IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA GROWERS' ASSOCIATION, INC., NATIONAL CHRISTMAS TREE ASSOCIATION, FLORIDA FRUIT & VEGETABLE ASSOCIATION, INC., VIRGINIA AGRICULTURAL GROWERS ASSOCIATION, INC., SNAKE RIVER FARMERS ASSOCIATION, NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS, NORTH CAROLINA CHRISTMAS TREE ASSOCIATION, NORTH CAROLINA PICKLE PRODUCERS ASSOCIATION, FLORIDA CITRUS MUTUAL, NORTH CAROLINA AGRIBUSINESS COUNCIL, INC., MAINE FOREST PRODUCTS COUNCIL, ALTA CITRUS, LLC, EVERGLADES HARVESTING & HAULING, INC., DESOTO FRUIT AND HARVESTING, INC., FOREST RESOURCES ASSOCIATION, TITAN PEACH FARMS, INC., H-2A USA, INC., and OVERLOOK HARVESTING COMPANY, LLC,	)	
Plaintiffs,	)	
v.	)	1:09CV411
HILDA L. SOLIS, in her official capacity as United States Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR, JANET NAPOLITANO, in her official capacity as United States Secretary of Homeland Security, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,	)	
Defendants,	)	
and	)	

UNITED FARM WORKERS,)
JAMES CEASE,)
MARIO CENTENO-RODRIGUEZ,)
JUAN CISNEROS-IBARRA,)
LUIS ENRIQUE CISNEROS-IBARRA,)
REYMUNDO GUTIERREZ,)
CARLOS LUIS GUZMAN-AVILA,)
JUAN LUIS GUZMAN-CENTENO,)
JOSE RAUL GUZMAN-CENTENO,)
ABELARDO HERNANDEZ-AGUAS,)
GREGORIO HUERTAS-SAMANO,)
PEDRO IBARRA-AVILA,)
ATANACIO LUGO-RINCON,)
OBDULA MALDONADO-ABELLANEDA,)
MIGUEL ANGEL OLGUIN-HERNANDEZ,)
ARTURO OLGUIN-MONROY,)
OMERA RODRIGUEZ-GUZMAN,)
DESIDERIO TOVAR-ZAPATA, and)
ALEJANDRO TREJO-LEON,)
on behalf of themselves and)
all others similarly situated,)
)
Defendant-Intervenors.)

MEMORANDUM OPINION AND ORDER

OSTEEN, JR., DISTRICT JUDGE.

Before the court are Plaintiffs' Motion for Summary Judgment (Doc. 124) and Defendant-Intervenors' Motions for Partial Summary Judgment (Docs. 131, 132). Plaintiffs allege that the Department of Labor ("DOL") suspended a rule and imposed a new rule without following the requisite procedures for "rule making" as set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553 and 701 et seq. All Defendants contend that DOL's rule making complied with the requirements of the APA. Defendant-Intervenors

also contend that they are entitled to the recovery of certain wages based upon DOL's rules which were not implemented during this court's preliminary injunction.

Also pending before this court is Defendant-Intervenors Motion for Leave to File Supplemental Memorandum Regarding Mootness ("Supplemental Memorandum"). (Doc. 138.) Because that memo addresses the issue of mootness in relation to the summary judgment pleadings, the motion will be allowed. Defendant-Intervenors are not required to separately file the Supplemental Memorandum.

For the reasons set forth herein, Plaintiffs' motion for summary judgment will be granted and Defendant-Intervenors' motions for partial summary judgment will be denied.

I. FACTS[1]

The Immigration and Nationality Act of 1952, as amended, provides a means by which employers may legally obtain temporary services of foreign agricultural workers when American workers are not available and classifies those foreign workers as "(H)(ii)(a)" ("H-2A"). 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The Department of Labor and Department of Homeland Security are the

[1] The relevant facts of this case are largely undisputed and are more thoroughly set out in Plaintiffs' brief in support of their motion for preliminary injunction (Doc. 3) and in the Federal Defendants' response to the motion for preliminary injunction (Doc. 36). The facts are summarized in this opinion and order.

agencies responsible for creating the regulations necessary to implement the H-2A program and for administering that program. The H-2B program is a similar program originally directed to logging workers in the forest products industry.[2] See id. § 1101(a)(15)(H)(ii)(b).

Congress delegated to the Secretary of Labor the authority to implement the H-2A certification program through administrative rule making. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 301(e), 100 Stat. 3359. Farmers must be "certified" by DOL to participate in the H-2A program. To obtain certification, the contracts the farmers enter into with their workers must comply with the H-2A rules and regulations in effect at that time. See 20 C.F.R. § 655.105 (removed Feb. 12, 2010). The rules and regulations cover a variety of issues related to the H-2A program, including wages to be paid the foreign workers. See 8 U.S.C. § 1188(a)(1); see also, e.g., 20 C.F.R. § 655.105(g) (removed Feb. 12, 2010). For example, the Adverse Effective Wage Rate ("AEWR") sets the wage rate, and the AEWRs set by DOL's H-2A rules affect the wage rates in the applicable labor markets. A rule raising the AEWR

[2] Under the 1987 Rule, the H-2A and H-2B programs had separate rules. When the 2008 Rule was implemented, the H-2B program was incorporated into the H-2A process. Thus, for purposes of this order, the rule making process is referred to as the H-2A program even though the H-2B rules are affected by this rule making process as well.

increases the market wage rate. Correspondingly, a rule lowering the AEWR decreases the market wage rate. See Indus. Holographics, Inc. v. Donovan, 722 F.2d 1362, 1367 (7th Cir. 1983) (stating that the assumption that employment of an alien at wages below the prevailing wage will tend to affect the wages of American workers is not arbitrary or capricious).

In 1987, DOL promulgated a series of regulations governing the H-2A program (collectively referred to herein as "the 1987 Rule") that largely remained in effect until 2008, when DOL promulgated new H-2A regulations ("the 2008 Rule") and eliminated the 1987 Rule. The 2008 Rule became effective on January 17, 2009. See Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110, 77,110 (Dec. 18, 2008). The 2008 Rule was created to fix various perceived problems with the 1987 Rule. See id. For example, the 2008 Rule was designed to eliminate duplicative H-2A activities, more rigorously penalize noncompliant entities, and protect workers. Id.

On March 17, 2009, DOL issued a notice of proposed rule making ("the 2009 NPRM"), proposing to "suspend" the 2008 Rule for nine months and reinstate the 1987 Rule "[t]o avoid the regulatory vacuum that would result" from that suspension. Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 11,408, 11,408 (Mar. 17, 2009). DOL specified a ten-day

comment period for the 2009 NPRM. Id. The 2009 NPRM advised interested parties that DOL would not consider certain comments in promulgating any rule that might arise from the notice:

> Please provide written comments only on whether the Department should suspend the December 18, 2008 final rule for further review and consideration of the issues that have arisen since the final rule's publication. Comments concerning the substance or merits of the December 18, 2008 final rule or the prior rule will not be considered.

Id. (emphasis added). The "prior rule" reference was to the 1987 Rule, which was to be reinstated during the suspension period.

On May 29, 2009, consistent with the 2009 NPRM, DOL issued a new H-2A rule ("the Substitution Rule"), scheduled to take effect on June 29, 2009, and summarized as follows:

> The Department of Labor (DOL or Department) is suspending the H-2A Final Rule published on December 18, 2008 and in effect as of January 17, 2009. . . . To ensure continued functioning of the H-2A program, the Department is republishing and reinstating the regulations in place on January 16, 2009 for a period of 9 months, after which the Department will either have engaged in further rulemaking or lift the suspension.

Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 25,972, 25,972 (May 29, 2009). With regard to the scope-of-comment restriction contained in the 2009 NPRM, the Substitution Rule states:

> [I]n the Notice, the Department requested that parties limit their comments to the issue of whether the Department should suspend the December 2008 Rule for further review and consideration of the issues that have arisen since the December 2008 Rule's publication. Though all comments have been reviewed, only those comments responding to issues on which the Department

sought comment were considered in this Final Rule. Id. at 25,973.

On June 9, 2009, North Carolina Growers' Association, Inc.; National Christmas Tree Association; Florida Fruit & Vegetable Association, Inc.; Virginia Agricultural Growers Association, Inc.; Snake River Farmers Association; National Council of Agricultural Employers; North Carolina Christmas Tree Association; North Carolina Pickle Producers Association; Florida Citrus Mutual; North Carolina Agribusiness Council, Inc.; Maine Forest Products Council; Alta Citrus, LLC; Everglades Harvesting & Hauling, Inc.; Desoto Fruit and Harvesting, Inc.; Forest Resources Association; Titan Peach Farms, Inc.; H-2A USA, Inc.; and Overlook Harvesting Company, LLC (collectively, "Plaintiffs") filed a Complaint naming as defendants DOL, Hilda L. Solis in her official capacity as Secretary of DOL, the Department of Homeland Security ("DHS"), and Janet Napolitano in her official capacity as Secretary of DHS (collectively, "the Federal Defendants"). (Doc. 1 at 1-3.) Plaintiffs allege that the Federal Defendants violated the APA, 5 U.S.C. §§ 553 and 701 et seq., in formulating the Substitution Rule. (Compl. (Doc. 1) ¶¶ 54-86.) Plaintiffs are all farm operators or foresters that have an interest in, and are impacted by, the H-2A and H-2B programs and the regulations of those programs.

On June 18, 2009, United Farm Workers, James Cease, Mario

Centeno-Rodriguez, Juan Cisneros-Ibarra, Luis Enrique Cisneros-Ibarra, Reymundo Gutierrez, Carlos Luis Guzman-Avila, Juan Luis Guzman-Centeno, Jose Raul Guzman-Centeno, Abelardo Hernandez-Aguas, Gregorio Huertas-Samano, Pedro Ibarra-Avila, Atanacio Lugo-Rincon, Obdula Maldonado-Abellaneda, Miguel Angel Olguin-Hernandez, Arturo Olguin-Monroy, Omera Rodriguez-Guzman, Desiderio Tovar-Zapata, and Alejandro Trejo-Leon (collectively, "Defendant-Intervenors") filed a Motion to Intervene as Parties Defendant (Doc. 37). The court granted Defendant-Intervenors' motion to intervene. (Doc. 90 at 3.) Defendant-Intervenors support the Substitution Rule and, pursuant to that rule, filed counterclaims seeking to recover the higher wage rates payable under the Substitution Rule's AEWR rather than the lower wage rates which were actually implemented pursuant to the 2008 Rule during the period in which this court's injunction was pending. This wage rate issue that arose as a result of the two conflicting rules is referred to herein as the "Wage Differential."

After this court entered an order granting Plaintiffs' motion for a preliminary injunction (Doc. 59), DOL filed a new notice of proposed rule making seeking to suspend the 2008 Rule and implement a new rule. See Temporary Agricultural Employment of H-2A Aliens in the United States, 74 Fed. Reg. 45,906 (Sept. 4, 2009). On February 12, 2010, DOL issued a final rule

regarding the H-2A program. See Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884 (Feb. 12, 2010) ("the 2010 Rule"). The 2010 Rule became effective March 15, 2010, and is not at issue in this case. However, the applicable DOL rules during the time period of June 2009 through March 2010, when implementation of the Substitution Rule was enjoined by this court pending a final resolution on the merits, are at issue. All parties agree that during that time period, DOL administered the H-2A program pursuant to the 2008 Rule and did not implement the Substitution Rule. The parties also agree that there is a Wage Differential between the 2008 Rule as administered during the pendency of the injunction and the AEWR that would have been implemented pursuant to the Substitution Rule.

II. LEGAL STANDARDS

A. Mootness as to the Federal Defendants

In response to Plaintiffs' motion for summary judgment, the Federal Defendants contend that

> Plaintiffs' claims for declaratory and injunctive relief based on [the Substitution Rule] have been rendered moot and Plaintiffs no longer have a live case or controversy as to the Federal Defendants. Because federal courts are forbidden from entertaining actions without a case or controversy, this Court should dismiss Plaintiffs' claims against the Federal Defendants.

(Defs.' Opp'n Pls.' Mot. Summ. J. (Doc. 126) at 4.) Plaintiffs agree with the Federal Defendants that the issues in this case

are moot as to the Federal Defendants except to note that Plaintiffs will be seeking attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. (See generally Pls.' Reply Government Defs. (Doc. 128) at 1-2.)

Plaintiffs' Complaint seeks both declaratory and injunctive relief with respect to the Substitution Rule. (Doc. 1 at 34.)

> To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. . . .
>
> When a legislature amends or repeals a statute, a case challenging the prior law can become moot even where re-enactment of the statute at issue is within the power of the legislature.

Brooks v. Vassar, 462 F.3d 341, 348 (4th Cir. 2006) (internal quotation marks omitted). Additionally, declaratory relief such as Plaintiffs have sought in this case may be entered only when "the challenged government activity . . . is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." See Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 122 (1974). "The question is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id. (internal quotation marks omitted).

This court agrees with the parties that because the H-2A and

H-2B programs were administered under the 2008 Rule following this court's preliminary injunction until implementation of the 2010 Rule, this case is moot as to the Federal Defendants. Accordingly, this case will be dismissed as moot as to the Federal Defendants.[3] However, as argued by Plaintiffs, because of the Wage Differential issue and related counterclaims, this matter is not moot as to Defendant-Intervenors. This court will therefore address summary judgment as to the remaining claims.[4]

B. Summary Judgment

Summary judgment is appropriate where an examination of the pleadings, affidavits, and other proper discovery materials before the court demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56. The moving party bears the burden of initially demonstrating the absence of a genuine

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[3] 5 U.S.C. § 702 provides "[t]hat any mandatory or injunctive decree shall specify the Federal officer or officers. . .personally responsible for compliance. This order contains an injunction. Should the Federal Defendants be necessary parties because of injunctive relief, then in the alternative this court would apply the same analysis to Plaintiffs' claims against the Federal Defendants as set forth herein with respect to the Intervenor-Defendants.

[4] All parties' summary judgment and partial summary judgment briefs have argued either in response to, or in accordance with, the substantive arguments contained in the Federal Defendants' briefs. This court has considered the Federal Defendants' substantive arguments as they relate to Plaintiffs' motion for summary judgment and Defendant-Intervenors' motions for partial summary judgment as adopted or responded to by Plaintiffs or Defendant-Intervenors.

issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party has met that burden, then the nonmoving party must persuade the court that a genuine issue remains for trial by "go[ing] beyond the pleadings" and introducing evidence that establishes "specific facts showing that there is a genuine issue for trial." Id. at 324 (internal quotation marks omitted).

In considering a motion for summary judgment, the court is not to weigh the evidence, but rather must determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The court must view the facts in the light most favorable to the nonmovant, drawing all justifiable inferences in that party's favor. Id. at 255. A mere factual dispute is insufficient to prevent summary judgment; the fact in question must be material, and the dispute must be genuine. Fed. R. Civ. P. 56; Anderson, 477 U.S. at 247-48. Material facts are those facts necessary to establish the elements of a party's cause of action. Anderson, 477 U.S. at 248. A dispute is only "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

C. Review of Agency Action

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review

thereof." 5 U.S.C. § 702. In reviewing agency action, "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did. De novo factfinding by the district court is allowed only in limited circumstances." Occidental Eng'g Co. v. INS, 753 F.2d 766, 769 (9th Cir. 1985).

> The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court. The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.

Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-744 (1985) (internal quotation marks and citation omitted). "The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred." Id. at 744. The Federal Defendants have filed the agency record with this court and this matter is ripe for review. See Notice of Paper Filing (Doc. 123).

Judicial review of agency action is narrow. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). A reviewing court may not substitute its judgment for that of the agency. Id. However, an agency's action may be set aside if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law." 5 U.S.C. § 706(2)(A).

In conducting rule making pursuant to the APA, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (internal quotation marks omitted).

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies . . . .

Id.; see also Ohio River Valley Envtl. Coal. v. Kempthorne, 473 F.3d 94, 102 (4th Cir. 2006). "Although the scope of review is narrow, the agency must nevertheless explain the evidence which is available, and must offer a rational connection between the facts found and the choice made." Ohio River Valley, 473 F.3d at 102-103.

III. ANALYSIS

Under the APA, "rule making" is defined as an agency's "process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Section 553(c) of the APA requires that agencies "give interested persons an opportunity to participate in the rule making through submission of written data, views, or

arguments."[5] Id. § 553(c). This court finds that the two actions by DOL with respect to the Substitution Rule, that is, the suspension of the 2008 Rule and reinstatement of the 1987 Rule, constituted "rule making" under §§ 551 and 553.[6]

In support of their motion for summary judgment, Plaintiffs

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[5] 5 U.S.C. § 553(b) provides that the notice provisions do not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to public interest." The Federal Defendants do not contend this provision applies, nor is there a finding and brief statement of reasons which would permit suspension of the notice provisions.

[6] The Substitution Rule is a "rule" as that term is defined in the APA. Section 551(4) states that a "rule" is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). An act also constitutes a "rule" if it is an "approval or prescription for the future" of rates or wages. Id. Here, the Substitution Rule, specifically the component that reinstates the 1987 Rule, constituted a "rule" in that it implements the AEWRs with which Plaintiffs must comply.

Notwithstanding the fact that the Supreme Court has suggested that rule suspensions are permissible, see Motor Vehicle Mfrs. Ass'n, 463 U.S. at 50 n.15 ("We think that it would have been permissible for the agency to temporarily suspend the passive restraint requirement . . . ."), it is not settled whether rule suspensions constitute "rule making" under § 551(5) and must therefore comply with § 553(c). Nevertheless, it is not necessary to resolve this issue to determine whether Plaintiffs' motion for summary judgment should be granted. Here, Defendants did more than just suspend a set of regulations in promulgating the Substitution Rule. In addition to withdrawing a rule, Defendants effectively formulated a new rule by reinstating the 1987 Rule. As stated, the APA's definition of "rule making" explicitly covers rule formulation. 5 U.S.C. § 551(5) (defining "rule making" as an agency's "process for formulating, amending, or repealing a rule" (emphasis added)). Accordingly, in order for the Substitution Rule to be valid, DOL must have complied with § 553(c) of the APA in reinstating the 1987 Rule.

argue that the 2009 NPRM's scope-of-comment restriction violated § 553(c) of the APA because the restriction prohibited Plaintiffs from participating in the making of the actual rule that DOL proposed to implement, that is, the 1987 Rule. See Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 11,408, 11,408 (Mar. 17, 2009) ("Comments concerning the substance or merits of the December 18, 2008 final rule or the prior rule will not be considered."). Not only did DOL issue an initial statement advising that it would not consider comments on the substance or merits of the two rules, DOL in fact refused to consider comments that it received as to those rules' substance and merits. Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 25,972, 25,973 (May 29, 2009) ("Though all comments have been reviewed, only those comments responding to issues on which [DOL] sought comment were considered in this Final Rule.").[7]

With respect to rule making, 5 U.S.C. § 553(c) provides:

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for

[7] In addition to avoiding the APA rule making procedures, this limitation on comment review creates a separate issue with respect to the judicial review provided for in 5 U.S.C. § 702. Because of the comment limitation and the notation that "only those comments responding to issues on which [DOL] sought comment were considered in this Final Rule," it is difficult for a reviewing court to determine which comments were considered by DOL. Thus, the procedure used by DOL in this rule making is, at best, evasive as to judicial review of substantive provisions.

> oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

5 U.S.C. § 553(c). To comply with the notice and comment provisions of § 553(c), "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.

DOL refused to accept and consider comments as to the 2008 Rule and the 1987 Rule even though the 2009 NPRM specifically identified substantive issues which would be directly affected by the proposed rule making. Several stated reasons for the 2009 NPRM raise questions as to the propriety of the comment content restriction. However, of particular significance to DOL's comment restriction is the fact the 2009 NPRM stated that the suspension of the 2008 Rule and the re-implementation of the former H-2A rule were warranted because of "severe economic conditions [now] facing the country." See Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 25,972, 25,972 (May 29, 2009). If severe economic conditions required a rule suspension and re-implementation of the 1987 Rule, then comments as to the substance and merits of the rules by persons affected are relevant and important. DOL's refusal to consider such comments constitutes a failure to "give interested persons an opportunity to participate in the rule making through submission

of written data, views, or arguments." See 5 U.S.C. § 553(c). Additionally, the refusal to consider the merits of the two rules constitutes a "fail[ure] to consider . . . important aspect[s] of the problem." See Motor Vehicles Mfrs. Ass'n, 463 U.S. at 43.

Not surprisingly, individuals providing comments noted the lack of consideration of the substance and merits as to the potential economic effects of the agency action. One comment stated that

> [n]owhere in the Federal Register is the economic impact of this precipitous rulemaking addressed by the Department. It is inconceivable that after only six weeks under regulations reviewed and then promulgated in compliance with [the] APA, the Labor Department could ascertain that a return to previous regulations is economically beneficial to the Department, H2A employers or workers.

Comment, Charles T. Hall, Jr., Mar. 21, 2009 (ETA-2008-0001-1070.1), DOL000113, DOL000114. Similarly, another comment noted:

> Our experience has shown the issued Adverse Effect Wage Rate (AEWR) has had an overall detrimental effect on the performance level of our harvesting workers. Under the previous H-2A regulations the AEWR guaranteed wage significantly exceeded both prevailing wage standards and the Florida minimum wage rate. The artificially high AEWR adversely impacted the workers' motivation to strive for desired productivity levels.

Comment, Ricke Kress, Mar. 26, 2009 (ETA-2008-0001-1156-cp), DOL000283, DOL000284. While this court makes no finding as to whether these comments are accurate, the comments do appear to address the substance and merits of the 2008 Rule and the 1987 Rule and therefore are the type of comments that were not considered by DOL. Although DOL did note in the Substitution

Rule that it received comments about the AEWR, it appears consideration of those comments was limited only to the suspension issue and did not extend to the merits of the choice of rule during the suspension period. See Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 25,972, 25,977 (May 29, 2009) ("One of the primary reasons that the new Administration wants to review the December 2008 Rule is precisely to determine whether the generally reduced wage rates under that rule are having a depressive effect on farmworker wages."). It is clear that DOL determined the substance and merits of the 1987 Rule were appropriate for current conditions during the suspension. DOL did so without considering merits comments and without explaining the substance and merits of its decision.

In addition to the comments DOL received, Plaintiffs have presented evidence that they would have submitted additional comments absent the scope-of-comment restriction contained in the 2009 NPRM. (See Wicker Aff. (Doc. 4-3) at 29 ("Again, as with the rest of the substance of the regulations governing the H-2A program, the NCGA would like an opportunity to comment on specific provisions . . . of the Department's proposal . . . . But according to the terms set by the Department in the Notice, any comments on these subjects will not be considered . . . .").) It is undisputed that Plaintiffs were prejudiced by the comment restriction. See Columbia Venture LLC v. S.C. Wildlife Fed'n,

562 F.3d 290, 294 (4th Cir.) (per curiam) ("[T]he party who claims deficient notice bears the burden of proving that any such deficiency was prejudicial, and if that party fails to carry its burden, the agency's decision must be upheld." (internal quotation marks omitted)), cert. dismissed, 130 S. Ct. 418 (2009). Indeed, the Substitution Rule recognized that at least one affected party objected to the scope-of-comment limitation and had comments it would like to offer. Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 25,972, 25,979 (May 29, 2009) ("An agricultural association objected to the Department's limitation of the scope of comments to the suspension itself, as opposed to comments on the merits or substance . . . . The association stated that it has numerous comments it would like to offer on both the current regulations, as well as the prior regulations . . . .").

In addition to the economic issues for which no comments as to the substance and merits of the rules were solicited, the Substitution Rule's reinstatement of the 1987 Rule in its entirety, see id. at 25,973, presents an additional issue for which no comments as to substance or merits were considered. The Fourth Circuit Court of Appeals previously held that a regulation contained within the 1987 Rule was invalid and harmed a party that is a plaintiff in the current action. See U.S. Dep't of Labor v. N.C. Growers Ass'n, Inc., 377 F.3d 345, 353 (4th Cir. 2004) ("[W]e hold that the cultivation, growing, and harvesting

of Christmas trees is agriculture as defined in § 203(f), and that the employees of the Growers are thus exempt from the overtime provisions of the FLSA."). The issues arising from this classification were noted in at least one comment to DOL. Comment, Gail Greenman, Mar. 26, 2009 (ETA-2008-0001-1169.1), DOL000314, DOL000316 ("Since 2004, Christmas tree growers who have adopted modern practices in the Fourth Circuit have been considered agriculture for purpose[s] of the FLSA. This has not been the case for Christmas tree growers in the rest of the country. Until the Department implemented its current rules, there was a lack of uniform standards across the country as to the classification of Christmas tree operations."). Because this comment is directed to the merits of the 1987 Rule, the comment would not have been considered. This is another instance in which DOL failed to "examine the relevant data and articulate a satisfactory explanation for its action." See Motor Vehicles Mfrs. Ass'n, 463 U.S. at 43.

By prohibiting consideration and discussion of the substance and merits of the rules subject to the 2009 NPRM, DOL "failed to consider an important aspect of the problem" and failed to "offer a rational connection between the facts found and the choice made." See id. at 43, 52 (internal quotation marks omitted). Although Plaintiffs and Defendant-Intervenors alike might be familiar with the 1987 Rule, Defendant-Intervenors have presented no authority which supports a proposition that temporary rule

reinstatements should be evaluated under a different legal standard than that which is used in assessing the promulgation of all other types of rules.[8]

As a result of the comment restrictions, the undisputed fact that substantive comments were submitted and not considered, and the fact that substantive comments were not submitted as a result of the scope-of-comment limitations contained in the 2009 NPRM, this court finds that the Federal Defendants' formulation of the Substitution Rule was arbitrary and capricious as that term is used in 5 U.S.C. § 706(2)(A). DOL openly failed to consider comments concerning the substance and merits of the suspended rule and the rule which was reinstated. See Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 25,972, 25,973 (May 29, 2009) ("Though all comments have been reviewed, only those comments responding to issues on which [DOL] sought comment were considered in this Final Rule."). Defendant-Intervenors have not presented any authority or argument which adequately explains the Federal Defendants' refusal to consider the substance and merits of the 1987 Rule, nor have they explained why the evaluation of the substance and the merits of the 1987

[8] The argument that reinstatement was necessary to avoid a regulatory vacuum created by the suspension is not persuasive because the suspension was self-imposed by the agency. Notwithstanding the failure to comply with the APA, the suspension process urged by the Federal Defendants, if taken to its extreme, would permit a complete circumvention of the APA and judicial review by the enactment of suspensions and temporary implementations.

Rule and the 2008 Rule were not relevant issues that DOL was required to consider. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." (internal quotation marks omitted)).

For the reasons set forth herein, this court finds that Plaintiffs' Motion for Summary Judgment (Doc. 124) should be granted as to Defendant-Intervenors. In light of this ruling and following careful review, this court declines to impose the measures suggested by Defendant-Intervenors in their Supplemental Memorandum. (See Doc. 138 Ex. 1.)

IV. CONCLUSION

For the reasons set forth herein, **IT IS ORDERED** that Defendant-Intervenors' Motion for leave to File Supplemental Memorandum Regarding Mootness (Doc. 138) is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (Doc. 124) is **DENIED AS MOOT** as to the Federal Defendants. This court retains jurisdiction as to the Federal Defendants pending a final order as to Plaintiffs' claim for attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (Doc. 124) is **GRANTED** as to Defendant-Intervenors and

Defendant-Intervenors' Motions for Partial Summary Judgment (Docs. 131, 132) are **DENIED.**

IT IS FURTHER ORDERED that a **PERMANENT INJUNCTION** is hereby issued, enjoining the implementation of the Substitution Rule (Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 25,972 (May 29, 2009)) and denying recovery by Defendant-Intervenors pursuant to their counterclaims by or under the rules set out in Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 25,972 (May 29, 2009).

IT IS FURTHER ORDERED that Defendant-Intervenors' claims are **DISMISSED WITH PREJUDICE.**

This the 4th day of October 2011.

William L. Osteen, Jr.
United State District Judge