**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

THE MANUFACTURED HOUSING INSTITUTE; and THE TEXAS MANUFACTURED HOUSING ASSOCIATION,

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF ENERGY; and JENNIFER M. GRANHOLM,

Defendants.

No. 1:23-CV-00174-LY

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR EXPEDITED EVIDENTIARY HEARING ON THEIR MOTION TO STAY AGENCY ACTION

Defendants, the United States Department of Energy and Jennifer M. Granholm, in her official capacity as Secretary of Energy (collectively, "Agency" or "DOE"), respectfully submit this response to Plaintiffs' Motion for Expedited Evidentiary Hearing on their Motion to Stay Agency Action ("Motion" or "Pls.' Mot."), ECF No. 16. Plaintiffs' Motion should be denied because judicial review of agency action in Administrative Procedure Act ("APA") cases is limited to the record compiled by the agency, and Plaintiffs have failed to make the requisite showing to justify departure from that presumption.[1]

In support of their opposition to Plaintiffs' Motion, Defendants state the following:

[1] Defendants do not oppose scheduling oral argument (as opposed to an evidentiary hearing) for the first date the Court and the parties are available if the Court concludes argument would aid its consideration of the Motion.

1. Plaintiffs initiated this lawsuit on February 14, 2023, seeking a declaration under the APA that the DOE rule establishing energy conservation standards for manufactured housing, Energy Conservation Program: Energy Conservation Standards for Manufactured Housing ("Final Rule"), 87 Fed. Reg. 32,728 (May 31, 2022), is contrary to the rule's enabling legislation and is arbitrary and capricious. *See* Compl., ECF No. 1, ¶¶ 113-119 (citing 5 U.S.C. §§ 706(2)(C), (2)(D); 42 U.S.C. § 17071); 121-130 (citing 5 U.S.C. § 706(2)(A)).

2. That same day, Plaintiffs filed a Motion to Stay Agency Action and Request for Expedited Consideration and Hearing pursuant to 5 U.S.C. § 705, ECF No. 5. In support of their motion, Plaintiffs attached, among other documents, three expert reports and a declaration from a member of the Manufactured Housing Consensus Committee ("MHCC") summarizing the MHCC's criticism of the Final Rule. *See* ECF No. 5, Exhibits 2-5. The expert reports and declaration opine on the Agency's conclusions contained in the Final Rule, including, for example, the Final Rule's requirement for the sizing of heating and air conditioning equipment. *See, e.g.*, ECF No. 5-2 at 17. The expert reports and declaration also opine on the Final Rule's cost analysis. *See, e.g.*, ECF No. 5-3 at 9, 38-71, ECF No. 5-4 at 5-13; ECF No. 5-5 at 19-61.

3. "When a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal" for the purpose of "determine[ing] whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Delta Talen, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020) (J. Yeakel) (citations omitted). As such, "'review [of an agency action] is . . . based on the full administrative record that was before the [agency] at the time [of] decision.'" *Ctr. for Biological Diversity v. Texas Dep't of Transportation*, No. 1:16-cv-876-LY, 2019 WL 12313647, at *26 (W.D. Tex. Sept. 30, 2019) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)); *see also Luminant*

Gen. Co. v. U.S. Envt'l Prot. Agency, 714 F.3d 841, 850 (5th Cir. 2013) ("The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.") (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)) (internal alterations omitted); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001) ("Review is generally limited to the record in existence at the time the agency made its decision.").

4. "Supplementation of the administrative record" with materials that were not before the agency at the time of its decision "is not allowed unless the moving party demonstrates unusual circumstances justifying a departure from the general presumption that review of the whole record under the APA is limited to the record compiled by the agency." *Ctr. for Biological Diversity*, 2019 WL 12313647, at *26 (quoting *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010)). The Fifth Circuit has identified only three such unusual circumstances: "(1) the agency "deliberately or negligently excluded documents that may have been adverse to its decision;" (2) the district court needs to "supplement the record with 'background information' in order to determine whether the agency considered all of the relevant factors;" or (3) the agency "failed to explain administrative action so as to frustrate judicial review."[2] *Ctr. for Biological Diversity*, 2019 WL 12313647, at *26 (quoting *Medina Cty. Evntl. Action Ass'n*, 602 F.3d at 706). Plaintiffs, as the parties seeking an expedited hearing on extra-record materials, must demonstrate that a departure from the general presumption that judicial

[2] Plaintiffs contend that district courts in the Fifth Circuit routinely consider eight factors when evaluating a request to supplement the administrative record, including the nature of the relief at issue. *See* Pls.' Mot. at 3 ¶ 7 (citing *Texas v. Biden*, No. 2:21-cv-067-Z, 2021 WL 4552547 (N.D. Tex. July 19, 2021)). But as the district court in *Texas v. Biden* observed, most of these exceptions to the record rule "fit within the three broader categories in *Medina*" and there "will often [not] be a significant practical distinction between the eight exceptions" discussed by the district court and the "three listed in *Medina*." *Texas v. Biden*, 2021 WL 4552547, at *2. To the extent there is any conflict between the various lists of factors, *Medina* controls as circuit precedent.

review is limited to the record compiled by the agency is justified with respect to the evidence they seek to rely upon. *See Ctr. for Biological Diversity*, 2019 WL 12313647, at *26.

5. Plaintiffs fail to demonstrate why this Court is unable to decide Plaintiffs' Motion to Stay Agency Action without an evidentiary hearing. Plaintiffs argue that "this Court regularly holds evidentiary hearings on motions for preliminary injunction[s.]" Pls.' Mot. at 2 ¶ 5. However, this argument is irrelevant to the question of whether an expedited evidentiary hearing on Plaintiffs' Motion to Stay Agency Action under 5 U.S.C. § 705 is appropriate. The cases upon which Plaintiffs rely are inapposite because they do not involve a challenge to agency action under the APA, which, as discussed above, *see supra* ¶ 4, limits judicial review to the administrative record and only permits the use of extra-record materials upon a showing of unique circumstances. Similarly, the fact that a district court in another circuit stated in an unpublished opinion that it held an evidentiary hearing to resolve a motion for a preliminary injunction in a case brought under the APA, *see* Pls.' Mot. at 2 ¶ 5, is neither controlling nor persuasive on the question of whether an evidentiary hearing is appropriate here, particularly as that case did not acknowledge the presumption of record-only review and the unusual circumstances necessary to justify supplementation of the record.

6. Plaintiffs next argue that "[a]bsent an expedited evidentiary hearing on the Motion to Stay, Plaintiffs' members face irreparable harm given the Final Rule's May 31, 2023 compliance date" because that date is "arbitrarily short given publication of the Final Rule on May 31, 2022," and the lack of procedures for testing, compliance, and enforcement create uncertainty for manufacturers that could result in "substantial legal exposure." Pls.' Mot. at 2-3 ¶ 6. But Plaintiffs' assertion of irreparable harm due to an impending compliance deadline does not speak to the need for the Court to hold an *evidentiary* hearing to consider materials outside of the

administrative record. This Court can consider Plaintiffs' Motion to Stay Agency Action in advance of the Final Rule's compliance date without considering extra-record evidence.

7. The only place in Plaintiffs' Motion where Plaintiffs make any attempt to demonstrate the unusual circumstances necessary to justify the consideration of extra-record materials is Plaintiffs' assertion that the "Final Rule is rife with factors that the agency failed to consider." *Id.* at 3 ¶ 7 (emphasis in original) (citing ECF No. 5 at 4-7, 7-11, 13-15, 16-17). Such conclusory statements are insufficient, however, to overcome the presumption that review of agency action under the APA is limited to the record in existence at the time the agency made its decision. *See City of Dallas, Tex. v. Hall*, No. 3:07-cv-0060-P, 2007 WL 3257188, at *10 (N.D. Tex. Oct. 29, 2007) (denying motion to supplement the administrative record where the movant "contend[ed] in a conclusory fashion that an exception should be made . . . because [the material] falls within several of the exceptions for allowing extra-record evidence").

8. Aside from being conclusory, Plaintiffs' assertion that the record is "rife with factors that the agency failed to consider," Pls.' Mot. At 3 ¶ 7, is belied by a fair examination of the Final Rule. For example, Plaintiffs' Motion to Stay Agency Action relies on extra-record material to bolster their claim that the Agency failed to consider aspects of this rulemaking, including the costs associated with testing, compliance and enforcement. *See* ECF No. 5 at 4-7. Similarly, Plaintiffs rely on the expert report of Pavel Darling to support their argument in the Motion to Stay Agency Action that the Final Rule's cost analysis is flawed because it failed to consider, among other things, actual construction costs. *See, e.g.* ECF No. 5 at 7 (citing Darling Report ¶ 48) ("DOE arbitrarily relied upon ***2014*** cost estimates and then assumed an annual inflationary increase of *2.3%* . . . [h]owever . . .the cost of construction materials has actually increased by *6.5% annually* between 2014 and 2021"). Plaintiffs also rely on the expert report of

Mark Ezzo to support their contention the Agency did not consult with the United States Department of Housing and Urban Development ("HUD") about the Final Rule. *See id.* at 19 (citing Ezzo report at 17) (arguing that failure to consult with HUD led to "fundamental misunderstandings of the manufactured housing industry" including the Final Rule's requirement that "heating equipment be sized according to Manual S").

9. The Final Rule, however, addresses these issues. *See, e.g.*, Final Rule, 87 Fed. Reg. at 32,757-58 (explaining the absence of a certification, compliance, and enforcement system by stating that "DOE notes that many of the requirements in the standards would require minimal compliance efforts . . . and therefore such efforts would result in minimal additional costs to manufacturers."), 32,759-60 (addressing the one-year compliance timeframe and noting that "many manufacturers already have experience complying with efficiency requirements similar to what DOE is requiring in this final rule" and also noting statutory requirement for DOE to update its regulations within one year of revisions to the International Energy Conservation Code), 32,774 (addressing insulation supply and demand and noting that manufacturers have "flexibility in using any combination of energy efficiency measures" to meet required standards, "manufacturers can continue to use current insulation types and techniques," and that "DOE is not restricting the type of insulation being used as long as the standards (either prescriptive or performance) are met"), 32,788-91 (discussing various costs, including "the cost analysis of the different energy efficiency measures to be employed as a result of this rule (ceiling, wall, floor, and window insulation)" and "labor costs"), 32,788 (stating referenced studies "are the best current and future estimates of inflation, energy prices, and escalation rates"), 32,745-46 (stating in its examination of affordability impacts of the rule that "[i]n response to the affordability concerns raised by HUD and commenters . . . DOE is finalizing a tiered standard . . . that would alleviate first-cost impacts

for purchasers at the lower end of the manufactured home price range"), 32,756-57 (explaining DOE's consultation with HUD throughout the rulemaking and further noting that DOE's statutory mandate to promulgate its energy efficiency regulations is separate from HUD's authority over manufactured housing), 32,781-82 (explaining DOE's utilization of Manual S for equipment sizing).

10. In arguing that the Agency failed to consider certain factors in promulgating the Final Rule, Plaintiffs "basically make a merits argument in a discovery motion[,]" *Midcoast Fishermen's Ass'n v. Gutierrez*, 592 F. Supp. 2d 40, 44 (D.D.C. 2017). But disagreement with an agency's analysis and conclusions does not justify a departure from the record rule. *See Standing Rock Sioux Tribe v. U.S. Army Corps. of Engineers*, 255 F. Supp. 3d 101, 125 (D.D.C. 2017) ("Disagreement with an agency's analysis is not enough to warrant the consideration of extra-record evidence."); *Indep. Turtle Farmers of Louisiana, Inc. v. United States*, 703 F. Supp. 2d 604, 613 & n.10 (W.D. La. 2010) (declining to admit as extra-record evidence letters expressing disagreement with agency decision). Indeed, it bears noting that Plaintiffs not only had the opportunity to raise factors for the Agency's consideration during the rulemaking, but Plaintiffs availed themselves of that opportunity by submitting detailed comments. *See* MHI Comment Letter (Nov. 23, 2021), ECF No. 5-6; TMHA Comment Letter (Nov. 22, 2021), ECF No. 5-1. And the Final Rule is replete with references to those comments. *See, e.g.*, Final Rule, 87 Fed. Reg. at 32,743, 32,746, 32,748, 32,754.

11. In sum, Plaintiffs have failed to demonstrate the existence of "unusual circumstances justifying a departure from the general presumption that review of the whole record under the APA is limited to the record compiled by the agency." *Ctr. for Biological Diversity*, 2019 WL 12313647, at *26 (quoting *Medina Cty. Envtl. Action Ass'n*, 602 F.3d at 706). The

Court, therefore, should decline to hold an evidentiary hearing to consider the extra-record materials appended to Plaintiffs' Motion to Stay Agency Action.

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion for an Expedited Evidentiary Hearing on their Motion to Stay Agency Action.

Dated: March 3, 2023

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CERTIFICATE OF SERVICE

On March 3, 2023, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Western District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ *Kristina A. Wolfe*