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, v. MOUNTAIN PLAINS AGRICULTURAL SERVICES, *et al.*, Defendant-Intervenors.	Civil Action No. 11-1790-BAH

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT

The Department of Labor and its Secretary, Hilda Solis, (collectively, DOL) issued two Training and Employment Guidance Letters (TEGLs) without notice and an opportunity for public comment. The TEGLs establish the terms of employment, including wages and housing benefits, that employers participating in the H-2A program must offer to sheepherders and open range livestock workers (collectively, herders). Plaintiffs brought this case under the Administrative Procedure Act (APA) to vindicate their procedural rights to have notice of proposed regulatory action and to offer comments. Defendant-Intervenors Mountain Plains Agricultural Services and Western Range Association (collectively, MPAS), have moved for summary judgment. Doc. 29. As explained below, MPAS's motion should be denied.

ARGUMENT

I. Plaintiffs Challenge the Current TEGLs; Thus, the History of Programs Used to Import Foreign Herders Is Inapposite.

The issue in this case is whether DOL violated the APA by issuing two TEGLs without notice and an opportunity for public comment. MPAS, however, devotes more than half of the memorandum in support of its motion for summary judgment to describing programs used to import foreign workers for herding jobs *before* DOL issued the challenged TEGLs. *See* Doc. 29-2 at 2-19. MPAS apparently believes that a violation of procedural rights guaranteed by the APA can be excused if the procedurally defective rules are the latest in a series of rules that evaded the APA's requirements, but MPAS provides no authority in support of its theory. It is no answer to plaintiffs' contention that DOL violated the law to say that the agency has always done so.

MPAS also suggests that the history of the program may excuse the violation of the APA because certain worker advocates communicated with DOL about the program, even though DOL never announced a rulemaking or sought comments on the challenged TEGLs before they were issued. Again, MPAS provides no authority in support of its theory, and the D.C. Circuit has rejected similar arguments. *See, e.g.*, *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) ("[A]n 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." (citing *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988))); *accord Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003); *see also MCI Telecomm. Corp. v. FCC*, 57 F.3d 1136, 1142 (D.C. Cir. 1995) (holding that "comments received do not cure the inadequacy of the notice given"). Thus, MPAS's discussion of the history of the regulation of foreign labor in herding is irrelevant to the legal question presented in this case.

II. Plaintiffs Have Standing.

MPAS argues that plaintiffs lack standing based, in large part, on the same arguments MPAS made in support of its motion to dismiss. *See* Doc. 18. Plaintiffs have already responded to those arguments and produced declarations establishing their standing to challenge DOL's failure to comply with the notice-and-comment requirements of the APA. *See* Doc. 26 and attached declarations. Plaintiffs' declarations show that they are U.S. workers with experience in herding, and they are ready, willing, and able to perform herding work. Although plaintiffs want to work as herders, they have been unable to find herder jobs with wages and working conditions other than those set by the TEGLs for H-2A herders.[1] Plaintiffs would accept herding jobs on terms that are a modest improvement over those set by the TEGLs. Because notice-and-comment rulemaking would have provided an opportunity for plaintiffs to demonstrate that the conditions established by the TEGLs depress the wages and working conditions available to U.S. workers who want herding jobs, notice-and-comment procedures might have resulted in better wages and working conditions than those set by the TEGLs. Thus, plaintiffs have been injured by the denial of their procedural rights, and they have suffered an injury far more specific than that of members of the public with a generalized interest in having the government obey the law.

MPAS argues that plaintiffs cannot establish standing without demonstrating that the TEGLs have, in fact, had a depressive effect on the wages and working conditions that would otherwise be available to U.S. workers. *See* Doc. 29-2 at 22-23. MPAS fails to recognize that "[a] special standing doctrine applies when litigants attempt to vindicate procedural rights, such

[1] MPAS incorrectly asserts that the TEGLs require payment of an Adverse Effect Wage Rate (AEWR). *See* 29-2 at 13, 15. As discussed in detail in plaintiffs' opposition to DOL's motion for summary judgment (at 5-9), an AEWR is distinct from a prevailing wage. Although the H-2A legislative rules require payment of an AEWR if it exceeds the prevailing wage, the TEGLs require payment only of the latter.

as the right to have notice of proposed regulatory action and to offer comments relating to such action." *Ctr. for Auto Safety, Inc. v. Nat'l Highway Traffic Safety Admin.*, 342 F. Supp. 2d 1, 11-12 (D.D.C. 2004) (citing *Sugar Cane Growers*, 289 F.3d at 94-95); *see Iyengar v. Barnhart*, 233 F. Supp. 2d 5, 12 (D.D.C. 2002) (same). In such a case, "'where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs,' they can establish standing 'without meeting all the normal standards for redressability and immediacy.'" *Id.* at 12 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). A plaintiff asserting a procedural violation must show that "the procedural step was connected to the substantive result," but "never has to prove that if he had received the procedure the substantive result would have been altered." *Sugar Cane Growers*, 289 F.3d at 94-95; *accord Nat'l Parks Conservation Ass'n v. Mason*, 414 F.3d 1, 5 (D.C. Cir. 2005); *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003). Thus, plaintiffs need not prove that notice-and-comment procedures would have altered the standards in the TEGLs or resulted in standards under which plaintiffs would return to work as herders.

Finally, MPAS suggests that plaintiffs cannot establish harm because DOL—applying the standards in the challenged TEGLs—certified that the employment of H-2A herders would not have an adverse effect on U.S. workers, Doc. 29-2 at 20-22, and because plaintiffs cannot establish injury absent a showing that the challenged TEGLs caused conditions to deteriorate relative to the conditions resulting from the special procedures previously in place, *id.* at 23. These arguments are frivolous. So long as notice-and-comment procedures might have resulted in improved standards for the workers, plaintiffs have standing to challenge the violation of their procedural rights. *See Sugar Cane Growers*, 289 F.3d at 94-95.

III. The Challenged TEGLs are Legislative Rules Issued in Violation of the APA's Notice-and-Comment Procedures.

The TEGLs provide the only basis for the performance of many of DOL's duties with respect to herders. For this reason, and as discussed further in the memorandum in support of plaintiffs' motion for summary judgment (at 19-22), the TEGLs are legislative rules that required notice-and-comment rulemaking. *See Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

MPAS argues that the TEGLs did not require notice-and-comment rulemaking because they are interpretive rules. Doc. 29-2 at 25-30. MPAS first contends that the TEGLs "reflect [DOL's] interpretation of its authority" under 20 C.F.R. § 655.102, so they do not provide a legislative basis for the agency's performance of its duties. *Id.* at 27; *see also id.* at 25 (stating that TEGLs "merely interpret [DOL's] authority to grant variances to its general procedures when necessary to carry out its [c]ongressional mandate to administer the H-2A program"). Section 655.102 states that DOL has "authority" to "establish, continue, revise, or revoke special procedures for processing certain H-2A applications." Thus, under MPAS's theory, the TEGLs' substantive terms—including housing, wages, recruitment, and other employment benefits—all simply "interpret" this regulation.[2]

The APA's exception for interpretive rules cannot sustain the weight placed on it by MPAS. As MPAS recognizes, *see* Doc. 29-2 at 25, interpretive rules must "derive a proposition

[2] MPAS also argues that DOL could legally replace the TEGLs with ad hoc "special procedures" on an employer-by-employer basis. Doc. 29-2 at 27. It contends that, given this alternative, the TEGLs do not provide the legal basis for DOL's duties. *See id.* But *American Mining*, from which MPAS quotes to support this proposition, states only that "[w]here a statute or legislative rule has created a legal basis for enforcement, an agency can simply let its interpretation evolve ad hoc in the process of enforcement or other applications (e.g., grants)." *Am. Mining Cong.*, 995 F.2d at 1111-12. That case does not suggest that an agency can use ad hoc enforcement to disregard, rather than interpret, binding statutory and regulatory requirements.

from an existing document whose meaning *compels* or *logically justifies* the proposition." *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010) (internal quotation marks omitted) (emphasis added). "[I]f the relevant statute or regulation consists of vague or vacuous terms[,] . . . the process of announcing propositions that specify applications of those terms is not ordinarily one of interpretation, because those terms in themselves do not supply substance from which the propositions can be derived." *Id.* at 495 (internal quotation marks omitted). In this case, the provision in § 655.102 for establishment of "special procedures" uses precisely this kind of vague or vacuous term. It is simply implausible that provisions regarding, for example, housing standards, a prevailing wage, and frequency of pay are "logically justified," much less "compelled," by § 655.102.[3] Thus, § 655.102 does not free DOL from the strictures of notice-and-comment rulemaking for H-2A-related legislative rules.

In *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989), the D.C. Circuit held that a regulation permitting an agency to adopt "additional reasonable conditions" on demonstrations in national parks did not release the agency from its obligation to conduct notice-and-comment rulemaking for a later-adopted "condition" that limited the types of property that could be stored in a particular park. Similarly, here, DOL cannot "grant itself a valid exemption to the APA for all future regulations . . . simply by announcing its independence in a general rule." *Id.* Section 655.102 does not excuse DOL's failure to conduct notice-and-comment rulemaking.

MPAS next argues that the TEGLs do not effectively amend 20 C.F.R. § 655.102 and, for that reason, are not legislative rules. *See* Doc. 29-2 at 28 (citing *American Mining*). But even

[3] Although MPAS does not specifically rely on it, the same is true of § 655.102's provision permitting DOL "to establish monthly, weekly, or semi-monthly adverse effect wage rates" for range production of livestock occupations. Without more, this term is too vague to serve as the basis for the TEGLs. In any event, the TEGLs require only a prevailing wage, not an AEWR.

assuming that the TEGLs comply with § 655.102, which requires employers to "demonstrate upon written application . . . that special procedures are necessary," the TEGLs effectively amend other portions of the H-2A legislative rules, including 20 C.F.R. § 655.120(a) (regarding the offered wage rate) and § 655.151 (regarding recruitment). As described in more detail in plaintiffs' opposition to DOL's motion for summary judgment (at 9-11), because the TEGLs effectively amend the H-2A legislative rules, they are legislative and require notice-and-comment rulemaking.

Finally, MPAS points to a footnote in *Pesikoff v. Secretary of Labor*, 501 F.2d 757 (D.C. Cir. 1974). In that case, the D.C. Circuit held that DOL's denial of an employer's request for labor certification to import a foreign maid under the H-2 visa statute, which covered skilled and unskilled labor, was not an abuse of discretion. *See id.* at 759, 762-63. The statute required that DOL certify the absence of workers willing and able to do the job and that the employment of aliens would not adversely affect U.S. workers' wages and working conditions. *Id.* at 759. The petitioner had argued, among other things, that "the Secretary's certification denial must be overturned because it was based on an internal Labor Department field memorandum" that had not undergone notice-and-comment rulemaking and that "direct[ed] the Secretary's delegates to deny certification to aliens" like the foreign maid. *Id.* at 763 n.12. Rejecting that argument, the court concluded that the memorandum was interpretive, emphasizing that "the Secretary did not attempt to argue that the internal memorandum ha[d] any more legal force than d[id] [the statute] directly" and that the Secretary denied the certification "without ever making reference to the internal memorandum." *Id.* In light of these facts, the court concluded that it could "not say that the Pesikoffs were affected by the memorandum at all." *Id.*

The memorandum in *Pesikoff* is not analogous to the TEGLs. The TEGLs, which were published in the Federal Register, purport to bind employers and the agency by using mandatory language. *See, e.g.*, Open Range TEGL, 76 Fed. Reg. at 47,244 (stating that employers "must" pay the prevailing wage); *id.* at 47,245 (stating that DOL "may not" process a labor certification application under the TEGLs if workers are not required to be on call 24 hours a day, 7 days per week); *id.* at 47,247 (identifying housing items, such as heat and food storage, that "shall" or "must" be provided). In contrast, the unpublished *Pesikoff* memorandum was for internal agency use only. *Pesikoff*, 501 F.2d at 763 n.12. Moreover, unlike in *Pesikoff*, DOL here has issued regulations to implement the statutory requirement that the agency certify that U.S. workers are unavailable and that foreign workers will not adversely affect U.S. workers' wages. Because the TEGLs effectively amend those H-2A legislative rules (a legal scenario unlike the one in *Pesikoff*), the TEGLs are legislative rules that could not properly be issued without notice-and-comment rulemaking.

CONCLUSION

Defendant-Intervenors' motion for summary judgment should be denied.

Respectfully submitted,

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