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-DAE

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

By avoiding premature adjudication, the ripeness doctrine prevents courts from entangling themselves in abstract disagreements over administrative policies. Plaintiffs' challenge to the Energy Conservation Standards for Manufactured Housing Rule ("Standards Rule") presents such an abstract disagreement. Their claims regarding the costs associated with testing, compliance, and enforcement are predicated upon assumptions about how Defendant Department of Energy ("DOE") will evaluate compliance and the related costs, even though those costs may never materialize. Indeed, DOE has recently announced a proposed rule regarding compliance and enforcement. Waiting until after DOE completes that rulemaking will enable the Court to resolve those claims in the context of a concrete—not abstract—dispute, thereby significantly advancing the Court's ability to consider the legal issues those claims present. As such, Plaintiffs' claims regarding the costs associated with testing, compliance, and enforcement are not currently fit for judicial decision.

Consideration of Plaintiffs' remaining claims challenging the Standards Rule should similarly be delayed in the interest of judicial economy because the forthcoming final enforcement rule may resolve some of their concerns, thereby narrowing the issues requiring judicial review. Deferring review of Plaintiffs remaining claims will also serve the interests of judicial economy by avoiding piecemeal adjudication, preserving the resources of both the Court and the parties.

Moreover, Plaintiffs concede that their members do not face imminent enforcement and the Standard Rule's extended compliance dates ensure that Plaintiffs' members do not need to come into compliance until after DOE promulgates the final enforcement rule. Plaintiffs' members will thus not suffer hardship in the absence of judicial review. Accordingly, Plaintiffs' claims are unripe for adjudication and this case should be dismissed.

ARGUMENT

I. Plaintiffs' Claims Are Not Fit For Judicial Review

Plaintiffs largely disregard DOE's arguments, choosing instead to focus on the finality of the Standards Rule. *See, e.g.*, Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss ("Pls.' Mem.") at 8-9, 14-15, ECF No. 50. But DOE never argued that the Standards Rule does not constitute final agency action. *See generally* Defs.' Mot. to Dismiss ("Defs.' Mot."), ECF No. 49. Rather, DOE argued that Plaintiffs' claims are not currently fit for judicial review because that review would benefit from a more concrete setting—namely the completion of DOE's supplemental enforcement rulemaking, which will clarify how the agency will evaluate manufacturer compliance with the standards, set forth procedures for enforcing noncompliance, and address associated costs. *See id.* at 1-2, 9-12. It is well-settled that claims arising from final agency action are unfit for judicial review if "further factual development would significantly advance [the Court's] ability to deal with the legal issues presented[.]" *Nat'l Park Hospitality Ass'n v. U.S. Dep't of Interior*, 538 U.S. 803, 812 (2003) (citations omitted); *see also Walmart, Inc. v. U.S. Dep't of Justice*, 21 F.4th 300, 311 (5th Cir. 2021) ("Failure on even one of the three prongs [courts consider when evaluating fitness for adjudication] can render a case unfit for judicial review.").

That is precisely the circumstance presented here. Permitting DOE to complete the enforcement rulemaking will significantly advance the Court's ability to review Plaintiffs' claims by allowing it to avoid entangling itself in abstract disagreements sparked by Plaintiffs' speculations about how DOE will evaluate and enforce manufacturer compliance with the standards, as well as the costs associated with those not-yet-promulgated procedures.

Plaintiffs contend that the Court does not need a more concrete setting because "the Standards Rule has already failed to account for [the] costs" related to "DOE's forthcoming testing,

compliance, and enforcement procedures[.]" Pls.' Mem. at 14; *see also id.* at 12. The duct system leakage testing hypothetical highlighted in their First Amended Complaint, Plaintiffs assert, "merely illustrates the consequences flowing from DOE's failure." *Id.* at 14. Plaintiffs argue that "[w]hatever the costs may be for duct leakage testing, DOE's cost-effectiveness analysis from the Standards Rule admittedly fails to incorporate those costs." *Id*.

As an initial matter, contrary to Plaintiffs' contention, the Standards Rule does address the costs associated with demonstrating compliance. DOE stated in the Standards Rule that "many of the requirements" would "require minimal compliance efforts[,]" such as "documenting the use of materials [already] subject to separate Federal or industry standards" and would thus "result in minimal additional costs to manufacturers." *Energy Conservation Program: Energy Conservation Standards for Manufactured Housing*, 87 Fed. Reg. 32,728, 32,758 (May 31, 2022). DOE also noted that it would endeavor to ensure in a future action that "manufacturer compliance with the standards" is "not overly burdensome or costly[.]" *Id.*

In any event, Plaintiffs' argument underscores, rather than refutes, the speculative nature of their claims related to the costs associated with compliance and enforcement because it presupposes the forthcoming enforcement rule will require duct system leakage testing and thus impose compliance costs beyond the minimal costs contemplated in the Standards Rule. But it is far from certain whether DOE will require duct system leakage testing to demonstrate compliance in the final enforcement rule. Indeed, DOE recently announced its proposed enforcement rule and the proposed rule does not include any specific test procedures to demonstrate compliance with the standards. *See* DOE, Pre-Publication Copy, *Energy Conservation Program: Energy Conservation Standards for Manufactured Housing; Enforcement*, Notice of Proposed Rulemaking ("Enforcement NOPR") at 8, 19 (signed Dec. 6, 2023), *available at*

https://www.energy.gov/sites/default/files/2023-12/mh-enforcement-nopr.pdf, attached as Exhibit A. Consistent with its statements in the Standards Rule, DOE is proposing to evaluate compliance by reviewing, upon request, certain records that manufacturers are already required to maintain and provide to the Department of Housing and Urban Development ("HUD") pursuant to existing HUD regulations. *See* Enforcement NOPR at 12-13 (citing 24 C.F.R. part 3282); *see also id.* at 20-21, 35-36.

Accordingly, postponing review of Plaintiffs' claims regarding the costs associated with testing, compliance, and enforcement until after DOE completes the enforcement rulemaking will solidify the factual context of the dispute between the parties, which will significantly advance the Court's ability to resolve the legal issues those claims present. *See Nat'l Park Hospitality Ass'n*, 538 U.S. at 812. As it stands now, an actual controversy does not exist given the assumptions upon which Plaintiffs' claims are predicated may not materialize. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'") (citation omitted).

Although Plaintiffs correctly observe that Defendants do not contend that resolution of Plaintiffs' other claims would benefit from a more concrete setting, *see* Pls.' Mem. at 13-14, Defendants explained in their opening memorandum that permitting DOE to complete the enforcement rulemaking before considering all of Plaintiffs' claims serves the interests of judicial economy because the final enforcement rule may resolve some of Plaintiffs' concerns, which would narrow the issues requiring review, *see* Defs.' Mot. at 11. The recently announced proposed enforcement rule exemplifies this point: Plaintiffs claim that DOE failed to "account for actual market conditions" and thus failed to consider whether the Standards Rule "will too greatly impact the purchase price of manufactured housing[.]" Pls.' First Am. Compl. Seeking Permanent

Declaratory & Injunctive Relief Under the APA ¶¶ 79, 123, ECF No. 48; *see also id.* ¶ 115. They provide several examples of DOE's purported failures, including the adoption of Manual S for equipment sizing. *See id.* ¶ 89 (asserting the adoption of Manual S "severely restricts current sales practices"). In the proposed enforcement rule, however, DOE proposes to clarify the equipment sizing requirement by permitting manufacturers to use either Manual S or the approach codified in HUD's regulations. *See* Enforcement NOPR at 9-10, 35. If the final enforcement rule includes DOE's proposed clarification, Plaintiffs' concerns regarding Manual S will be resolved, thereby eliminating an issue requiring judicial review.

Defendants also explained that postponing consideration of Plaintiffs' claims until after DOE has promulgated the final enforcement rule serves the interests of judicial economy by avoiding piecemeal adjudication. *See* Defs.' Mot. at 11-12. Plaintiffs counter that the "interests of judicial economy cannot justify deferring review of an otherwise ripe challenge[.]" Pls.' Mem. at 15. This argument ignores that Plaintiffs' claims regarding the costs associated with testing, compliance, and enforcement are speculative and thus not ripe for adjudication. Reviewing Plaintiffs' remaining claims now, before DOE completes its enforcement rulemaking, would potentially result in the Court having to consider the validity of the Standards Rule multiple times, particularly if Defendants were to prevail on the remaining claims and/or Plaintiffs challenge the supplemental provisions promulgated in the enforcement rule. The Fifth Circuit has long disfavored such "piecemeal judicial review" because it "contravene[s] sound policies favoring judicial and administrative economy." *Pennzoil Co. v. FERC*, 742 F.2d 242, 245 (5th Cir. 1984). Plaintiffs offer no sound reason why the Court should decline to apply those policies here.

Finally, relying on *Wyoming v. Zinke*, 871 F.3d 1133, 1142 (10th Cir. 2017), Plaintiffs contend the ripeness doctrine is inapplicable because "[s]ubsequent agency action[,]" only

"render[s] a challenge to a final rule unripe" if the subsequent action presents "unusual circumstances[,]" meaning a "'clearly expressed' intention to rescind" or revise "the rule." Pls.' Mem. at 9-10 (quoting *Zinke*, 871 F.3d at 1142). Plaintiffs argue that because DOE has not "committed to revising or rescinding the Standards Rule," the "Delay Rule does not present the 'unusual circumstances' necessary to render Plaintiffs' challenges unfit for review." Pls.' Mem. at 10. Plaintiffs' reliance on *Zinke* is misplaced. "Unusual circumstances" are not limited to an agency's expressed intention to rescind or revise a challenged rule. The Tenth Circuit made clear that the Bureau of Land Management's proposed rule to rescind the challenged rule rendered the appeal unfit for judicial review because the matter in dispute "rest[ed] upon contingent future events that may not occur as anticipated, or . . . may not occur at all" and thus had become a "moving target." *Zinke*, 871 F.3d at 1142 (citation omitted); *cf. Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735-36 (1998) (noting possibility that agency may take further action to refine its land and resource management plan, including "*modify[ing] the expected methods of implementation*," and observing that "review now[,]" without the benefit of a focused logging proposal, "may turn out to have been unnecessary") (emphasis added). Given Plaintiffs' claims regarding the costs associated with testing, compliance, and enforcement likewise rest upon contingent future events that may not occur as anticipated, *see supra* at 3-4, the claims, like the appeal in *Zinke*, are a moving target. Therefore, contrary to Plaintiffs' contention, those claims do present an "unusual circumstance" that render them unfit for judicial review.

Because Plaintiffs' claims regarding the costs associated with testing, compliance, and enforcement are unfit for judicial review, and postponing review of their remaining claims would serve the interests of judicial economy, the Court should end its inquiry here and dismiss Plaintiffs'

action as unripe. *See Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 435 n.30 (5th Cir. 2021) ("Unsuitability for review is determinative.").

II. Plaintiffs' Members Will Not Suffer Hardship Absent Judicial Review

Even if the Court were to consider the hardship prong of the ripeness inquiry, Plaintiffs have not demonstrated that their members will suffer hardship if the Court were to delay review of their claims. Indeed, Plaintiffs concede that their members do not face imminent enforcement of the standards. Pls.' Mem. at 18. Nonetheless, relying on *National Propane Gas Association v. United States Department of Transportation*, 43 F. Supp. 2d 665 (N.D. Tex. 1999), Plaintiffs argue that because the Standards Rule remains in effect and "DOE expects manufacturers to begin modifying their behavior," their members will suffer hardship in the absence of judicial review because they "need to alter their day-to-day operations to avoid future penalties." Pls.' Mem. at 17-18 (citing *Nat'l Propane Gas Ass'n*, 43 F. Supp. 2d at 675).

Neither the Standards Rule nor the Delay Rule, however, require manufacturers to take steps to alter their operations until the final enforcement rule has been promulgated. The amended compliance dates set forth in the Delay Rule—60 days after publication of the final enforcement rule for Tier 1 homes and July 1, 2025, for Tier 2 homes—ensure that manufacturers will have time to modify their operations after DOE has clarified how it will evaluate compliance. DOE's expectation, therefore, is that manufacturers' decisions regarding what steps they will need to take to comply with the standards will be informed by the final enforcement rule. *See Energy Conservation Program: Energy Conservation Standards for Manufactured Housing; Extension of Compliance Date*, 88 Fed. Reg. 34,411, 34,413 (May 30, 2023) ("Delaying the compliance date until after the enforcement procedures are issued provides manufacturers time to understand

DOE's enforcement procedures and prepare their operations to ensure compliance with DOE's standards.").

As such, this matter is distinguishable from *National Propane Gas Association*. There, Congress enacted legislation that prohibited the Department of Transportation from using appropriated funds to enforce the challenged rule. *Nat'l Propane Gas Ass'n*, 43 F. Supp. 2d at 674. Notwithstanding the apparent bar on enforcement imposed by Congress, the district court concluded the plaintiffs would suffer hardship in the absence of judicial review because the challenged rule remained in effect, the Department of Transportation "expect[ed] and intend[ed] immediate compliance" with the regulations, and, as a result, the "regulations ha[d] a direct and immediate impact on the day-to-day affairs of [the] plaintiffs." *Id.* at 675. Those circumstances are not present here. Although the Standards Rule does remain in effect, DOE's decision to delay compliance coupled with its acknowledgment that the delay will afford manufacturers an opportunity to understand the enforcement procedures before compliance with the standards is required demonstrates that the Standards Rule does not have a "direct and immediate impact on the day-to-day affairs" of Plaintiffs' members. *Id.*; *see also Roman Cath. Diocese of Dall. v. Sebelius*, 927 F. Supp. 2d 406, 426-27 (N.D. Tex. 2013) (concluding that plaintiff's inability to "sufficiently plan its compliance with the regulations in that it will have inadequate time to make effective decisions" does not constitute a hardship warranting judicial review).

Plaintiffs also argue that delaying review of their claims would impose "substantial hardship" because it would be "a practical impossibility" to refile and prosecute this case before their members would have to comply with the Tier 1 standards, particularity given Defendants' prior position that Section 705 of the Administrative Procedure Act does not provide the Court with authority to stay the compliance date. Pls.' Mem. at 18-19. But this argument rings hollow.

Plaintiffs may, like any other litigant, seek relief once DOE promulgates the final enforcement rule, irrespective of Defendants' prior litigation position, should the final enforcement rule not resolve their concerns about the Standards Rule. Their members will also be able to raise their claims if, after compliance is required, "enforcement is initiated." *Roman Cath. Diocese of Dall.*, 927 F. Supp. 2d at 427. Accordingly, Plaintiffs' members will not suffer hardship by delaying judicial consideration of their claims until after DOE promulgates the final enforcement rule.

CONCLUSION

For these reasons, as well as the reasons set forth in Defendants' opening memorandum, Plaintiffs' challenge to the Standards Rule is not ripe for adjudication. The Court should accordingly grant Defendants' motion and dismiss Plaintiffs' First Amended Complaint for lack of subject matter jurisdiction.

Dated: December 7, 2023

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRAD P. ROSENBERG
Special Counsel

/s/ *Kristina A. Wolfe*
KRISTINA A. WOLFE (VA Bar No. 71570)
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station
Washington, DC 20044
Tel: (202) 353-4519; Fax: (202) 616-8470
Email: Kristina.Wolfe@usdoj.gov

CERTIFICATE OF SERVICE

On December 7, 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