UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR RULEMAKING SCHEDULE AND FOR VACATUR

Plaintiffs seek an order directing the Department of Labor (DOL) (1) to publish, within 120 days of this Court's order, a final rule after notice-and-comment rulemaking to replace the Training and Employment Guidance Letters (TEGLs) invalidated by the D.C. Circuit, and (2) to set an effective date for the final rule that is 30 days after the rule's publication. Plaintiffs also ask this Court to provide for automatic vacatur of the TEGLs after 150 days to coincide with the effective date of the final rule.

Neither DOL nor intervenors have specifically opposed an order requiring that a final rule become effective within 30 days after the rule's publication. DOL, however, seeks to delay publication of a final rule until November 2015—roughly fourteen months from now. DOL's proposed schedule should be denied. DOL has not demonstrated that plaintiffs' 120-day schedule is unreasonable, particularly in light of the substantial amount of time that DOL has already had to begin the rulemaking and the interim consequences of delay for U.S. workers. Even if this

Court were inclined to allow DOL more than 120 days, it should reject the agency's maximalist proposed schedule, which is five months longer than DOL's earlier estimate of the time necessary to adopt a final rule.

The Court should likewise reject intervenors' argument that plaintiffs are not entitled to any remedy that includes a schedule for rulemaking (or vacatur) beyond a notice-and-comment period because plaintiffs suffered only a procedural injury. That argument is at odds with the plain language of the Administrative Procedure Act (APA) and would make a mockery of the procedural right afforded to plaintiffs under that statute.

As for plaintiffs' request for vacatur of the TEGLs 150 days after the order's issuance, DOL and intervenors never explain why vacatur would be inappropriate where it coincides—as plaintiffs have proposed—with the date on which a final replacement rule becomes effective. Instead, they knock down a straw man by focusing on the disruptive effect of vacating the TEGLs *before* a new rule becomes effective, a scenario that will not occur under plaintiffs' proposal.

ARGUMENT

I. This Court Should Grant Plaintiffs' Request for a 120-Day Schedule for Issuance of a Final Rule.

DOL contends that plaintiffs' 120-day proposed schedule for publication of a final rule provides insufficient time for the agency to engage in notice-and-comment rulemaking and to comply with statutory and executive order obligations. Doc. 51, Fed. Defs.' Remedy Resp. at 2. DOL instead seeks until November 2015, roughly fourteen months from now, to publish a final rule. *Id.* at 9. This Court should reject DOL's request as unreasonable and enter plaintiffs' proposed rulemaking schedule.

A. As plaintiffs have explained, a 120-day rulemaking schedule is warranted in light of both DOL's longstanding violation of the APA's notice-and-comment requirement and the critical importance of ensuring that the importation of H-2A workers does not adversely affect U.S. workers' wages and working conditions. Pls.' Remedy Mot. at 3-4. The reasonableness of plaintiffs' proposal is underscored by *Comite De Apoyo A Los Trabajadores Agricolas v. Solis* (*CATA*), 2010 WL 3431761, at *19, *25 (E.D. Pa. Aug. 30, 2010), a nearly identical case involving a procedural challenge to a wage methodology used in the H-2B visa program, in which the court imposed a 120-day rulemaking deadline. *See* Doc. 49-1, Pls.' Remedy Mot. at 4 (discussing *CATA* case).

DOL's response ignores altogether the important public interest in rapidly ensuring that legally valid rules govern the certification of H-2A workers. DOL instead urges this Court to begin from the premise that a "normal timeframe" for rulemaking should apply. Fed. Defs.' Remedy Resp. at 8; *id.* at 2 (stating that "DOL has every reason to pursue the normal, mandated schedule for the notice and comment process"). But the "normal timeframe" is not an appropriate benchmark here, where the rulemaking is required by the D.C. Circuit's conclusion that DOL violated plaintiffs' rights and that the existing rules are unlawful.

DOL likewise fails to distinguish *CATA* and the 120-day rulemaking schedule ordered in that case. DOL states that the *CATA* rule involved a single issue (a wage methodology), whereas this case involves several terms of employment, such as housing accommodations and recruitment efforts. *Id.* at 9.[1] However, assuming that DOL continues to exempt herders from the wages otherwise due under the general H-2A regulations, a new wage methodology will

[1] Contrary to DOL's assertion (at 9), plaintiffs did not "neglect to mention" that the rule in *CATA* involved only a wage provision. *See* Pls.' Remedy Mot. at 4 (stating that "Judge Pollak ordered DOL to adopt within 120 days of his order a final rule governing prevailing wage rates after notice and an opportunity for public comment").

assuredly be the most complicated aspect of this rulemaking. DOL tacitly concedes as much in its regulatory agenda, which describes a rule to replace the TEGLs by focusing singularly on the development of a wage methodology. *See* DOL, Semiannual Agenda of Regulations 9-10, *available at* http://www.dol.gov/regulations/DOL-2014-0003-0001.pdf (describing plan to propose a rule governing the wage methodology for H-2A herders); Fed. Defs.' Remedy Resp. at 2 (indicating that the action proposed in the regulatory agenda by DOL, and by extension, the Office of Information and Regulatory Affairs (OIRA), is intended "to replace the procedurally defective TEGLs"). In any event, the differences in the substantive scope of the rule in *CATA* and the rule at issue here do not justify DOL's request for a rulemaking schedule that is three and a half times as long as that ordered in *CATA*.

B. Even if this Court were inclined to enter a rulemaking schedule longer than plaintiffs' proposal, it should reject out of hand DOL's maximalist counter-proposal. As an initial matter, DOL's current request to publish a final rule in fourteen months is *five months longer* than the period of time that the agency initially told this Court it would need to replace the TEGLs. In its summary judgment briefing, DOL requested, in the event of a remand, "that the Court grant DOL no less than 270 days [or roughly nine months] to complete full notice and comment rulemaking." Doc. 33, Fed. Defs.' Opp'n to Pls.' Mot. for Summ. J. at 9. DOL has not explained why its own estimate for the time necessary to adopt a final rule has ballooned by more than 50 percent.

In addition, none of the rulemaking steps described by DOL justifies the agency's proposed schedule. First, DOL contends that to comply with Executive Order 12,866, it must devote approximately six months of the schedule to two separate 90-day review periods by OIRA. Fed. Defs.' Remedy Resp. at 4-5. The government dismisses as irrelevant plaintiffs' point

that under that order, where an agency action is governed by a "court-imposed deadline," an agency need only accommodate OIRA's preferred review period "to the extent practicable." Exec. Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51,735, § 6(a)(3)(D) (Sept. 30, 1993). Rather, in the government's view, the two 90-day OIRA review periods set the standard for an appropriate rulemaking schedule, and plaintiffs must demonstrate why a court order should "depart from th[at] normal timeframe." Fed. Defs.' Remedy Resp. at 8.

The flaw in the government's position is that nothing in Executive Order 12,866 purports to set such a standard for a federal court's exercise of its equitable powers after a finding that an agency has violated the APA. Indeed, the order expressly states that it "is intended only to improve the internal management of the Federal Government." Exec. Order 12,866, § 10. In light of the seriousness of the legal violation at issue and the ongoing impact of that violation on plaintiffs and other U.S. workers, it is reasonable to expect DOL and OIRA to prioritize this rulemaking and the review process for it.

Second, DOL states that it needs until March 2015—six months from now—to publish a notice of proposed rulemaking (NPRM). It emphasizes that the agency must carefully craft a proposed rule before providing it to OIRA for the first of OIRA's 90-day reviews. Fed. Defs.' Remedy Resp. at 6. However, even if OIRA were to receive the full 90-day review period, DOL's request to publish a proposed rule in six months would still be unreasonable. DOL concedes that it will finish preparing a proposed wage methodology and standards for recruitment and housing "shortly." Fed. Defs.' Remedy Resp. at 5. That DOL is near completion of its draft is no surprise in light of the fact that DOL has been preparing to replace the TEGLs since May 2014. *See* DOL, Semiannual Agenda of Regulations 9-10. In light of these facts, DOL

should not need an additional three months on top of OIRA's review period to publish an NPRM.

Third, DOL contends that it will need sixty days for a public comment period because of its obligations under Executive Orders 12,866 and 13,563. Fed. Defs.' Remedy Resp. at 7. It asserts that the agency "cannot just expedite the rulemaking process by dispensing with the directives under the governing executive orders." *Id.* The proposal advanced by plaintiffs, however, would permit DOL to provide such a 60-day comment period if it chooses. Moreover, the executive orders do not *require* a 60-day comment period or any other period of time for public comment. Indeed, Executive Order 13,563 states that a 60-day comment period is recommended only "[t]o the extent feasible and permitted by law." Exec. Order 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, § 2(b) (Jan. 18, 2011).

Fourth, DOL contends that it will need sixty days "to review public comments and provide a full economic analysis for OIRA's review." Fed. Defs.' Remedy Resp. at 8. Plaintiffs appreciate that DOL will need to consider the public comments submitted during the comment period and respond to the major issues raised. DOL has not demonstrated, however, that it requires 60 days to complete that work. Most importantly, although DOL relies heavily on the need to assess the costs and benefits of the rule pursuant to Executive Order 12,866, *see* Fed. Defs.' Remedy Resp. at 8 (citing Executive Order 12,866, § 6(a)(3)(B)-(C)), the obligation to which it points must be carried out only where feasible. *See* Exec. Order 12,866, § 6(a)(3)(D) ("[W]hen an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, *to the extent practicable*, comply with subsections (a)(3)(B) and (C) of this section." (emphasis added)).

II. Intervenors' Contention That Plaintiffs Are Not Entitled to Any Remedy Beyond a Schedule for a Comment Period Is Meritless.

Intervenors argue that this Court's remedial order should not set a schedule for "final adoption" of a replacement rule or vacatur of the TEGLs held invalid by the D.C. Circuit because these steps are unnecessary to remedy plaintiffs' procedural injury. Intervenors' Remedy Opp'n at 1, 4. In intervenors' view, plaintiffs are entitled only to comment on a proposed rule.

Intervenors' argument is frivolous. It directly conflicts with the APA's provision on judicial review, 5 U.S.C. § 706(2), which provides that a "reviewing court shall . . . set aside agency action . . . found to be . . . without observance of procedure required by law." The argument is also at odds with numerous cases cited in plaintiffs' motion. *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259, 1261 (D.C. Cir. 2005) (holding that agency violated the APA's notice-and-comment requirement and vacating the rule before remand); *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) (same); *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 91 (D.D.C. 2007) (same). In addition, intervenors' position would permit DOL to offer the public a meaningless opportunity to comment on a rule that the agency has no intention to adopt and instead to apply the procedurally invalid TEGLs for the indefinite future. Such a scheme would make a mockery of the APA's notice-and-comment requirement and the D.C. Circuit's holding in this case. Intervenors' contention that a comment period that leads nowhere would provide plaintiffs with "exactly what they desire," Intervenors' Remedy Opp'n at 4, cannot be taken seriously.

Rizzo v. Goode, 423 U.S. 362 (1976), and *Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989) (per curiam), on which intervenors rely, are not to the contrary. *Rizzo* involved federal courts' equitable power to address a Section 1983 violation; it said nothing about a court's power to remedy an APA procedural violation. *See* 423 U.S. at 370, 378. *Reeder* recognized the

possibility that an agency may remedy a notice-and-comment violation by promulgating a rule without substantive modification after proper notice and comment. 865 F.2d at 1305. It does not support intervenors' assertion that notice and an opportunity for public comment, without adoption of some final rule after that notice-and-comment period, would remedy a procedural injury under the APA.

III. This Court Should Order DOL to Make the Final Rule Effective 30 Days After Its Publication in the Federal Register.

An order directing DOL to make a final rule effective within 30 days of publication is necessary to ensure that DOL does not, as it has done before, adopt a final rule but deprive the rule of any impact by delaying its implementation. *See* Pls.' Remedy Mot. at 6. Neither DOL nor intervenors pose any specific objection to this aspect of plaintiffs' motion. Accordingly, the Court should adopt plaintiffs' proposed schedule with regard to the effective date.

IV. This Court Should Vacate the Invalid TEGLs on a Date That Coincides with the Effective Date of the New Final Rule.

Plaintiffs request that the Court's order provide for automatic vacatur of the TEGLs 150 days after the order—a date that would coincide with the effective date of the new final rule. *Id.* at 7. As plaintiffs have explained, this action is warranted under the APA, which directs courts to "set aside agency action . . . found to be . . . without observance of procedure required by law." 5 U.S.C. § 706(2).

Vacatur coinciding with the effective date of a new rule is also appropriate in light of the circumstances of this case. In adopting the new final rule, DOL may choose, based on public comment, to eliminate certain exemptions for herding occupations now set forth in the invalidated TEGLs by reverting to the generally applicable H-2A regulations at 20 C.F.R. part 655. *See* Pls.' Remedy Mot. at 7. Under those circumstances, although DOL may state in the

commentary accompanying the final rule that certain special exemptions for herders no longer apply, the standards themselves will be set forth in existing regulations under 20 C.F.R. part 655, not in the new rule. In light of this possibility, vacatur of the TEGLs will prevent confusion among workers and employers by making clear that the TEGLs have no legal force or effect.

A. DOL and intervenors do not contest that vacatur is appropriate once a new final rule is in place. Instead, they knock down a straw man by fundamentally mischaracterizing plaintiffs' proposal as one that aims to vacate the TEGLs before a replacement rule becomes effective. Specifically, DOL contends that under plaintiffs' proposal, "if DOL needs more than 120 days to publish a final rule, the agency may take more time to complete the process, but after 150 days . . . the current TEGLs should be vacated." Fed. Defs.' Remedy Resp. at 9-10. Not so. Plaintiffs seek a court order mandating publication of a final rule within 120 days, with an effective date for the rule thirty days later. Under that schedule, DOL would have no discretion to delay publication of a final rule. Accordingly, vacatur and the effective date would be simultaneous.

Intervenors portray plaintiffs' request as one that would force DOL to "adopt a legislative rule by March 1, 2015," but that would "vacate the currently governing guidance on March 1, 2015[,] if DOL has not adopted a rule by then." Intervenors' Remedy Opp. at 1. Again, not so. As an initial matter, plaintiffs have never referred to March 1, 2015, as a deadline for publication of a final rule or the effective date of that rule, which plaintiffs suggest be keyed to the date of this Court's order for a rulemaking schedule. Moreover, as discussed above, plaintiffs' request does not seek vacatur if "DOL has not adopted a rule" by the deadline provided by this Court; they seek vacatur coincident with the effective date of the final rule. Indeed, the purpose of

vacatur in plaintiffs' proposal is to ensure that the TEGLs are wiped from the books once a replacement rule is in effect.

To be sure, plaintiffs' request for automatic vacatur of the TEGLs after 150 days would strengthen DOL's incentive to comply with this Court's scheduling order. *Cf. Haw. Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 288 F. Supp. 2d 7, 13 (D.D.C. 2003) (staying, for a set period of time, the court's mandate on a decision vacating a biological opinion and noting that, since "the automatic lifting of the stay could . . . have serious consequences for [the agency] and the listed turtles," "the parties should have every incentive to cooperate with one another as they reach a sufficient and legally valid decision"). But plaintiffs assume that the legal force of this Court's order is alone sufficient incentive for DOL to fulfill its obligations. At a minimum, this Court should not assess the propriety of vacatur by assuming that the government will defy the order establishing a rulemaking schedule.

Plaintiffs' proposal would also ensure that the legally invalid TEGLs do not remain in place indefinitely or by default should intervenors or other employers seek a preliminary injunction against DOL's new rule. In *CATA*, for example, the district court invalidated portions of a DOL rule governing union recruitment and definitions for full-time work and job contractors in the H-2B program but remanded to the agency without vacatur. In a later challenge to the replacement rule, industry groups successfully sought a preliminary injunction during the pendency of the litigation, enabling them to continue acting under the invalidated (but not vacated) rule for nearly two and a half years (and counting) after the new rule was slated to become effective. *See CATA*, No. 09-240, 2014 WL 4473485, at *6-*7 (E.D. Pa. Sept. 11, 2014) (describing the procedural history).

That scenario is possible here, in light of intervenors' previous threat to this Court to seek emergency relief, *see* Doc. 48, Joint Status Report at 5, and the government's candid assessment even at this early stage that a replacement rule "will likely be the subject of further judicial review given the contentious nature of issues involved," Fed. Defs.' Remedy Resp. at 2. Plaintiffs suspect that it is for this reason—not any real objection to vacatur that coincides with the effective date of a final rule—that intervenors so vociferously oppose plaintiffs' proposal.

B. Because the objections of DOL and intervenors to vacatur rest on mischaracterizations of plaintiffs' proposal, defendants' corresponding arguments miss the mark. DOL contends that vacatur is disfavored here because the APA violation was procedural, not substantive. *Id.* at 10. But the cases on which DOL relies—*Natural Resources Defense Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011), and *Delta Air Lines, Inc. v. Export-Import Bank*, 718 F.3d 974 (D.C. Cir. 2013) (per curiam)—considered the option of vacatur *before* remand to an agency for a new agency action. They did not address whether vacatur that coincides with the date of a new final rule's effectiveness is appropriate. In any event, those cases do not support the distinction between procedural and substantive defects that DOL attempts to draw. In fact, *Natural Resources Defense Council* determined to vacate guidance based only on a procedural defect before it ever considered whether to address a separate substantive challenge to the same guidance. *See* 643 F.3d at 321 ("Our case law provides little direction on whether, having determined to vacate on procedural grounds, we should nonetheless address substantive claims.").

Intervenors go further by arguing that vacatur is *never* appropriate where an agency action suffers from a procedural defect because such a defect cannot constitute a "serious deficienc[y]" under the standard in *Allied-Signal, Inc. v. Nuclear Regulatory Commission*, 988

F.2d 146 (D.C. Cir. 1993). Intervenors' Remedy Opp'n at 6. Yet intervenors fail to address plaintiffs' point that *Allied-Signal* does not apply where vacatur coincides with a new final rule. *See* Pls.' Remedy Mot. at 8. In addition, intervenors' position is contrary to well-established Circuit law recognizing that a procedural defect can constitute a serious deficiency. *See id.* at 8-9 and cases cited therein. That intervenors can point to cases in which an agency action was held to be substantively deficient yet remanded without vacatur, *see* Intervenors' Remedy Opp'n at 6-7, is beside the point. This Court has an array of options in crafting an appropriate remedy for an APA violation. *See, e.g.*, *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (determining that immediate vacatur was inappropriate but nevertheless entering an order that an action would "be vacated automatically" after 90 days if the agency failed adequately to justify the challenged action); *see also In re Core Commc'ns, Inc.*, 531 F.3d 849, 862-63 (D.C. Cir. 2008) (Griffith, J., concurring) (discussing selected cases in which the D.C. Circuit opted for "alternatives to the open-ended remand without vacatur").

Likewise, defendants' dire predictions of disruption in the regulatory scheme hinge on the assumption that the TEGLs will be vacated before a new rule becomes effective. Defendants point to no disruptive effects of vacating the TEGLs on a date that coincides with the effective date of the new final rule.

In any event, defendants' predictions of disruption are overblown. DOL and intervenors contend that in the absence of the TEGLs there would be no standards available for certifying the importation of H-2A herders. Fed. Defs.' Remedy Resp. at 11; Intervenors' Remedy Opp'n at 8. However, with the exception of housing, the H-2A regulations—which were already adopted by notice-and-comment rulemaking—would provide such standards. *See* Doc. 27-1, Pls.' Memo. in Supp. of Mot. for Summ. J. at 26-28 (describing the impact of the TEGLs' vacatur without a

replacement rule). DOL responds that the H-2A regulations' wage rates would be inappropriate for herders because "herding occupations involve special conditions that are not readily suitable to the rules governing other agricultural occupations." Fed. Defs.' Remedy Resp. at 11 (citing reasoning in one of the TEGLs invalidated by the D.C. Circuit). DOL might reach that conclusion in rulemaking and create a legislative exemption for herders, but as the H-2A regulations stand, they apply generally to all H-2A workers, including herders. *See Mendoza v. Perez*, 754 F.3d 1002, 1024-25 (D.C. Cir. 2014) ("In the absence of the TEGLs, petitions for certification of H-2A herders would be subject to the standards found in 20 C.F.R. part 655 . . . ."). Intervenors' speculative assertion that vacatur would cause herder employers to exit the business and sell off every last sheep in the American West for mutton production, *see* Intervenors' Remedy Opp'n at 9, defies common sense. As discussed above, employers could continue to hire foreign workers under the non-housing-related terms set forth in the generally applicable H-2A regulations, and they could hire U.S. workers at non-depressed wages and working conditions.

CONCLUSION

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

Dated: October 3, 2014

Respectfully submitted,

/s/ Julie A. Murray

Julie A. Murray
D.C. Bar No. 1003807
Allison M. Zieve
D.C. Bar No. 424786
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000
jmurray@citizen.org

Edward Tuddenham
D.C. Bar No. 416194
228 W. 137th Street
New York, NY 10030
(212) 234-5953

P. Alex McBean
UTAH LEGAL SERVICES, INC.
205 North 400 West
Salt Lake City, UT 84103
(801) 328-8891

Jennifer J. Lee
Migrant Farm Worker Division
COLORADO LEGAL SERVICES
1905 Sherman Street, Suite 400
Denver, CO 80203
(303) 866-9366

Attorneys for Plaintiffs