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*	§	**CASE NO. 1:23-CV-00174-DAE**
v.	§	
THE UNITED STATES DEPARTMENT OF ENERGY and JENNIFER M. GRANHOLM, *Defendants*	§	

ORDER

Now before the Court are Plaintiffs' Motion to Strike or, in the Alternative, Motion for Leave to Conduct Limited Discovery, filed July 15, 2024 (Dkt. 72); Defendants' Response, filed July 26, 2024 (Dkt. 74); and Plaintiffs' Reply, filed August 2, 2024 (Dkt. 75). By Text Order entered July 25, 2024, the District Court referred the motion to this Magistrate Judge for disposition, pursuant to 28 U.S.C. § 636(b)(1)(A), Federal Rule of Civil Procedure 72, and Rule 1(c) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. On August 19, 2024, the Court held a hearing by videoconference on the motion to strike, at which all parties appeared through counsel.

I. Background

Plaintiffs the Manufactured Housing Institute and the Texas Manufactured Housing Association allege that Defendants the United States Department of Energy ("DOE") and Secretary of Energy Jennifer M. Granholm violated the Administrative Procedure Act when they promulgated a Final Rule[1] setting energy standards for manufactured housing. Plaintiffs ask the

[1] Energy Conservation Program: Energy Conservation Standards for Manufactured Housing, 87 Fed. Reg. 32,728 (May 31, 2022), codified at 10 C.F.R. pt. 460.

Court to invalidate the Final Rule, contending that DOE failed to consider all costs, used incorrect economic assumptions, made conclusions contrary to cited data, and failed to consult as required with the Secretary of Housing and Urban Development ("HUD").

Defendants certified the administrative record on July 1, 2024. Dkt. 71. The last item certified is the Declaration of Ashley Armstrong ("Declaration"), a Program Manager for the State and Community Energy Programs and a Senior Policy Advisor for the Office of Energy Efficiency and Renewable Energy at DOE, who was personally involved in the agency's rulemaking efforts pertaining to manufactured housing. Dkt. 71-3 ¶¶ 1, 2. Defendants state that they submit the Declaration "solely to 'provide[] information about whom [the DOE] consulted . . . , when [DOE] consulted . . . , and how and for what purpose [DOE] consulted' during the rulemaking process." Dkt. 71 at 1 n.1 (quoting *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 325 (D.D.C. 2016)).

Plaintiffs move the Court to strike the Declaration based on Defendants' "failure to assert, much less establish, grounds for supplementing the Administrative Record." Dkt. 72 at 2. In the alternative, Plaintiffs request leave to depose Armstrong and "reserve the right to seek additional discovery if warranted by Armstrong's deposition testimony." *Id.* Defendants ask the Court to deny Plaintiffs' motion to strike, arguing that agencies "routinely submit such factual background declarations to help provide context for the administrative record" and that the Declaration "is neither improper nor opens up the agency to extra-record discovery." Dkt. 74 at 2.

II. Motion to Strike

A. Legal Standards

This case is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 706. When a plaintiff brings a claim under the APA, the "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing

court." *Budhathoki v. Nielsen*, 898 F.3d 504, 517 (5th Cir. 2018) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). Designation of the administrative record "is entitled to a presumption of administrative regularity. The court assumes the agency properly designated the administrative record absent clear evidence to the contrary." *City of Dallas, Tex. v. Hall*, Nos. 3:07-CV-0060-P, 3:07-CV-0213-P, 2007 WL 3257188, at *4 (N.D. Tex. Oct. 29, 2007) (citations omitted). A court cannot consider other evidence unless a party demonstrates that unusual circumstances justify departing from the general presumption that review is limited to the record compiled by the agency. *Medina Cnty. Env't Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010).

"Motions to supplement the record are rarely granted." *OnPath Fed. Credit Union v. U.S. Dep't of Treasury, Cmty. Dev. Fin. Insts. Fund*, 73 F.4th 291, 299 (5th Cir. 2023) (affirming denial of motion to supplement administrative record). But supplementation may be permitted when

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, . . .
>
> (2) the district court needed 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.

Id. (quoting *Medina*, 602 F.3d at 706). "When an agency's initial explanation indicates the determinative reason for the final action taken, the agency may elaborate later on that reason (or reasons) but may not provide new ones." *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1, 21 (2020).

B. Analysis

Plaintiffs contend that Defendants failed to follow the statutory requirements of the Final Rule's enabling legislation, the Energy Independence and Security Act of 2007 ("EISA"), 42 U.S.C. § 17071. The statute states that DOE shall promulgate standards for energy efficiency in

manufactured housing after consulting with the HUD Secretary, "who may seek further counsel from the Manufactured Housing Consensus Committee." 42 U.S.C. § 17071(a)(2)(B).

Plaintiffs argue that Defendants submitted the Declaration to respond to their arguments in this litigation that the Final Rule lacks any evidence DOE consulted with HUD about the energy standards. Plaintiffs characterize the Declaration as "precisely the kind of litigation-driven, *post-hoc* testimony that the record rule is intended to prevent." Dkt. 75 at 5. Defendants deny that the Declaration constitutes supplementation of the administrative record. They contend that the Declaration provides "a high-level index of numerous specific instances of consultation to further illuminate DOE's compliance with EISA" and state that the administrative record could not include the substance of specific details of "several instances of DOE's consultations with HUD in compliance with EISA," which are protected by the deliberative process privilege. Dkt. 74 at 2

After carefully considering the arguments of the parties and the relevant case law, the Court agrees with Defendants that the Declaration is properly submitted because it merely explains the record and contains no new rationalizations. "There is nothing improper in receiving declarations that merely illuminate reasons obscured but implicit in the administrative record." *Clifford v. Peña*, 77 F.3d 1414, 1418 (D.C. Cir. 1996) (cleaned up). The Declaration may be considered "only to provide background and explanation of that record." *Roe v. Dep't of Def.*, 947 F.3d 207, 223 (4th Cir. 2020), as amended (Jan. 14, 2020).

III. Motion for Leave to Conduct Discovery

A. Legal Standards

To obtain extra-record discovery from an agency in an APA case, a plaintiff must "make a probabilistic showing that discovery is sufficiently likely to unearth evidence relevant to deciding whether the record should be supplemented or added to." *La Union del Pueblo Entero v. Fed.*

Emergency Mgmt. Agency, 141 F. Supp. 3d 681, 695 (S.D. Tex. 2015); *see also City of Dallas*, 2007 WL 3257188, at *6 (stating that a party seeking discovery "must make a significant showing – variously described as 'strong,' 'substantial,' or 'prima facie' – that it will find material in the agency's possession indicative of bad faith or an incomplete record") (quoting *Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001)). A trial court's discretion to admit or exclude extra-record evidence in supplementation is generally broad. *Ctr. For Biological Diversity v. Tex. Dep't of Transp.*, No. 1:16-CV-876-LY, 2019 WL 12313647, at *26 (W.D. Tex. Sep. 30, 2019) (quoting *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 247-48 (5th Cir. 2006)).

B. Analysis

Plaintiffs seek "the opportunity to further develop the inadequate record left by" the Declaration, arguing that it "is so vague and lacking in specificity that it still frustrates judicial review." Dkts. 72 at 12, 75 at 2. They contend that the Declaration "leaves substantial gaps about whether DOE actually sought HUD's advice and opinions on the Final Rule and whether many of the referenced meetings even concerned the Final Rule." Dkt. 75 at 5. Defendants respond that even if the administrative record is insufficient to establish that DOE has met its statutory consultation obligation, the proper remedy is remand, not extra-record discovery. *Env't Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) ("If the agency action, once explained by the proper agency official, is not sustainable on the record itself, the proper judicial approach has been to vacate the action and to remand the matter back to the agency for further consideration.").

The Court finds that Plaintiffs have not met their burden to depose Armstrong. As stated above, the Declaration is considered only as background and explanation of the administrative record. At this stage of the proceeding, Plaintiffs have not shown that deposing Armstrong is likely to unearth

evidence of bad faith or that the record is incomplete. *See FBME Bank*, 209 F. Supp. 3d at 325 & n.5 (denying motion to strike affidavit or depose affiant and finding that affidavit showed agency met consultation obligations); *see also Cross-Valiant Cellular P'ship v. U.S. Dep't of Agric.*, No. 20-334-RAW, 2021 WL 3172924, at *2 (E.D. Okla. July 26, 2021) (denying depositions).

IV. Conclusion

For these reasons, the Court **DENIES** Plaintiffs' Motion to Strike or, in the Alternative, Motion for Leave to Conduct Limited Discovery (Dkt. 72).

IT IS ORDERED that the Clerk remove this case from this Magistrate Judge's docket and return it to the docket of the Honorable David A. Ezra.

SIGNED on August 25, 2024.

SUSAN HIGHTOWER
UNITED STATES MAGISTRATE JUDGE