IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

THE MANUFACTURED HOUSING INSTITUTE; and THE TEXAS MANUFACTURED HOUSING ASSOCIATION,	)	
Plaintiffs,	)	Civil Action No.: 23-cv-00174
v.	)	
THE UNITED STATES DEPARTMENT OF ENERGY; and JENNIFER M. GRANHOLM, Secretary of the United States Department of Energy in her official capacity only,	)	
Defendants.	)	

PLAINTIFFS' MOTION TO STAY AGENCY ACTION AND REQUEST FOR EXPEDITED CONSIDERATION AND HEARING

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Plaintiffs challenge the DOE's recently published energy standards for manufactured housing. 87 Fed. Reg. 32,728 (the "Final Rule"). *See* Dkt. No. 1 ("Complaint"). The Final Rule requires all new manufactured homes to comply with those energy standards by May 31, 2023. However, the Final Rule violates both the Administrative Procedures Act (the "APA"), 5 U.S.C. § 551, *et seq.*, and the Final Rule's enabling legislation, the Energy Independence and Security Act of 2007 (the "EISA"), 42 U.S.C. § 17071. Plaintiffs respectfully and timely move this Court, pursuant to 5 U.S.C. § 705, to stay the Final Rule's May 31, 2023 compliance deadline.

INTRODUCTION

The APA authorizes this Court to stay the Final Rule's compliance date pending review. 5 U.S.C. § 705. The standard for a stay under § 705 mirrors that of a preliminary injunction.

Here, Plaintiffs are likely to succeed on the merits of their challenge to the Final Rule. *First*, the EISA requires DOE to perform a cost-effectiveness analysis for its energy standards. However, the Final Rule's cost-effectiveness analysis is woefully incomplete and flawed. *Second*, the Final Rule's one-year compliance deadline is arbitrary and capricious. DOE demands the industry's compliance with its new standards *before* DOE has issued rulemaking related to testing procedures for those standards. *Third*, DOE ignores *its own data*, which demonstrates the Final Rule is not cost-effective for thousands of low-income purchasers of multi-section manufactured homes. *Fourth*, DOE failed to consult adequately with HUD, as also mandated by the EISA.

Plaintiffs' members will suffer irreparable harm if a stay is not granted. Plaintiffs' members face a substantial threat of enforcement which alone constitutes irreparable harm. With regard to the public's interest, the Final Rule threatens to exacerbate the nation's dire affordable housing crisis, forcing low-income families into alternative housing rentals or worse. Based on purchase price increases, it is estimated that the Final Rule could cause between 17,030 and 51,010 fewer

manufactured home sales over the next ten years. For those that can still afford a home, the Final Rule will likely lead to homebuyers suffering a net loss of money. And, significantly, these adverse impacts will be felt disproportionately by minority and low-income purchasers.

FACTUAL BACKGROUND

Pursuant to Fed. R. Civ. P. 10(c), Plaintiffs adopt and incorporate, as if fully set forth herein, the factual allegations stated in the Complaint, Dkt. No. 1, and the Exhibits attached.

Manufactured housing is an indispensable part of America's affordable housing market generally and Texas specifically, where over 20% of the nation's manufactured homes are built. (TMHA November 22, 2021 Comment Letter ("TMHA Comment Letter"), attached as Exhibit 1, at 1). Traditionally, HUD has exclusively created and enforced national building standards for manufactured housing. *See* 24 C.F.R. Part 3280 (the "HUD Code"); (*see also* Expert Report of Mark Ezzo ("Ezzo Report"), attached as Exhibit A to Exhibit 2, at 2–9). An express purpose of HUD's legislative mandate is "to facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans." 42 U.S.C. § 5401(b)(2).

The manufactured housing industry can only help with the nation's housing crisis if its homes remain affordable. Toward that end, the EISA directs that, in promulgating new energy standards, DOE must ensure that the standards are "cost-effective," taking into account the economic impact on "the purchase price of manufactured housing and on total life-cycle construction and operating costs." 42 U.S.C. § 17071(b)(1). That is, energy efficiency standards should result in net savings for customers, not a net loss. Moreover, to leverage HUD's expertise with the industry, the EISA directs DOE to consult with HUD in preparing the standards. *See* 42 U.S.C. § 17071(a)(2)(B) (providing that DOE is obligated to consult with HUD "who may seek further counsel from the Manufactured Housing Consensus Committee").

DOE published the Final Rule on May 31, 2022, which requires that manufactured homes comply with the new energy standards beginning on May 31, 2023. *See* 87 Fed. Reg. at 32,728. The Final Rule provides a rigorous set of energy conservation regulations based on the 2021 version of the International Energy Conservation Code ("IECC"), to be codified in 10 C.F.R. Part 460. However, DOE failed to comply with the EISA's statutory mandates and also acted arbitrarily and capriciously in its rulemaking. As summarized by HUD's Manufactured Housing Consensus Committee ("MHCC"), a federal advisory committee, after its review of the Final Rule:

> 1. The MHCC has reviewed the DOE Final Rule and has determined DOE circumvented the standards development process prescribed in EISA which requires cost justification and consultation with HUD.
>
> 2. DOE provided an energy conservation standard which was based on site-built construction and applied it to a performance-based national code. If adopted as written, the Final Rule would adversely impact [HUD's] entire Manufactured Housing program and cost increases associated with compliance would reduce prospective purchasers (especially minorities and low-income consumers) from durable, safe, high quality and affordable housing.
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> 3. The MHCC previously recommended that DOE include the substantial cost of testing, enforcement, and regulatory compliance in its costing analysis. The Final Rule did not consider these costs.

(Exhibit A to Declaration of F. R. Daily ("Daily Decl."), attached as Exhibit 3). The Final Rule's May 31, 2023 compliance deadline should be stayed pending review of Plaintiffs' challenges.

LEGAL STANDARD

Section 705 of the APA "authorizes reviewing courts to stay agency action pending judicial review." *Affinity Healthcare Servs., Inc. v. Sebelius*, 720 F. Supp. 2d 12, 15 n.4 (D.D.C. 2010).

"The factors governing issuance of a preliminary injunction also govern issuance of a § 705 stay." *Dist. of Columbia v. USDA*, 444 F. Supp. 3d 1, 15 (D.D.C. 2020). Those factors are: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in the plaintiff's favor; and (4) an injunction is

in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). When the United States government is the opposing party, the last two factors are considered together. *See Texas v. United States*, 809 F.3d 134, 187 & n.204 (5th Cir. 2015).

ARGUMENT

I. Plaintiffs' Challenge to the Final Rule is Likely to Succeed on Its Merits

Under the APA, courts hold unlawful and set aside any agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(C)–(D). The APA also directs courts to hold unlawful and set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). Agency action is arbitrary and capricious when the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] 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 of the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

A. DOE Failed to Consider Important Aspects of the Problem

In the Final Rule, DOE purported to perform a cost-effectiveness analysis as required by the EISA, 42 U.S.C. § 17071(b)(1), but DOE's analysis willfully ignores substantial costs that its standards will impose if allowed to go into effect. In so doing, DOE violated the EISA's legislative mandate, and DOE also acted arbitrarily and capriciously. *See State Farm*, 463 U.S. at 43.

i. DOE failed to consider the costs associated with testing, compliance and enforcement.

DOE has admittedly taken no steps to determine the procedures for testing a home's compliance with the Final Rule nor did DOE consider the costs related to any such forthcoming

procedures. *See, e.g.*, 87 Fed. Reg. at 32,758 ("DOE has also not included any potential associated costs of testing, compliance or enforcement at this time."); *id.* at 32,743. For this reason alone, the Final Rule's cost-effectiveness analysis is fatally flawed. *See Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) ("There can be no 'hard look' at costs and benefits unless all costs are disclosed."). In *Gas Appliance Mfrs. Ass'n, Inc. v. Dep't of Energy*, 998 F.2d 1041, 1047 (D.C. Cir. 1993), the court held that DOE's rulemaking was unlawful because it failed to consider the "cost of testing."[1] Plaintiffs are likely to succeed on this challenge to the Final Rule.

In 2016, DOE published proposed energy standards for manufactured housing based on the 2015 version of the IECC. Those 2016 proposed standards were ultimately withdrawn. *See* 83 Fed. Reg. at 38,074. However, in conjunction with its 2016 proposed standard, DOE published companion rulemaking related to testing procedures. As stated by DOE in that rulemaking:

> Test procedures **are necessary** to provide for accurate, comprehensive information about energy characteristics of manufactured homes and provide for the subsequent enforcement of the standards. . . . The proposed test procedures are used as the basis for manufacturers to show compliance with the energy conservation standards, once finalized and compliance is required.

81 Fed. Reg. at 78,734–35 (emphasis added). Yet in preparing the Final Rule at issue here, DOE inexplicably chose to leave testing and enforcement costs out of the equation altogether.[2]

DOE's failure in this regard is material. Duct-leakage testing illustrates the problem. The Final Rule provides a duct-leakage standard for all manufactured homes without any attendant

[1] In various other contexts as well, courts have found agency action arbitrary and capricious when the agency failed to consider important costs. *See, e.g.*, *Sec. Indus. & Fin. Mkts. Assoc. v. CFTC*, 67 F. Supp. 3d 373, 430–33 (D.D.C. 2014); *Business Roundtable v. SEC*, 647 F.3d 1144, 1148–52 (D.C. Cir. 2011); *Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133, 143–44 (D.C. Cir. 2005); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1222–23 (5th Cir. 1991) (EPA acted unlawfully where, "in its zeal to ban any and all asbestos products," it "basically ignored the cost side of the . . . equation").

[2] DOE regularly prepares testing procedures in the context of its energy standards for consumer products such as refrigerators, washers, and dryers. *See* 10 C.F.R. § 430.21 *et seq.* (prescribing separate "Uniform Test Method[s]" for over 20 different types of products).

testing procedures. 81 Fed. Reg. at 78,779 ("DOE received multiple comments regarding duct leakage testing. . . . [DOE] is not addressing a test procedure at this time."). There are multiple types of duct leakage tests—"in-plant" tests can be conducted at the manufacturing plant before the home is installed at the homebuyer's site; "on-site" tests require that the home be fully installed before conducting the test. (Expert Report of Francis Conlin ("Conlin Report"), attached as Exhibit A to Exhibit 4, at 2). "On-site" testing is utilized for IECC inspections of site-built homes, but "on-site" duct leakage test would likely cost $1,500 *per manufactured home*. (*Id.*).[3]

Adding $1,500 to the purchase price of each manufactured home overwhelms the DOE's estimated energy savings for both Tier 1 and Tier 2 homes over a ten-year period.[4] (Expert Report of Pavel Darling ("Darling Report"), attached as Exhibit A to Exhibit 5, ¶ 60). Without accounting for duct-leakage testing, DOE cannot reasonably conclude that the Final Rule is cost effective.

As another example, in DOE's proposed testing procedures related to the 2016 proposed rule, DOE expressly allowed manufacturers to "to rely on [energy efficiency] values currently being determined by component manufacturers [in their] . . . specification sheets." 81 Fed. Reg. at 78,737. There is no similar allowance in the Final Rule, meaning that manufacturers may have to conduct their own tests to ensure all component parts comply with the Final Rule. (Ezzo Report at 13). Such materials testing is unprecedented in the industry. (*Id.*).[5]

Compliance programs also add costs to the equation. If DOE ultimately adopts a

[3] Further compounding the problem, Building Performance Institute, the premier training provider for performing IECC-compliant duct-leakage tests for site-built homes, does not currently provide any training for duct-leakage tests in manufactured homes. (Conlin Report at 8).

[4] While many of the Final Rule's standards apply to all manufactured homes, the Final Rule establishes different thermal envelope requirements for single-section manufactured homes (Tier 1 homes) and multi-section manufactured homes (Tier 2 homes). 87 Fed. Reg. at 32,741. The Final Rule applies these two "tiers" to each of three "climate zones" for manufactured housing—thereby resulting in thermal envelope standards for each climate zone by each tier.

[5] These are only a few examples related to the many standards in the Final Rule—all of which lack any accompanying test procedures. *See* 87 Fed. Reg. at 32,758–83.

compliance program similar to that of HUD, (*see* Ezzo Report at 2–3), it could cost manufacturers an additional $180 to $360 per home to pay for such inspection services. (*Id.* at 12–13). Therefore, it is without question that DOE omitted key costs in the Final Rule related to test procedures, compliance and enforcement. DOE arbitrarily concluded that its standards are cost effective because DOE failed to take a "hard look" at "all costs." *Sigler*, 695 F.2d at 979.

ii. DOE failed to consider actual economic facts which undermine the Final Rule's assumptions and conclusions.

To perform its cost-effectiveness analysis, DOE attempted to calculate the life-cycle costs ("LCC") that will result from its new energy standards. *See* 87 Fed. Reg. at 32,742. The LCC model calculates energy savings a consumer will receive (*i.e.*, lower energy bill) over a given period of time and subtracts the increased purchase costs arising from those standards (*i.e.*, increased price of home to consumer). If the resulting number is positive, then the energy standards are deemed to be cost effective. If negative, then the energy standards are not cost effective.

Despite promulgating the Final Rule in May 2022, DOE's LCC analysis failed to consider substantial economic events that existed as of that date such as the COVID-19 pandemic, historic inflation levels, and interest rate hikes to combat inflation. DOE's economic assumptions in the Final Rule are therefore contrary to economic realities and cannot survive APA scrutiny.

a. Inflation and Construction Costs

Mandating additional energy efficiency measures (such as thicker insulation) increases the materials cost of a home and the resulting purchase price. To calculate this increased purchase price, DOE arbitrarily relied upon ***2014*** cost estimates and then assumed an annual inflationary increase of *2.3%* to arrive at 2023 dollars. (Darling Report ¶ 47). However, as was well-known at the time DOE published the Final Rule, the cost of construction materials has actually increased by *6.5% annually* between 2014 and 2021—driven by materials cost increases of 35.1% from 2020

to 2021. (*Id.* ¶ 48). DOE's LCC analysis therefore grossly understated the costs.

Had DOE actually considered the economic realities in which it conducted its rulemaking, the Final Rule's LCC analysis would have looked substantially different. Adjusting only for the *actual* cost of materials, the estimated purchase price increase for Tier 2 homes would be $5,700 for Climate Zone 3 and $6,200 for Climate Zone 2. (*Id.* ¶ 49). This update alone turns the LCC estimate *negative* for Tier 2 homes over a 10-year period.[6] (*Id.*). Thus, the majority of Tier 2 homebuyers will *lose* money over a 10-year time period, meaning the Final Rule fails to meet its cost-effectiveness statutory mandate. *See* 42 U.S.C. § 17071(b)(1); *see also Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) ("[A] serious flaw undermining [a] [cost-benefit] analysis can render the rule unreasonable.").

The Final Rule's standards likely will create new supply chain bottlenecks, exacerbate existing material shortages, and thereby produce even more costs that DOE failed to consider. Manufacturers have predominately used R-11 insulation, but the Final Rule requires manufacturers to use R-13 and R-20 insulation—materials that are not currently used in large quantities by the industry. (*See* MHI Nov. 23, 2021 Comment Letter ("MHI Comment Letter"), attached as Exhibit 6, at 6); (Ezzo Report at 14–15). Thus, the Final Rule threatens to drive up materials costs above their already elevated levels. (Darling Report ¶¶ 62–64). Industry analysts expect construction and materials costs to remain elevated at this new baseline. (*Id.* ¶ 62).[7]

[6] While DOE also conducted a 30-year LCC analysis, the 10-year analysis is more reliable and more accurately reflects the impacts on initial homebuyers. (Darling Report ¶ 27–29). Moreover, the EISA requires DOE to compare life-cycle costs with the increase in the purchase price of the home. *See* 42 U.S.C. 17071(b)(1). As such, the more relevant life-cycle cost is the amount of energy savings that the initial homeowner will receive. *See* 87 Fed. Reg. at 32,784.

[7] DOE's sole response to these forecasted supply chain disruptions is that manufacturers "do not need to meet both the prescriptive and the performance method; rather they have the option to only meet one." 87 Fed. Reg. at 32,774. This response is wholly inadequate to address the legitimate concerns raised by various commentators. *See Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021) (agency cannot "rel[y] upon a threadbare explanation" that "falls well short of what is needed to demonstrate the agency grappled with an important aspect of the problem before it"); *AARP v. EEOC*, 267 F. Supp. 3d 14, 33 (D.D.C. 2017) (agency must "respond in a reasoned

The Final Rule also fails to account for how the new standards will increase the amount of lumber in homes, raising transportation costs. To fit the additional insulation required for Tier 2 homes, manufacturers will likely have to switch to building 2x6 inch exterior walls from the previously typical 2x4 walls. (Ezzo Report at 16–17). This additional lumber will likely require manufacturers to add axles to each home's transportation frame, and each additional axle costs approximately $400 per section. (*Id.* at 17).[8]

Agency action has been held unlawful where, as here, the agency failed to take into account important economic realities. *See Gas Appliance Mfrs. Ass'n*, 998 F.2d at 1047–48 (DOE used an "arbitrary multiplier" for the cost of adding insulation derived from the residential water heater market while failing to consider the residential market's exponentially larger size); *La. State v. Dep't of Com.*, 559 F. Supp. 3d 543, 547–48 (E.D. La. 2021) (agency "failed to consider the difficulty . . . complying with the Final Rule in light of the COVID-19 pandemic").

b. Interest Rates

In assessing financing for manufactured homes—which is one component of DOE's LCC analysis—DOE assumed that real estate loans would have a 5% interest rate and personal property, or chattel, loans would have a 9% interest rate. *See* 87 Fed. Reg. at 32,785. DOE's interest-rate assumptions failed to account for the well-known federal interest rate hikes that began before DOE published the Final Rule. (Darling Report ¶ 50–52).[9]

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manner to those [comments] that raise significant problems" (quotation omitted)).

Performance standards are not magic. Meeting them still requires purchasing additional materials, like insulation, even if a different type and quantity is used. (Ezzo Report at 15). For example, DOE's flippant suggestion that manufacturers can use other forms of insulation besides fiberglass, such as spray foam or foam boards, overlooks the substantial cost and burdens associated with using such alternatives. Spray foam is more expensive, substantially reduces a plant's production rate, necessitates changes to the factory design, and requires additional specialized labor—all of which would add to the cost of the home. (*Id.*).

[8] This increase is in addition to the costs associated with the Final Rule's effect on the height of homes. (*See* Ezzo Report at 17).

[9] For example, beginning in March 2022, the Federal Reserve raised interest rates and signaled that more rate hikes

As anticipated, the Federal Reserve continued raising interest rates throughout 2022, with predictable effects on the home lending market. (*Id.* ¶ 51–52). As of January 2023 the current average rate is 6.3%. (*Id.* ¶ 52). DOE's assumed real estate loan interest rate of 5% therefore failed to account for the economic trends apparent at the time of the Final Rule's publication. (*Id.*). For many manufactured home borrowers, the impact will be even more pronounced. DOE recognized that chattel lending is the predominate method of financing manufactured home purchases. *See* May 2022 DOE Technical Support Document ("TSD"), attached as Exhibit 7, § 8.2.2.1 ("78 percent of manufactured homes are purchased with financing use a personal property loan."). DOE estimated that chattel lending rates typically exceed real property mortgage rates by 0.5 to 5%. *Id.* Thus, the chattel lending rate, based on the actual real estate mortgage rate, could exceed 11%. (*See* Darling Report ¶ 53).

When correcting only (1) the real estate loan interest rate to 6.3% and (2) the actual cost of materials, *see supra* at 7–9, but also accounting for increased energy savings as a result of inflation, the overall effect to the DOE's LCC analysis is that Tier 2 homebuyers will, on average, *lose* money over a 10 year period because of the Final Rule. (Darling Report ¶ 56). As a function of shipments, 60% of all Tier 2 homebuyers will lose money over a 10 year period because of the Final Rule. (*Id.* ¶ 59). This 60% includes all homebuyers in both the Houston and El Paso markets—the only two Texas markets analyzed by DOE. (*Id.*).

In sum, when DOE's "central assumptions" in its LCC model are corrected to reflect the actual economic environment existing as of May 2022, the Final Rule's standards are demonstrably *not* cost effective, especially for Tier 2 homebuyers. *Cf. Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1391 (D.C. Cir. 1985). Plaintiffs are likely to succeed in establishing

would be necessary to address historic inflation trends. (Darling Report ¶ 50–51).

that DOE's cost-effectiveness analysis failed its statutory mandate and was arbitrary.

B. The Final Rule's One-Year Compliance Period Is Unreasonable

In the Final Rule, DOE mandated that manufacturers begin complying with its new energy standards by May 31, 2023, only one year after the rule was published. *See* 87 Fed. Reg. at 32,728. A "discernible path to compliance" is a necessity for reasoned rulemaking. *Gas Appliance Mfrs. Ass'n*, 998 F.2d at 1045. Courts have previously set aside overly brief time periods for complying with agency rulemaking that did not provide for a realistic path to compliance. *See, e.g.*, *La. State*, 559 F. Supp. 3d at 547–50; *AFL-CIO v. Chao*, 298 F. Supp. 2d 104, 126–28 (D.D.C. 2004), *rev'd on other grounds*, 409 F.3d 377 (D.C. Cir. 2005). DOE's decision to impose a one-year compliance period fails to provide manufacturers a realistic path to compliance.[10]

First, it is unreasonable for DOE to demand compliance with the Final Rule *before* DOE promulgates any rulemaking related to testing procedures, compliance or enforcement. As conceded previously by DOE, testing procedures are "necessary." *See supra* at 5. Before rulemaking related to this "necessary" component of the Final Rule, DOE cannot reasonably demand compliance with the Final Rule. For energy standards in other industries, DOE has refused to mandate compliance unless and until test-procedure rulemaking has been finalized.[11] It is arbitrary and capricious for DOE to act differently here.

Second, the Final Rule's solar heat gain coefficient ("SHGC") requirements for windows

[10] Moreover, in past rulemaking regarding consumer products, **DOE typically allows for 3–5 year periods** for manufacturers to come into compliance with new energy standards. For example, when DOE promulgated new energy conservation standards for air conditioners and heat pumps, DOE set a compliance deadline for January 1, 2023, almost six years after the rule was published on January 6, 2017. *See* 82 Fed. Reg. 24,211.

[11] With regard to "Off Mode Standards for Central Air Conditioners and Central Air Conditioning Heat Pumps," DOE issued a policy statement that: "In light of the lack of a final test method for measuring off mode electrical power consumption for CAC/HP, DOE will not assert civil penalty authority for violation of the off mode standard for CAC/HP specified at 10 C.F.R. § 430.32(c)(6) until 180 days following publication of a final rule establishing a test method for measuring off mode electrical power consumption for CAC/HP."
https://www.energy.gov/sites/prod/files/2014/07/f17/Enforcement%20Policy%20Statement%20-%20cac%20off%20mode.pdf (last accessed Feb. 8, 2023).

and doors will require manufacturers to purchase windows and doors that, at best, are severely supply constrained and, at worst, do not exist. (Ezzo Report at 15).

Third, the transition from R-11 insulation to R-13 and R-20 insulation requires manufacturers to source materials they have not used before without supporting evidence or rationale for this new mandate. (MHI Comment Letter at 6); (Ezzo Report at 14–15). Government incentives for the use of higher R-value insulation has caused demand to skyrocket, meaning there likely will not be enough insulation for manufacturers to comply with the Final Rule under the current deadline. (Ezzo Report at 15).

Fourth, the Final Rule's standards for roof trusses mandate a minimum vertical height dimension of at least 5.5 inches. For manufacturers using trusses with a shallower dimension, new truss designs will need to be developed. (Ezzo Report at 14). It is common for a single plant to have upwards of 75 or more different home designs. (*Id.*). Each redesign requires the truss supplier to test at least three samples under HUD's structural standards. (*Id.*). Meeting the Final Rule's compliance deadline may be impossible for many manufacturers as they redesign roof trusses.

Fifth, the Final Rule will require virtually every home model to be redesigned to, for example, accommodate additional insulation. Each redesign must be approved by the manufacturer's DAPIA to ensure compliance with the HUD Code. (*Id.* at 16–17). DAPIAs are unlikely to be able to handle the volume of approval requests in the short compliance period.

DOE dismissed these concerns raised by MHI and others without adequate explanation. (*See, e.g.*, MHI Comment Letter at 24). DOE stated that the "industry has experience with the means to comply with performance standards" and that "section 413 requires DOE to update the manufactured home standards within one year following an update to the IECC." 87 Fed. Reg. at 32759. Neither of these responses actually addresses the time constraints imposed on

manufacturers, and DOE therefore failed to meaningfully respond to manufacturers' substantial concerns about the compliance window. *See Spirit Airlines*, 997 F.3d at 1255.[12]

C. DOE Ignored Affordability Concerns for Low-Income Families Purchasing Tier 2 Homes

One of DOE's stated goals in promulgating the Final Rule is to ensure that manufactured housing remains affordable for low-income purchasers. *See* 87 Fed. Reg. at 32,746. DOE found that such affordability considerations "interrelate" with DOE's cost-effectiveness analysis. *See* TSD § 9.3; 87 Fed. Reg. at 32,745, 32,749. Thus, DOE acknowledges, as it must, that its new standards should certainly be cost-effective for low-income purchasers for whom affordability is of paramount importance. Yet, DOE flatly ignored *its own data*, which shows that the energy standards are not cost-effective for low-income families purchasing a multi-section (Tier 2) home.

In the Final Rule's TSD, DOE found (1) that 78% of all manufactured home purchases are financed with a *chattel* loan and (2) that low-income families typically use chattel loans to finance their purchase. TSD §§ 6, 8.2.2.1. DOE separately analyzed the Final Rule's cost effectiveness for chattel loan purchases. *See id.* at § 9. Significantly, DOE's own cost-effectiveness model found that if a multi-section home is financed with a chattel loan, then the energy standards are not cost-effective—that is, using the national average, such purchasers will *lose* money over a 10-year period as a result of the Final Rule. *See id.* at § 9.3. When the actual cost increases associated with the Final Rule are considered, *see supra* at 7–10, 98% of borrowers using a chattel loan to finance a multi-section home have a negative 10-year LCC, with an average 10-year LCC of negative $892. (Darling Report ¶ 68).

[12] In Texas, homebuilders have experienced firsthand the consequences of hastily implemented energy standards. After the Texas Department of Licensing and Regulation adopted the 2015 IECC, sales of modular homes decreased by 35% due manufacturers' inability to source necessary materials. (TMHA Comment Letter at 3).

To avoid the devastating impact of this data, DOE self-servingly fabricated the conclusion that low-income consumers do not "purchase multi-section homes because multi-section homes are generally more expensive." TSD § 9.3. However, economic studies—cited in the Final Rule—demonstrate that thousands of low-income families *do* purchase multi-section homes. These low-income families will suffer a net *loss* of money as a result of the Final Rule if they purchase their multi-section home with a chattel loan (assuming they can still afford to buy the home at all).

In the Final Rule, DOE referenced the 2019 American Housing Survey, which concluded that 17% of multi-section occupants fall below the Federal Poverty Level. 87 Fed. Reg. at 32,750. For a family of four, the 2022 Federal Poverty Level is $27,750 in annual income.[13] That same study revealed that 45% of multi-section occupants fall below 200 percent of the Federal Poverty Level—or $55,500 in annual income using a family of four. *See id.* HUD defines "low income" families as those with 80% or less than the median income for a given region.[14] Nationally, the median family income for the United States was approximately $90,000 in 2022—80% of which is $72,000.[15] Given this data, it was unreasonable for DOE to conclude that low-income families do not purchase multi-section homes. *State Farm*, 463 U.S. at 43 (agency conclusions cannot "run[] counter to the evidence before the agency"). DOE's own data shows that tens of thousands of multi-section purchasers are low income.[16]

Courts routinely set aside agency actions where the data before the agency undermines its

[13] https://www.healthcare.gov/glossary/federal-poverty-level-fpl/ (last accessed February 6, 2023)

[14]https://www.hud.gov/topics/rental_assistance/phprog#:~:text=HUD%20sets%20the%20lower%20income,HA%20but%20not%20at%20another (last accessed February 6, 2023).

[15] https://www.huduser.gov/portal/datasets/il/il22/Medians-Methodology-FY22.pdf (last accessed February 6, 2023).

[16] As an estimate, the industry shipped 105,000 homes in 2021, and DOE found 55% of shipments are multi-section homes (82,500 multi-section homes). *See* TSD § 10.2.2. Forty-five % of those 82,500 multi-section homes—representing the number of low-income, multi-section purchasers according DOE's own data—is approximately 37,000 low-income, multi-section purchasers annually.

conclusions and explanations. *See, e.g.*, *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1024–26 (9th Cir. 2011) (agency's conclusion that 25% whitebark pine declines were "not a threat" to the grizzly population was arbitrary and capricious).[17] This is especially true where the agency "ignores contradictory relevant evidence regarding a critical factor in its decision." *New Life Evangelistic Ctr., Inc. v. Sebelius*, 672 F. Supp. 2d 61, 74 (D.D.C. 2009). DOE's willful disregard of its own cost-effectiveness data for multi-section, low-income homebuyers violated the EISA and was arbitrary and capricious.

D. DOE Failed to Consult with HUD

The EISA mandates that DOE promulgate its energy standards for manufactured housing in "consultation with the Secretary of [HUD], who may seek further counsel from the [MHCC]." 42 U.S.C. § 17071(a)(2)(B). DOE neglected this statutory requirement as well.

The HUD consultation requirement serves a clear purpose: to ensure that DOE—a newcomer to the regulation of manufactured housing—benefits from the expertise of HUD. (*See* Ezzo Report at 2–9). Yet, the administrative record is devoid of any evidence that DOE consulted with HUD about the Final Rule. DOE's conclusory comment in the Final Rule that it satisfied this obligation should be rejected. *See* 87 Fed. Reg. at 32,756. "When a statute specifically requires an agency to consult with an outside entity during the course of a rulemaking, the administrative record should contain *some evidence* that such a consultation took place." *FBME Bank Ltd v. Lew*, 209 F. Supp. 3d 299, 323 (D.D.C. 2016) (emphasis added).[18]

The only specific reference to consultation with HUD in the Final Rule relates to DOE's

[17] *See also Texas v. Biden*, 589 F. Supp. 3d 595, 619 (N.D. Tex. 2022); *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) (vacated as moot following agency's withdrawal of offending requirement).

[18] *See also City of Phoenix v. Huerta*, 869 F.3d 963, 973–74 (D.C. Cir. 2017) (FAA order was unlawful where "the FAA violated its duty to consult with the City"); *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 117–21 (1st Cir. 2002) (reversing judgment in agency's favor where there was "insufficient evidence in the record to show that the Secretary . . . complied with Congress' explicit procedural requirement to consult with the appropriate councils").

2016 proposed rule, which was based on the *2015* IECC, not the *2021* IECC. *See, e.g.*, 87 Fed. Reg. at 32,737–38. The 2016 proposed rule was developed in conjunction with a manufactured housing working group of interested stakeholders. (Ezzo Report at 11). DOE did not reconvene this working group for developing the Final Rule, despite the fact that the 2015 IECC differs materially from the 2021 IECC. (*Id.* at 11, 14). Moreover, the 2021 IECC has not received universal acceptance even with *site-built* homes. Only four states have adopted the 2021 IECC's standards for the construction of site-built homes. (Ezzo Decl. 10).

When Congress mandates consultation, the consultation must actually address the specific rulemaking at issue, not some other proposed rulemaking regarding a different set of standards. *See Nat'l Constructors Assoc. v. Marshal*, 581 F.2d 960, 971 (D.C. Cir. 1978) ("[A]dvisory committee consultation should, but in this case did not, consist of something more than a single and brief rest stop on the route between a tentative proposal of one construction health and safety standard, and the final promulgation of another, superficially related, but substantively quite different, standard."); *cf. FBME Bank*, 209 F. Supp. 3d at 323.

DOE's decision to "go-at-it alone" for the Final Rule led to fundamental misunderstandings of the manufactured housing industry. For example:

- The Final Rule requires heating equipment to be sized according to "Manual S," a standard developed for site-built housing. *See* 87 Fed. Reg. at 32,824; (Ezzo Report at 17). The HUD Code requires furnaces listed for manufactured housing. *See* 24 C.F.R. § 3280.707. Complying with the Final Rule could require installing unlisted furnaces, meaning the manufacturer would violate the HUD Code. (Ezzo Report at 17).

- Even within the *same* climate zone, Manual S requires different furnace sizes based on the precise installation location of the home. For example, all of California lies within Climate Zone 2, but the state has significant variations in regional climate, such as between Lake Tahoe and the Mojave Desert. (Ezzo Report at 18). Because a manufacturer will not know where a home sold to a California retailer will ultimately end up, a high risk of non-compliance exists. To avoid this risk, manufacturers may only be able

to sell homes via special order, thereby threatening the industry's longstanding retailer / inventory model. (*Id.*).

- Manual S analysis requires knowledge about the home's orientation with respect to the sun to determine equipment sizing. (*Id.*). As HUD's own MHCC pointed out, (*see* MHCC November 23, 2021 Comment Letter, attached as Exhibit 8, at 5), when building a home in a factory, the manufacturer has no idea how the customer will ultimately orient the home and thus has no way to perform the requisite analysis.

- HUD designed its climate zone regulations such that a home built for a higher climate zone can be sold in a lower, less restrictive zone. For example, a home built to Climate Zone 2 specifications can be sold in the less restrictive Zone 1. The Final Rule threatens to end this practice. (Ezzo Report at 18).

DOE waved away these concerns, stating "DOE expects that manufacturers already conduct system sizing calculations using best practices based on the load calculation and system sizing methodology specified in the HUD code." 87 Fed. Reg. at 32,782. But the relevant provisions of the HUD Code apply only to cooling systems that are "site-installed," when the orientation of the home is known. 24 C.F.R. § 3285.503(a). It does not apply to systems "provided and installed by the home manufacturer." *Id.* If DOE had sought HUD's guidance, the Final Rule could have incorporated a similar distinction. Instead, DOE eschewed HUD's insight.

In September 2022, HUD noticed two meetings of the MHCC because the Final Rule does "not fully align" with the HUD Code. 87 Fed. Reg. 57,771. Based on the substantial deficiencies in the Final Rule, the MHCC squarely rejected the Final Rule and recommended HUD incorporate a different set of energy standards into the HUD Code. *See supra* at 3. Thus, the current conflict between the agencies' regulations will persist. DOE could have avoided this outcome had it properly consulted with HUD.[19]

[19] The consultation requirement could possibly be met with joint rulemaking. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1167 (2012) ("Agencies appear to use joint rulemaking on an ad hoc basis to promote uniformity primarily where they perform closely related regulatory missions and where Congress has allocated each of them a role implementing one or a set of related statutes.").

II. Plaintiffs Will Suffer Irreparable Harm Absent a Stay

To satisfy this element, "[t]he plaintiff need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986).

A. Manufacturers face a threat of enforcement.

Plaintiffs' members may not be able to comply with the Final Rule by its May 31, 2023 compliance deadline, if complete compliance is even feasible. *See supra* at 11–12, 16–17. For noncompliance, DOE can impose a penalty of "1[%] of the manufacturer's retail list price," a phrase with no established meaning in the manufactured housing industry. 42 U.S.C. § 17071(c); (*see* MHI Comment Letter at 17); *see also VanDerStok v. Garland*, 2022 WL 4809376, at *4–6 (N.D. Tex. Oct. 1, 2022) ("legitimate fear of impending prosecution" constitutes irreparable harm).

Moreover, the lack of testing procedures creates a compliance blindside. Manufacturers will be forced to make their best guess about the appropriate testing protocol to follow. *See supra* at 4–7 & Complaint, Dkt. No. 1. If that protocol proves inadequate for any one facet of the Final Rule's entire regulatory scheme, manufacturers face enforcement by DOE.

B. The extraordinary costs imposed by the invalid Final Rule cannot be recovered.

DOE estimates that manufacturers will have to absorb over $29 million in conversion costs to bring their home designs into compliance with the Final Rule. *See* 87 Fed. Reg. at 32,795; TSD § 12.2.2. If Plaintiffs prevail in challenging the Final Rule, the substantial costs manufacturers will have incurred in attempting to comply with the Final Rule's standards will have been wasted and unrecoverable. "[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (emphasis in original) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21

(1994) (Scalia, J., concurring in part and in the judgment)). After all, "federal agencies generally enjoy sovereign immunity for any monetary damages." *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021). Every cent manufacturers spend to redesign their homes and refit their operations to comply with the Final Rule will be permanently wasted if the Final Rule is later set aside. *See Texas*, 829 F.3d at 434 ("Financial losses [are] irreparable injury where no adequate compensatory or other corrective relief will be available at a later date.") (cleaned up).

Due to both the certainty of substantial, unrecoverable compliance costs and the legitimate threat of future enforcement actions, Plaintiffs' members will suffer irreparable harm absent a stay.

III. The Equities and the Public Interest Favor a Stay

A stay of the Final Rule pending this Court's review is equitable and in the public interest. "[T]he maintenance of the *status quo* is an important consideration in granting a stay." *Wages*, 16 F.4th at 1143. "[T]here is generally no public interest in the perpetuation of unlawful agency action." *Id.* (quotation omitted). If a stay is not granted, the public interest will be harmed through the adverse effects on consumers that will result from a loss of affordable housing. Maintaining the affordability of this sector is crucial to addressing the housing crisis sweeping the nation.[20] Yet the Final Rules threatens to do just the opposite. (*See* Darling Report ¶ 72–79).

Based on purchase price increases, the Final Rule could cause between 1,703 and 5,101 fewer manufactured home sales each year over the next ten years. (*Id.* ¶ 77–78). This is especially problematic in the current economic environment because many homebuyers have already been priced out of homeownership and thus are forced to look at alternative rental housing options or worse. (*Id.* ¶ 79). This estimated decrease in home sales is likely too conservative because it does

[20] This public interest is especially important in Texas and other places where its residents have struggled immensely with homelessness and inadequate or unaffordable housing. *See* https://www.texastribune.org/series/texas-homeless-austin-greg-abbott-dallas-houston/ (last accessed Feb. 9, 2023).

not reflect the realities of manufactured home financing. Even seemingly minor increases in the purchase price of a home will lead to an increased likelihood of loan denials. (*See id.* ¶ 74–75). Denying access to affordable housing clearly harms the public interest. *See, e.g.*, *Allied Home Mortg. Corp. v. Donovan*, 830 F. Supp. 2d 223, 234 (S.D. Tex. 2011).

The brunt of the harm will be felt disproportionately by minority purchasers. Minority buyers are more likely to rely on higher-cost personal property loans to finance purchases. (Darling Report ¶ 67). Moreover, residents of majority-minority communities tend to have lower credit scores compared with the national average and tend to face higher interest rates. (*Id.* ¶ 70). This disproportionate effect is a separate and additional harm to the public interest. *Cf. Nat'l Cmty. Reinvestment Coalition v. CFPB*, 2022 WL 4447293, at *29–31 (D.D.C. Sept. 23, 2022); *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 934 F.3d 649, 656–57, 668–71 (D.C. Cir. 2019).

On the other hand, no significant harm will result if the Final Rule is stayed. Manufactured homes are already produced in highly efficient factories. (Ezzo Report at 10). And more than 30% of new manufactured homes already meet or exceed Energy Star standards. (MHI Comment Letter at 1). Given the existing efficiency benefits of owning a manufactured home, the Final Rule may—counterproductive to its mandate—decrease the affordability of these homes and drive their prospective owners toward renting or purchasing less efficient forms of housing.

REQUEST FOR RELIEF

For these reasons and those stated in the Complaint, Plaintiffs respectfully request that the Court stay the Final Rule's compliance date of May 31, 2023 pending final review of Plaintiffs' challenges to the Final Rule or further orders from this Court in accordance with 5 U.S.C. § 705, and for all other just relief.

Respectfully submitted, this 14th day of February, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was sent to the below recipients, via certified mail on February 14, 2023, in accordance with the Federal Rules of Civil Procedure.

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