering the issuance of new rules after notice-and-comment rulemaking within 120 days.

Respectfully submitted,

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