

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED FARM WORKERS, et al.,

No. 1:20-cv-01452-DAD-JLT

Plaintiffs,

v.

SONNY PERDUE, et al.,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION
FOR A TEMPORARY RESTRAINING
ORDER AND A PRELIMINARY
INJUNCTION

(Doc. No. 3)

This matter came before the court on October 20, 2020 for a hearing on the motion for a temporary restraining order and a preliminary injunction on behalf of plaintiffs United Farm Workers and UFW Foundation (collectively, "plaintiffs"). (Doc. No. 3.) Attorneys Mark Selwyn, Rachel Jacobson, Gregory Lantier, Nicholas Werle, Bruce Goldstein, and Gabriela Hybel appeared via video for plaintiffs, and United States Department of Justice Trial Attorney Michael Gaffney appeared via video for defendants Sonny Perdue, the Secretary of Agriculture; William Northey, the United States Department of Agriculture's ("USDA") Under Secretary for Farm Production and Conservation; and USDA (collectively, "defendants"). For the reasons explained below, the court will grant plaintiffs' motion for a temporary restraining order and a preliminary injunction.

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BACKGROUND

2 In their complaint, plaintiffs allege the following. Federal law instructs the United States
3 Secretary of Agriculture to procure and preserve information concerning agriculture, including
4 “by the collection of statistics” and “any other appropriate means within his power.” (Doc. No. 1
5 (“Compl.”) at ¶ 20.) Since 1910, the Secretary has satisfied that statutory mandate in part by
6 conducting the Agricultural Labor Survey, often referred to as the Farm Labor Survey (“FLS”).
7 (*Id.* at ¶ 21.) The FLS collects information from farm employers to obtain data on farm
8 employment, hours worked, wages paid, and other statistics. (*Id.*) For over 100 years, defendant
9 USDA has consistently employed the FLS to collect data regarding farm labor and wages. (*Id.*)
10 The FLS is traditionally conducted in April and October. (*Id.* at ¶ 22.) During those months, the
11 survey collects wage and employment data for four reference weeks, one in each quarter, from
12 farms and ranches with \$1,000.00 or more in annual agricultural sales revenue for all states
13 except Alaska. (*Id.*) The FLS samples approximately 35,000 farms and ranches. (*Id.*) Most FLS
14 data is collected by mail and computer-assisted phone interviews, with personal interviews used
15 for some large operations and those with special handling arrangements. (*Id.*)

16 The National Agricultural Statistics Service—USDA’s statistical branch—publishes the
17 FLS data semiannually in May and November in the Farm Labor Report (“FLR”). (*Id.* at ¶ 23.)
18 The May report includes employment and wage estimates based on January and April reference
19 weeks, and the November report includes estimates based on July and October reference weeks.
20 (*Id.*) The report includes quarterly estimates of the number of hired workers and average hours
21 worked per worker during each reference week. (*Id.*) The report also includes quarterly
22 estimates of average hourly wage rates for field workers; livestock workers; field and livestock
23 workers combined; and all hired workers, including supervisors, managers, and other workers.
24 (*Id.*) The November report, in addition, provides annual data based on the quarterly estimates.
25 (*Id.*)

26 The H-2A agricultural guest worker program permits agricultural employers to hire
27 foreign workers to perform agricultural work on a temporary basis when domestic labor markets
28 cannot supply an adequate number of workers at a particular time for a certain job. (*Id.* at ¶ 36.)

1 Employers are only authorized to hire foreign guest workers, however, if the United States
 2 Department of Labor (“DOL”) certifies that the foreign workers’ temporary employment “will
 3 not adversely affect the wages and working conditions of workers in the United States similarly
 4 employed.” (*Id.*) To avoid adverse effects to U.S. workers’ wages, DOL regulations require that
 5 employers utilizing the H-2A program pay a wage that is the highest of the (1) Adverse Effect
 6 Wage Rate (“AEWR”), (2) the prevailing wage rate,¹ (3) an agreed-upon collective bargaining
 7 wage, or (4) the federal or state minimum wage. (*Id.* at ¶ 37.)

8 Under those regulations, the DOL relies primarily on a two-pronged approach based on
 9 the AEWR and prevailing wage rate to guard against wage depression that would otherwise result
 10 from the hiring of large numbers of foreign agricultural workers. (*Id.* at ¶ 38.) The prevailing
 11 wage rate protects local wages paid for particular jobs, while the AEWR sets a state-wide wage
 12 floor to prevent wage disparities for jobs at H-2A employers in larger areas. (*Id.*) The DOL has
 13 recognized that it is the existence of both the AEWR and prevailing wage rates that ensures that
 14 U.S. workers are adequately protected from decreased wages caused by an influx of foreign guest
 15 workers. (*Id.*) The AEWR, however, is the primary wage rate under the H-2A program because
 16 it is higher than the other minimum wages in most circumstances. (*Id.*) As a result, the AEWR
 17 determines the wages of approximately 92 percent of the farmworkers employed by H-2A
 18 program employers.

19 DOL regulations have required the DOL to use the FLS to calculate the AEWR for the H-
 20 2A program since the program’s inception in 1986, and the DOL has used FLS data for the H-
 21 2A’s predecessor program since 1953. (*Id.* at ¶ 39.) Because of the DOL’s longstanding reliance
 22 on the survey, defendant USDA conducts the FLS in cooperation with the DOL, and the DOL has
 23 funded the FLS since July 2011 pursuant to a memorandum of understanding between the two
 24 agencies. (*Id.*) In 2010, the DOL recognized that using data other than the FLS to calculate
 25 AEWRs “entails a significant risk that U.S. workers may in the future experience wage

26
 27 ¹ Plaintiffs note in their motion that under the H-2A program, the “prevailing wage” is based on
 28 the wages paid in a local geographic area for a particular job. (Doc. No. 3 at 11) (citing Doc. No.
 3-10).

1 depression as a result of unchecked expansion of the demand for foreign workers.” (*Id.* at ¶ 40.)
 2 The DOL explained that “[t]he FLS is the only annually available data source that actually uses
 3 information sourced directly from farmers,” which “is a strong advantage of the FLS as the
 4 AEWR data source compared to all other alternatives.” (*Id.*) The DOL similarly explained in a
 5 2019 notice of proposed rulemaking that “[t]he FLS [remained] the Department’s preferred wage
 6 source for establishing the AEWR because it is the only comprehensive wage survey that collects
 7 data from farm and ranch employers.” (*Id.* at ¶ 41.) The DOL also recognized that it had “always
 8 used the FLS to set the H-2A AEWR, with the exception of a brief period under” its 2008 rule.
 9 (*Id.*) Most states do not collect, and therefore do not publish, local prevailing wage rates for jobs
 10 subject to the H-2A program. (*Id.* at ¶ 59.) And most states that do publish prevailing wage rates
 11 do not publish prevailing wage rates for general crop workers. (*Id.*) Accordingly, in the absence
 12 of the AEWR, most minimum H-2A wages would be determined by the highest of the federal
 13 minimum wage of \$7.25 per hour or the applicable state minimum wage. (*Id.*)

14 Agricultural employers have continued to rely heavily on the H-2A program in 2020, and
 15 their substantial use of that program will likely continue in 2021. (*Id.* at ¶ 55.) During the first
 16 three quarters of the 2020 fiscal year, the DOL received 12,351 applications from employers
 17 seeking certification for 232,362 H-2A workers and approved the hiring of 224,290 of those
 18 workers. (*Id.*) Employers in Washington State received approvals to hire 24,785 H-2A workers,
 19 and California employers received approvals to hire 21,337 H-2A workers. (*Id.*) The October
 20 2020 survey was expected to be conducted from on or about October 19, 2020 through on or
 21 about November 7, 2020, and the FLR was expected to be published in or about the week of
 22 November 23, 2020. (*Id.* at ¶ 22.)

23 On September 30, 2020, defendant USDA published a cursory, one-page notice (“the
 24 Suspension Notice”) in the Federal Register announcing the suspension of October 2020 FLS data
 25 collection and the cancellation of its November 2020 publication of the biannual FLR. (*Id.* at
 26 ¶¶ 2, 26); *see also Notice of Revision to the Agricultural Labor Survey and Farm Labor Reports*
 27 *by Suspending Data Collection for October 2020*, 85 Fed. Reg. 61719 (Sept. 30, 2020).
 28 According to plaintiffs, defendant USDA did not solicit any public comment or employ any

1 formal rulemaking procedures despite the Suspension Notice amounting to final agency action
 2 with respect to the suspension of FLS data collection and FLR publication, and defendant USDA
 3 lacks any rationale for suspending the FLS data collection and FLR publication. (Compl. at
 4 ¶¶ 26, 27.)

5 Plaintiffs filed their complaint against defendants seeking declaratory and injunctive relief
 6 on October 13, 2020. (Compl.) Plaintiffs' complaint asserts three claims for relief: (1) a
 7 violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, based upon defendant
 8 USDA's failure to consider important aspects of its decision in this regard; (2) a violation of the
 9 APA, 5 U.S.C. § 706, based upon defendant USDA's failure to offer a reasoned explanation for
 10 its decision; and (3) a violation of the APA, 5 U.S.C. § 553, due to defendant USDA's failure to
 11 comply with the requirements of notice-and-comment rulemaking. Plaintiffs filed the pending
 12 motion for a temporary restraining order and a preliminary injunction on October 13, 2020. (Doc.
 13 No. 3.) On October 19, 2020, defendants filed their opposition to plaintiffs' motion. (Doc. No.
 14 27.) The hearing on plaintiffs' motion was held on October 20, 2020. The day after that hearing,
 15 defendants filed a notice stating that the DOL had transmitted to the Office of Information and
 16 Regulatory Affairs ("OIRA") a draft final rule for adopting a new AEWR methodology on
 17 October 21, 2020. (Doc. No. 30); *see also See OIRA, Pending EO 12866 Regulatory Review*
 18 (October 21, 2020), <https://www.reginfo.gov/public/do/eoDetails?rrid=131303>. Plaintiffs
 19 immediately filed a response to defendants' notice on October 21, 2020. (Doc. No. 31.)

20 **LEGAL STANDARD**

21 The standard governing the issuing of a temporary restraining order is "substantially
 22 identical" to the standard for issuing a preliminary injunction. *See Stuhlbarg Intern. Sales Co. v.*
23 John D. Brush & Co., 240 F.3d 832, 839 n. 7 (9th Cir. 2001). "The proper legal standard for
 24 preliminary injunctive relief requires a party to demonstrate 'that he is likely to succeed on the
 25 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
 26 balance of equities tips in his favor, and that an injunction is in the public interest.'" *Stormans,*
27 Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council,*
 28 *Inc.*, 555 U.S. 7, 20 (2008)); *see also Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1172 (9th

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