IN THE 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 FEDERAL DEFENDANTS' 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, four U.S. workers interested in herder jobs, 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.

DOL has moved for summary judgment on three grounds. *See* Doc. 28-1. First, DOL asserts that the TEGLs are exempt from notice-and-comment rulemaking because

they are interpretive rules that merely clarify rights and obligations already provided by governing statute or other regulations. Second, DOL contends that the TEGLs are procedural rules that "simply outline the manner in which regulated parties present themselves to the agency." *Id.* at 2. Third, it asserts that the provision of the Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1188(c)(4), requiring the agency to "issue regulations" for range housing for herders does not require notice-and-comment rulemaking for the portions of the TEGLs that set housing standards.

As plaintiffs (collectively, the workers) demonstrate below, each of DOL's arguments falls short. First, the TEGLs are not interpretive rules because they (1) provide the only basis for performance of certain agency duties, and (2) effectively amend H-2A legislative rules—issued after notice and comment—that would otherwise apply to herders. Second, the TEGLs are not procedural rules because they alter workers' and employers' rights and interests. Finally, the TEGLs fall short of IRCA's mandate that DOL issue regulations setting standards for herders' range housing and violate Congress's directive that such housing regulations be issued pursuant to notice-and-comment procedures. Because the TEGLs are legislative rules that required notice and an opportunity for public comment, DOL's motion for summary judgment should be denied.[1]

[1] The workers here adopt, as they did in their initial brief, the D.C. Circuit's terminology in *Electronic Privacy Information Center v. U.S. Department of Homeland Security*, 653 F.3d 1 (D.C. Cir. 2011) (hereinafter, *EPIC*). They use the term "legislative rule" in a general sense to refer to rules that do not fall into any of the exceptions in section 533 of the APA, *id.* at 5, 11, and 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, they use 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.

ARGUMENT

I. The TEGLs Are Legislative Rules, Not Interpretive Statements.

DOL argues that the TEGLs merely clarify existing rights and obligations under the governing statute and/or implementing regulations, and thus are interpretive rules that do not require notice-and-comment rulemaking under the APA. *See* 5 U.S.C. § 553(b). In fact, the TEGLs provide the only basis for the conferral of certain benefits or enforcement, and they effectively amend portions of what the parties agree are H-2A legislative rules, established most recently through notice-and-comment rulemaking in 2010. *See* DOL, Employment and Training Administration (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). As a result, as discussed in more detail below and in plaintiffs' memorandum in support of their motion for summary judgment, the TEGLs are legislative rules, and DOL violated the APA by issuing them without notice and an opportunity for public comment.

In the discussion that follows, the workers explain why the TEGLs do not simply interpret statutory or regulatory provisions on wages, recruitment, and housing, but instead either provide a legislative basis for DOL's duties or effectively amend the H-2A legislative rules. In the section regarding herders' wages, the workers begin by describing a significant factual error that undermines all of DOL's legal arguments on that issue. They then dispose of DOL's two additional arguments, apparently asserted in the alternative, that the TEGLs are interpretive rules because they have a long history that has never included notice-and-comment rulemaking and because they are derived from an exception built into the H-2A legislative rules.

A. *American Mining* and its progeny supply the critical legal standards for this case.

DOL relies, as did the workers in their opening brief, on the standard for distinguishing legislative from interpretive rules used in *American Mining Congress v. Mine Safety and Health Administration*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Under *American Mining* and its progeny, a rule is legislative, not interpretive, if it (1) provides the only legislative basis on which an agency may ensure the performance of its duties, or (2) repudiates or is irreconcilable with a prior legislative rule. *See Am. Mining*, 995 F.2d at 1112. DOL also focuses on two other "guidelines": To be interpretive, a rule must, in fact, "interpret something," and by extension, it "must be logically related to the statute it interprets, and may not add new substance to vacuous statutory language." Doc. 28-1, at 12 (citing cases).

The workers do not dispute the latter two "guidelines"; rather, they believe that these guidelines are effectively addressed in this case through the *American Mining* inquiries. Put another way, if either of the two *American Mining* inquiries described above indicates that a rule is legislative, it goes without saying that the rule does not merely interpret a statute or regulation. So, if a rule provides the only legislative basis for an agency to carry out its duties, it must do something more than provide an interpretation of other governing law. Likewise, if a rule effectively amends a prior legislative rule, then it cannot possibly be construed to interpret that prior rule or interpret—at least validly—the organic statute that led to the prior rule. As a result, in the discussion that follows, the workers directly confront DOL's primary argument that the TEGLs interpret governing statutes and regulations, but they do so by showing that in

each example cited by DOL, the *American Mining* inquiries apply to indicate that the TEGLs are legislative rules.

B. The TEGLs' wage provision effectively amends, rather than interprets, the H-2A legislative rules.

DOL contends that the TEGLs merely interpret the H-2A legislative rules applicable to wages and that those regulations, not the TEGLs, supply the legislative basis for enforcement with regard to herders' pay. Specifically, DOL argues that 20 C.F.R. § 655.120(a) "establishes the basis for requiring employers in the range production of livestock to pay H-2A workers the 'AEWR' [Adverse Effective Wage Rate] or 'prevailing wage,'" and that "the TEGLs spell out the scope of th[is] legislative rule by adopting a specific methodology for setting prevailing wage rates." Doc. 28-1, at 17; *see also id.* at 13 (arguing that the use of the "prevailing wage" is a mere interpretation of the "offered wage rate," as used in 20 C.F.R. § 655.120(a)). DOL, however, mistakenly conflates the prevailing wage with an AEWR and incorrectly asserts that the TEGLs require employers to pay herders an AEWR. In fact, the H-2A legislative rules require payment of an AEWR where it exceeds the prevailing wage, whereas the TEGLs exempt employers from paying an AEWR altogether. DOL's factual error is fatal to its argument that the TEGLs' wage provision is a mere interpretation of the governing statute and H-2A legislative rules.

1. DOL errs by conflating a prevailing wage with an Adverse Effect Wage Rate.

As discussed in the workers' memorandum in support of their motion for summary judgment, the TEGLs permit H-2A employers to pay lower wage rates to herders than the wage rates set by the H-2A legislative rules. *See* Doc. 27-1 at 7-10.

Specifically, the TEGLs authorize H-2A employers to pay herders a prevailing wage, essentially the "going rate" for work given market forces. In contrast, the H-2A legislative rules require employers to pay either an AEWR or the prevailing wage, whichever is higher.

DOL errs by treating the prevailing wage as equivalent to an AEWR and in turn asserting that the TEGLs, like the H-2A legislative rules, require employers to pay herders an AEWR. *See* Doc. 28-1 at 17 (stating that 20 C.F.R. § 655.120(a) "establishes the basis for requiring employers in the range production of livestock to pay H-2A workers the 'AEWR' or 'prevailing wage'"); *id.* at 9 (stating that the TEGLs use a "specialized data collection regime for conducting annual prevailing wage surveys to determine the appropriate AEWR for open range livestock occupations"); *id.* at 19 (asserting that the TEGLs "establish procedures for determining the statutorily required adverse effect wage rate"). Under DOL's understanding of the TEGLs' wage scheme, the only difference between H-2A non-herder wages, as set by the H-2A legislative rules, and herder wages, as set by the TEGLs, is the methodology, including the data source, used to calculate the wage. *See id.* DOL's contention is factually incorrect.

First, the plain language of the TEGLs, when read in combination with the H-2A legislative rules, makes clear that DOL misapprehends the regulatory scheme by reading the two documents—and the wage provisions they contain—to state the same standard. The H-2A legislative rules provide for special procedures to act as an exception to, not a clarification of, their requirements: They mandate a particular offered wage rate "*except* where a special procedure is approved for an occupation or specific class of agricultural

employment." *Id.* § 655.120(a) (emphasis added); *see also id.* § 655.122(l).[2] Likewise, the TEGLs explicitly recognize that applications for herders must comply with the H-2A processing regulations "[u]nless otherwise specified in [the TEGLs]." 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, 47,244 (Aug. 4, 2011) (hereinafter, Open Range TEGL); TEGL No. 32-10, Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations Under the H-2A Program, 76 Fed. Reg. 47,256, 47,257 (Aug. 4, 2011) (hereinafter, Sheepherding TEGL).

The TEGLs attempt to take advantage of the purported exception in 20 C.F.R. § 655.120(a) by "continuing a special variance to the offered wage rate requirements" contained in the H-2A legislative rules. Open Range TEGL, Attachment A, I.A., 76 Fed. Reg. at 47,244; Sheepherding TEGL, Attachment A, I.A., 76 Fed. Reg. at 47,257-58 (same). The substantive wage provisions in the H-2A legislative rules and the TEGLs evince precisely such a variance. Section 655.120(a) of the H-2A legislative rules provides that "[t]o comply with its obligation under § 655.122(l), an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage." 20 C.F.R. § 655.120. Thus, § 655.120(a), like § 655.122(l), makes clear that an employer must pay an AEWR *or* a prevailing wage, whichever is higher. In contrast, the TEGLs require only that an employer "must

[2] As discussed *infra* (p. 17), § 655.120(a)'s open-ended exception in the H-2A legislative rules does not permit the agency to issue legislative "special procedures" without notice and an opportunity for public comment.

continue to offer, advertise in the course of its recruitment, and pay the monthly, weekly, or semi-monthly *prevailing wage* established by the OFLC." Open Range TEGL, Attachment A, I.A, 76 Fed. Reg. at 47,244 (emphasis added); *see also* Sheepherding TEGL, Attachment A, I.A, 76 Fed. Reg. at 47,257-58 (same). The TEGLs do not mention, much less require, an AEWR. *See also* H-2A Final Rule, 75 Fed. Reg. at 6891-6901 (discussing 20 C.F.R. § 655.120 and the conceptual differences between an AEWR and a prevailing wage).

Materials submitted by DOL in support of its motion for summary judgment confirm that a prevailing wage for herders is distinct from an AEWR. In DOL's Field Memorandum 74-89, which sets forth an earlier iteration of the "special procedures" for sheepherders, the agency required employers to pay herders "the prevailing wage rate . . . or a special monthly Adverse Effect Wage Rate (AEWR) established by the National Office, whichever is higher." Doc. 28-2 at 9. (The Memorandum elsewhere made clear that DOL had not yet established a special monthly AEWR for herders, but contemplated doing so. *See id.* at 10.) In 2001, DOL replaced Field Memorandum 74-89 with a new set of special procedures, but it again required employers to pay H-2A sheepherders the "highest of . . . the prevailing wage rate . . . ., or a special monthly Adverse Effect Wage Rate (AEWR) . . . or the legal federal or state minimum wage rate." Doc. 28-3 at 7.[3] Thus, the history of the "special procedures" for sheepherders confirms that the

[3] In 2007, DOL issued special procedures for H-2A applications involving the open range production of livestock. *See* Doc. 28-4. Those procedures stated that DOL, under the predecessor regulation to 20 C.F.R. § 655.102, had authority "to establish monthly [AEWRs]" for open range production occupations. *Id.* at 3. But the procedures then indicated, without further reference to an AEWR, that "the wages for workers engaged in the production of livestock are established using the methodology for determining statewide prevailing wage rates as set forth by DOL." *Id.* In other words, DOL relied on its authority to establish an AEWR to, in fact, set a prevailing wage rate.

prevailing wage is a different wage than an AEWR, even in the specific context of herders' wages.

Finally, the prevailing wage for herders is calculated using a different methodology than the AEWR methodology authorized by the H-2A legislative rules. As DOL concedes, the agency uses the U.S. Department of Agriculture (USDA) Farm Labor Survey to set an AEWR for non-herder H-2A workers. Doc. 28-1 at 9; *see also* 20 C.F.R. § 655.103(b) (defining AEWR methodology to rely on USDA data). But for herders, it "instead uses findings from prevailing wage surveys conducted by the local [State Workforce Agencies, or SWAs]" to "establish[] an appropriate wage rate." Doc. 28-1 at 9; *see also id.* at 17. DOL further recognizes that its "special procedures [for herders] include standards for determining, among other things, the relevant universe of data, survey sample sizes, and the frequency of surveys." *Id.* at 9 (citing Doc. 28-5, ETA Handbook No. 385). Thus, contrary to DOL's contention, this methodological difference is not simply a function of the availability of data for herders. *See* 28-1 at 9.[4]

In sum, the prevailing wage for herders as set by the TEGLs is distinct from an AEWR. DOL errs in conflating these two wage rates.

2. The TEGLs' wage provisions effectively amends the H-2A legislative rules.

DOL argues that the TEGLs merely interpret the offered wage rate as required by the H-2A legislative rules, specifically 20 C.F.R. § 655.120(a). *See* Doc. 28-1 at 13-14. But the TEGLs "cannot be interpretative if the regulatory framework [they] purport[] to interpret would yield the opposite result." *Steinhorst Assocs. v. Preston*, 572 F. Supp. 2d

[4] Regardless, DOL does not explain why the inapplicability of USDA data to herders would excuse the agency from using notice-and-comment procedures to adopt a methodology, including data source, that would be appropriate for these occupations.

112, 121 (D.D.C. 2008); *accord Am. Mining Cong.*, 995 F.2d at 1112; *see also* Doc. 27-1 at 23 (citing other cases). Such is the case here, where §§ 655.120(a) and 655.122(l) require payment of an AEWR if it exceeds the prevailing wage, but the TEGLs allow employers to pay the prevailing rate even if the AEWR is higher. Because the TEGLs are a substantive departure from the H-2A legislative rules, they are themselves legislative and require notice and comment.

DOL's comparison of the TEGLs' wage provisions to a rule deemed interpretive in *American Mining* is, therefore, of no assistance. In that case, the Federal Mine Safety and Health Act directed mine operators to make certain reports to the agency as required by regulation, and corresponding regulations required mine operators to report specified diagnoses of disease. 995 F.2d at 1107. The challenged Program Policy Letters (PPLs) interpreted those underlying regulations to mean that certain chest x-ray results constituted a reportable "diagnosis." The court held that the PPLs did not supply the legislative basis on which enforcement would be based; rather, the regulations "themselves require[d] the reporting of diagnoses of the specified diseases, so there [wa]s no legislative gap that required the [challenged rule] as a predicate to enforcement action." *Id.* at 1112. Critically, the court also concluded that the PPLs "offer[ed] no interpretation that repudiate[d] or [wa]s irreconcilable with an existing legislative rule." *Id.* at 1113.

In this case, the underlying H-2A legislative rules supply the legislative basis for enforcement, requiring employers to pay a prevailing wage or an AEWR, whichever is higher. 20 C.F.R. §§ 655.120(a); 655.122(l). But unlike the letters at issue in *American Mining*, the TEGLs do not interpret the underlying regulations. Rather, the TEGLs take

the H-2A regulatory requirement that employers pay the higher of an AEWR or the prevailing wage, and in a sleight of hand, leave only the requirement to pay a prevailing wage in place. Because the TEGLs "repudiate[]" and are "irreconcilable with an existing legislative rule," *Am. Mining*, 995 F.2d at 1113, they are legislative.

DOL also relies on *Funeral Consumer Alliance, Inc. v. FTC*, 481 F.3d 860 (D.C. Cir. 2007), for the proposition that the TEGLs are not legislative rules "even though [they] spell out the scope of the legislative rule by adopting a specific methodology for setting prevailing wage rates." Doc. 28-1 at 17. *Funeral Consumer Alliance*, however, said nothing about whether an agency's selection of a wage rate, including the methodology used to calculate it, qualifies as a legislative rule. Rather, that case held that an agency letter did not substantively amend a previous rule where the letter "only addresse[d] the definition of 'cash advance item,'" a term used in the earlier rule. *Funeral Consumer Alliance*, 481 F.3d at 863, 866. *Funeral Consumer Alliance* thus provides no support to DOL because the challenged rule in that case did not conflict with the underlying regulation and did not address wage methodology.

C. Because the Sheepherding TEGL's recruitment provision effectively amends the H-2A legislative rules, it cannot validly interpret the governing statute.

The Sheepherding TEGL exempts sheepherding and goatherding jobs from the generally applicable requirement of newspaper advertising for recruiting workers. DOL argues that this portion of the Sheepherding TEGL "interprets" two statutory provisions—8 U.S.C. §§ 1188(a)(1)(A) and (c)(3)(A)(ii)—by specifying the recruitment process used for H-2A herders. *See* Doc. 28-1 at 18; *see also id.* at 13-14. Under § 1188(a)(1)(A), DOL must certify that "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 under § 1188(c)(3)(A)(ii), DOL must certify an employer application for H-2A foreign labor if the application meets certain requirements, including a demonstration that the employer does not have or has not received referrals of U.S. workers who are able, willing, and qualified to do the job.

DOL stretches the process of interpretation beyond all recognition by asserting that a recruitment requirement including or excluding newspaper advertising simply flows from broad statutory provisions concerning the availability of U.S. workers. Interpretive rules must "derive a proposition 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). Newspaper advertising is surely not compelled, or even logically justified, by 8 U.S.C. §§ 1188(a)(1)(A) and (c)(3)(A)(ii), which do not specifically address *any* form of advertising, much less print advertising.

A bigger fallacy in DOL's theory is that DOL already provided a definitive interpretation of these statutory provisions when it adopted the H-2A legislative rules. The H-2A legislative rules require participating employers to advertise H-2A positions in a newspaper of general circulation as a way to test whether any U.S. workers are available for these positions. 20 C.F.R. § 655.151; *see also id.* § 655.152 (setting standards for required advertising). The Sheepherding TEGL does not. *See* 76 Fed. Reg. at 47,260 (stating that "all applications filed by an individual employer and/or an association are exempt from the regulatory requirements at 20 C.F.R. § 655.151 to place advertisements in a newspaper of general circulation"). DOL's brief concedes as much,

stating that "[t]he H-2A legislative rules also outline standardized recruitment requirements for locating qualified United States workers, *see* 20 C.F.R. § 655.150-158, but DOL exempts sheep and goatherding employers from the standardized recruitment regime." Doc. 28-1 at 9.

Accordingly, this aspect of the Sheepherding TEGL is not interpretive because, among other things. "the regulatory framework [it] purport[s] to interpret yield[s] the opposite result." *Steinhorst Assocs.*, 572 F. Supp. 2d at 121. DOL's reliance on *Erringer v. Thompson*, 371 F.3d 625 (9th Cir. 2004), is, therefore, unavailing. In *Erringer*, the Ninth Circuit held that the challenged provisions of a Program Integrity Manual that provided guidelines for determining which services are covered by Medicare were interpretive rules that did not require notice-and-comment rulemaking. The Ninth Circuit focused on the fact that, absent the manual, "Medicare contractors would still have an overarching duty to deny claims for items and services that are not 'reasonable and necessary' under the Medicare Act," and the manual interpreted what was "reasonable and necessary." 371 F.3d at 631. In this case, if DOL were writing on a blank slate, it might reasonably interpret §§ 1188(a)(1)(A) and (c)(3)(A)(ii) not to require newspaper advertising as part of the H-2A program's recruitment. (Even that interpretation would require notice-and-comment rulemaking given the open-ended statutory scheme. *See Catholic Health Initiatives*, 617 F.3d at 494.) But DOL did not write the TEGLs on a blank slate because the H-2A legislative rules already in effect require newspaper advertising. By exempting certain employers from that requirement, the Sheepherding TEGL effectively amends a prior legislative rule. It therefore could not properly be issued without notice and an opportunity for public comment.

D. The TEGLs' housing standards do not interpret IRCA, but instead provide the only basis for the enforcement of range housing standards.

DOL asserts that Attachment B of each TEGL, which sets standards for range housing, "interpret[s] the statutory phrase 'housing for employees principally engaged in the range production of livestock,'" as used in 8 U.S.C. § 1188(c)(4), "by setting forth the agency understanding of what constitutes adequate and safe mobile housing in the open range." Doc. 28-1 at 13; *see id.* at 18.

Section 1188(c)(4), however, only requires employers to "furnish housing in accordance with regulations" and directs "the Secretary of Labor [to] issue regulations which address the specific requirements of housing for employees principally engaged in the range production of livestock." The governing statute does not itself impose standards—even open-ended ones—for range housing. The terms "adequate" and "safe," although used repeatedly by DOL in its brief, do not appear in § 1188(c)(4), or in that section more generally. Likewise, the H-2A legislative rules do not supply standards for range housing that the TEGLs could interpret. Rather, they direct that, in the absence of standards issued by the Occupational Safety and Health Administration (OSHA) for range housing, "range housing for sheepherders and other workers engaged in the range production of livestock must meet guidelines issued" by [DOL's Office of Foreign Labor Certification, or] OFLC." 20 C.F.R. § 655.122(d)(2). OSHA does not issue standards that cover range housing, *see* Sheepherding TEGL, Attachment B, B.I, 76 Fed. Reg. at 47,261, and the TEGLs therefore supply those standards. Without the TEGLs, then, there

would be no regulation of range housing. The TEGLs are thus legislative, not interpretive, rules.[5]

American Mining Congress, 995 F.2d 1106, further illustrates why Attachment B of each TEGL must be a legislative rule. *American Mining Congress* held that a rule is legislative, not interpretive, if it provides the legislative basis for agency enforcement. *Id.* at 1112. The court provided as an example a rule based on a provision of the Securities Exchange Act of 1934, which "forbids certain persons, 'to give, or to refrain from giving a proxy' 'in contravention of such rules and regulations as the Commission may prescribe.'" *Id.* at 1109 (quoting statute). The court noted that the "statute itself forbids *nothing* except acts or omissions to be spelled out by the Commission." *Id.* Likewise, in *Hoctor v. U.S. Department of Agriculture*, 82 F.3d 165, 170 (7th Cir. 1996), an owner of exotic animals challenged a USDA requirement that he maintain an eight-foot fence around his animals. USDA issued the eight-foot rule without notice and an opportunity for comment as an "interpretation" of a regulation that required housing facilities for such animals to be "structurally sound and . . . maintained in good repair . . . to contain the animals." 9 C.F.R. § 3.125(a). The court held that the rule was not interpretive because an eight-foot requirement, as opposed to a seven-and-a-half foot or nine-foot requirement, could not be derived from the language of the regulation. *Hoctor*, 82 F.3d at 170. As Judge Posner stated, "[t]here is no process of cloistered, appellate-court type reasoning by which the Department of Agriculture could have excogitated the

[5] For this reason, the workers did not move to vacate Attachment B of each of the TEGLs pending DOL's adoption of new range housing rules after notice and an opportunity for public comment. *See* Doc. 27-1 at 26. Vacatur of this portion of the TEGLs would leave range housing unregulated by federal law, *id.*—a sure sign that this portion of the TEGLs is legislative, not interpretive.

eight-foot rule from the structural-strength regulation." *Id.* at 171. Rather, the rule represented the agency's judgment, from among various methods, as to how best to implement the regulatory requirement that animals be contained. *Id.* at 170. Because the rule set forth a legislative choice, the rule was legislative and could only be adopted through notice-and-comment rulemaking.

Similarly, 8 U.S.C. § 1188(c)(4) leaves to DOL the task of creating regulatory standards for worker housing. "When Congress authorizes an agency to create standards, it is delegating legislative authority, rather than itself setting forth a standard which the agency might then particularize through interpretation." *Hoctor*, 82 F.3d at 169. In Attachment B of the TEGLs, DOL exercises its legislative authority by addressing range housing for herders. Thus, the TEGLs are legislative.

E. Neither the long history of "special procedures" nor the purported exception for "special procedures" in the H-2A legislative rules excuses the TEGLs from notice-and-comment rulemaking.

DOL briefly argues, apparently in the alternative, that the TEGLs do not depart from or repudiate the H-2A legislative rules and, therefore, do not require notice-and-comment rulemaking. Specifically, DOL contends that the TEGLs (1) "continue a long-established agency practice," and (2) "specifically derive from an exception codified in the existing legislative rules." Doc. 28-1 at 16. DOL's first point is irrelevant, and its second point is precluded by Circuit law.

1. Historical evasion of the notice-and-comment requirement does not excuse an APA violation.

DOL argues that because it has used special procedures for fifty years to certify temporary foreign workers for open range production of livestock employment, the TEGLs are consistent with the H-2A legislative rules. Doc. 28-1 at 16. DOL cites no

precedent for that contention. In any event, the workers challenge only the current TEGLs, which "rescind[ed] and replac[ed]" previous "special procedures." Sheepherding TEGL, 76 Fed. Reg. at 47,257; Open Range TEGL, 76 Fed. Reg. at 47,244 (stating that TEGL "replac[ed]" earlier special procedures). Moreover, the APA does not have a "grandfather" clause exempting from notice and comment those rules that have long evaded the statute's requirements. It is no answer to the workers' contention that DOL violated the law to say that the agency has always done so.

2. The H-2A legislative rules' purported exception for "special procedures" does not exempt the TEGLs from notice-and-comment rulemaking.

DOL also asserts that the TEGLs do not repudiate the H-2A legislative rules because they "specifically derive from an exception codified in the existing legislative rules." Doc. 28-1 at 16. The H-2A legislative rules provide that, to allow for "flexibility," DOL may "establish, continue, revise, or revoke special procedures for processing certain H-2A applications." 20 C.F.R. § 655.102. The rules also exempt an employer from paying H-2A workers an AEWR, where that wage exceeds the prevailing wage, if "a special procedure is approved for an occupation or specific class of agricultural employment." *Id.* § 655.120(a).

As the workers argued in the memorandum in support of their motion for summary judgment, 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). So, for example, in *Picciotto*, an agency argued that a regulation authorizing it to adopt "additional conditions" on demonstrations in parks "grant[ed] it the authority to impose new substantive restrictions . . . without

engaging in notice and comment procedures." *Id.* at 346. As here, the agency contended "that since [the underlying regulation] went through notice and comment, the new restrictions d[id] not need to." *Id.* The D.C. Circuit rejected this argument, holding that the underlying regulation 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 demonstrators could store in a park. *Id.* at 346-47.

Like the regulation in *Picciotto,* DOL attempts to use a regulation (here, 20 C.F.R. § 655.102) to free the agency from the APA's requirements for the adoption of future "special procedures." Like the agency in *Picciotto,* DOL cannot validly do so.

II. Because the TEGLs Alter the Rights and Interests of Parties, They Are Not Procedural Rules.

DOL also argues that the TEGLs are procedural rules that do not require notice and comment because they "require nothing more than adherence to existing law, and simply outline the manner in which parties should present themselves to the agency." Doc. 28-1 at 2; *see also id.* at 18-20. As the workers demonstrated in the memorandum in support of their motion for summary judgment, *see* Doc. 27-1 at 17-19, the TEGLs go far beyond an "agency housekeeping rule," *JEM Broad. Co., Inc. v. FCC*, 22 F.3d 320, 328 (D.C. Cir. 1994). Rather, the TEGLs "alter the rights or interests of parties," exhibiting the hallmark of a substantive, not procedural, rule. *EPIC*, 653 F.3d at 5.

DOL likens the TEGLs to one of the manuals deemed to be procedural in *American Hospital Association v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987). *See* Doc. 28-1 at 19. There, the D.C. Circuit concluded that a manual was a procedural rule where it "set forth an enforcement plan for [the agency's] agents in monitoring the quality of and necessity for various operations" of hospitals and health care providers. *Id.* at 1050. The

government's agents, private groups called peer review organizations (PROs), contracted with the government to review whether the activities of hospitals, doctors, and other health care providers conformed to the Medicare Act's substantive standards. *Id.* at 1042. The manual "essentially establish[ed] a frequency and focus of PRO review, urging its enforcement agents to concentrate their limited resources on particular areas where [the agency] evidently believes PRO attention will prove most fruitful." *Id.* at 1050. Thus, from the perspective of hospitals and other health care providers, *see id.* at 1048-49, the manual "impose[d] no new burdens," at most "making it more likely that their transgressions from Medicare's standards w[ould] not go unnoticed" and "imposing on them the incidental inconveniences of complying with an enforcement scheme," *id.* at 1051. Critically, the court emphasized that "[w]ere [the agency] to have inserted a new standard of review governing PRO scrutiny of a given procedure, or to have inserted a presumption of invalidity when reviewing certain operations, its measures would surely require notice and comment." *Id.*; *see also James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000) (holding that USDA rule abolishing face-to-face meetings to approve food labels was procedural because it "did not alter the substantive criteria by which [the agency] would approve or deny proposed labels" but "simply changed the procedures it would follow in applying those substantive standards").

Unlike the manual at issue in *American Hospital Association*, the TEGLs alter the rights and interests of employers, for example, by setting minimum standards for employer-provided housing not derived from the governing statute. The TEGLs alter the rights of herders, for example, by disentitling herders to an AEWR. They also provide new standards for review of labor certification applications covering herders, a

substantive addition to the regulatory scheme that surely requires notice and comment. In DOL's own words, the TEGLs "provide[] guidelines to determine whether there are sufficient United States workers for these occupations," and they "establish procedures for determining the statutorily required adverse effect wage rate." Doc. 28-1 at 19. The TEGLs thus affect the substantive standards under which the agency approves employers' labor certification applications and, accordingly, do not fall within the APA's exception for procedural rules.

III. Congress Mandated That Requirements With Respect to Range Housing Be Issued Through Notice-and-Comment Rulemaking.

As described above (at 14), 8 U.S.C. § 1188(c)(4) provides that DOL "shall issue regulations which address the specific requirements of housing for employees principally engaged in the range production of livestock." This statutory mandate for regulations that set standards for range housing provides an alternative basis for the Court to hold that the TEGLs, at least with respect to housing standards, require notice-and-comment procedures.

Even if a rule would otherwise fall into the APA's exceptions for interpretive or procedural rules, notice-and-comment rulemaking is required if mandated by an organic statute, in this case, IRCA. *See* 5 U.S.C. § 553(b) ("*Except when notice or hearing is required by statute*, this subsection[, i.e., § 553(b),] does not apply . . . to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . ." (emphasis added)); *see also Ala. Power Co. v. FERC*, 160 F.3d 7, 11 (D.C. Cir. 1998) (noting that agency's characterization of a rule as interpretive "would not release the [agency] from its [procedural] obligations under the organic statute . . . , which draws no distinction between interpretative rules and other sorts of rules"); *Union of Concerned*

Scientists v. Nuclear Regulatory Comm'n, 711 F.2d 370, 380-81 (D.C. Cir. 1983) (holding that agency could not rely on APA's "good cause" exception to notice-and-comment rulemaking where Atomic Energy Act required notice and comment and "[t]he APA provides that an agency may have recourse to the exception 'except when notice or hearing is required by statute'" (quoting 5 U.S.C. § 553(b)) (emphasis omitted)).

DOL argues that "Congress' use of the term 'regulation' in IRCA does not necessarily limit DOL to notice and comment procedures when issuing housing *guidelines* for open range production of livestock occupations," Doc. 28-1 at 23 (emphasis added), because "regulation" has sometimes been used to encompass non-legislative rules, *id.* at 21-23. DOL's focus on the term "regulation" is misplaced because Congress's use of the words "specific requirements" in § 1188(c)(4) demonstrates that Congress intended for DOL to create enforceable standards. As explained above, "[w]hen Congress authorizes an agency to create standards, it is delegating legislative authority," *Hoctor*, 82 F.3d at 169, and legislative rules that set enforceable standards require notice-and-comment procedures, *see Am. Mining Cong.*, 995 F.2d at 1112 (a rule that provides the basis for agency enforcement is legislative). Thus, only a legislative rule could achieve the effect Congress sought—specific and enforceable requirements for range housing.

Moreover, IRCA uses both the term "regulations" and the term "guidelines." *See, e.g.*, Pub. L. No. 99-603, § 121(a)(3) (requiring that non-citizen students demonstrate their immigration status through documents that educational institutions "determine[] (in accordance with guidelines of the Secretary) constitute[] reasonable evidence"). In fact, in § 204(i), Congress used both terms in the same provision, directing the Secretary of

Labor to consult with state and local governments "[i]n establishing regulations and guidelines to carry out" an immigration-related state grant program. The statute reflects that Congress recognized a distinction between regulations and guidelines, so the specific language Congress chose—DOL "shall issue regulations which address . . . specific requirements"—plainly contemplated issuance of substantive requirements and standards such as are contained in legislative rules. *See Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995) (restating principle of statutory construction that "all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage").

Section 1188(c)(4) requires notice-and-comment rulemaking. Without it, the TEGLs' housing standards are invalid.

CONCLUSION

For the foregoing reasons, this Court should deny DOL's motion for summary judgment and grant plaintiffs' motion for summary judgment.

Respectfully submitted,

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