No. 21-1167

In the United States Court of Appeals
for the Seventh Circuit

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ALLIANCE FOR WATER EFFICIENCY, U.S. PUBLIC INTEREST RESEARCH GROUP, and ENVIRONMENT AMERICA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and JENNIFER M. GRANHOLM, SECRETARY OF ENERGY,

Respondents,

On Petition for Review of a Rule of the
United States Department of Energy

PETITIONERS' REPLY IN SUPPORT OF MOTION FOR STAY

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DOE does not defend the Showerheads Rule. Petitioners showed that DOE's redefinition is contrary to the unambiguous meaning of "showerhead"; that it violated EPCA's anti-backsliding rule; that DOE's decision was arbitrary and capricious; and that DOE violated NEPA. Doc. 7-1, at 15-23 ("Mot."). DOE does not deny any of it. The Court must take for granted that the Showerheads Rule is fundamentally unlawful.

DOE also does not dispute that if a single high-flow showerhead is sold in the areas where AWE's members draw their water, that sale would be an irreparable harm and an injury-in-fact sufficient to confer standing. Nor does DOE seriously deny that if such sales are a realistic possibility, AWE's need to monitor for them is an irreparable harm and also a source of standing. DOE's main (almost only) defense is that it says petitioners can only speculate whether anybody really would sell a high-flow showerhead.

In fact, such showerheads are currently on sale, and petitioners submit evidence of sales into California and Colorado. The harm is certain.

ARGUMENT

DOE contends that because the possibility of sales is speculative, the Court should refuse a stay because petitioners lack injury-in-fact to support standing (DOE does not contest causation and redressability) and, for exactly

the same reasons, lack irreparable harm. Doc. 16, at 17, 20 ("Opp."). As noted above, DOE does not defend the Rule itself. DOE evidently concedes that if petitioners' asserted harms suffice for standing, a stay is warranted.[1]

When doubt is raised in the preliminary-injunction context, "the court need no more be certain that it has jurisdiction than it need be certain that the plaintiff has a winning case on the merits." *SEC v. Lauer*, 52 F.3d 667, 671 (7th Cir. 1995). In other words, to obtain a stay pending review, petitioners need not definitively prove their standing at this stage; the court need only believe that jurisdiction could likely be proven at the appropriate time. *See Speech First, Inc. v. Killeen*, 968 F.3d 628, 638 (7th Cir. 2020).

Petitioners satisfied this burden as follows:

1. DOE's rule enables U.S. sales of high-flow showerheads. Such showerheads are made in other countries that do not have the 2.5-gpm-per-showerhead limit that DOE previously maintained. Ex. E, at 12; Ex. N ¶¶ 9-11; Ex. M ¶¶ 11-14. There is a "very substantial risk" that such products will now be imported and sold in the United States; DOE's rule said it expected consumers to value high-flow showerheads. Mot. 14.

[1] DOE minimally asserts the balance of harms weighs in its favor, but even that contention relies on the premise that petitioners lack standing. Opp. 20.

2. Petitioners detailed and quantified how such sales will cause increased water consumption. Mot. 10-12.

3. AWE's members include utilities serving customers from scarce water supplies. Ex. H ¶ 4. Member Denver Water made long-term plans based on trends in water consumption and policies for water conservation. Ex. I ¶¶ 11, 14. Use of high-flow showerheads among consumers in its watershed increases demand and makes it harder to supply Denver Water's customers and manage its system. *Id.* AWE's mission includes helping members establish and implement long-term water plans by providing information about water consumption and conservation. Ex. H ¶ 5. Given that mission, it must monitor the markets for the high-flow showerheads now permitted, because members need to know about them. *Id.* ¶ 11.

4. PIRG's and Environment America's members face harm from increased water and energy usage that will inevitably result from the Rule. Increased air pollution, including greenhouse gases, will exacerbate respiratory impairment and the effects of climate change in members' locales.[2] Mot. 12; Exs. J-L.

[2] DOE's contention that "someone, somewhere in the United States" installing high-flow showerheads would not harm petitioners' members in different areas ignores the reality of greenhouse gas emissions and climate

These harms are concrete and particularized, as DOE does not dispute. The only question is whether the Court can "have sufficient confidence," *Lauer*, 52 F.3d at 671, that there is a "substantial risk" that showerhead sales will occur, thus materializing these harms. "Significant" or "substantial risk," not certainty, is the standard. Mot. 13-14; Opp. 7. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), "did not jettison the 'substantial risk' standard." *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693 (7th Cir. 2015); *see also Sierra Club v. EPA*, 774 F.3d 383, 390 (7th Cir. 2014) (for standing, plaintiff need show only "a reasonable probability—not a certainty—of suffering tangible harm").

DOE's accusations of speculation are easily dismissed. First, DOE wonders whether consumers could lawfully install high-flow showerheads that they buy. They could. State conservation standards generally do not restrict what a consumer can do. Like EPCA, they prohibit sales, not a

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change. Opp. 14-15. Every gpm increase in average shower flow rate increases annual energy consumption by 25 trillion BTUs, and increased energy consumption unavoidably produces increased greenhouse gas emissions. Mot. 11-12. The climate-change consequences occur regardless of *where* the carbon dioxide is emitted. *See Zero Zone, Inc. v. U.S. DOE*, 832 F.3d 654, 679 (7th Cir. 2016). Petitioners' members are in areas particularly sensitive to the harmful effects of climate change. Exs. J-L; *see Massachusetts v. EPA*, 549 U.S. 497, 521 (2007) ("The harms associated with climate change are serious and well recognized.").

consumer's purchase or installation. *E.g.* Colo. Rev. Stat. § 6-7.5-103 ("[A] person shall not sell ... ."); Cal. Code of Regs. § 1605(c) ("No appliance may be sold ... .").

Second, DOE suggests that thanks to state conservation standards, high-flow sales elsewhere will not affect California and New York (where PIRG's declarant lives) and Colorado (where Denver Water is located). The New York standard does not take effect until 2022. 2019 NY A.B. 2286 § 2 . Besides, DOE ignores the basic fact that water flows: California relies on the Colorado River watershed that flows first through five other states, most without showerheads standards. Ex. E (Ex. B thereto).

And AWE itself must monitor the market for high-flow showerheads, to serve its members throughout the country. DOE does not seriously deny that being forced into such additional work is a legitimate harm if the Court accepts there is a real risk of high-flow showerhead sales. Opp. 18-19. DOE says an organization claiming harm from its own programmatic activities must show the effort "perceptibly impaired" its mission. Opp. 19-20. That is not the law. So long as the activity requires resources that AWE would not otherwise have had to spend, "[t]he fact that the added cost has not been

estimated and may be slight does not affect standing." *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

Third, DOE doubts consumers will buy the products, pointing to comments saying consumers like water-efficient showerheads. Opp. 9, 13. But the substantial risk is not that *all* consumers will buy high-flow showerheads, only that *some* will. The comments are consistent with that reality. Meanwhile, as petitioners pointed out and DOE has not denied, DOE's purpose was to enable sales of high-flow showerheads, precisely because some consumers want them. Mot. 14, 25. "Where the agency itself forecasts the injuries ... it is 'disingenuous' ... to claim that the injury is not sufficiently imminent." *New York v. U.S. DHS*, 969 F.3d 42, 60 (2d Cir. 2020).

Ten years ago, "myriad" high-flow multi-nozzle showerheads pervaded the market. 85 Fed. Reg. 49,284, 49,290 (Aug. 13, 2020). Surely people were buying them. DOE said its 2011 interpretation had "effectively banned" the products. *Id.* at 49,291. It is hardly speculative that, now DOE has lifted the ban, some consumers will want to buy the products again.

Fourth, DOE says a risk of harm shouldn't be based on "guesswork as to how independent decisionmakers will exercise their judgment." Opp. 13 (quoting *Clapper*, 568 U.S. at 413). In *Clapper*, a law empowering the

government to do special surveillance did not itself expose plaintiffs to risk, because actual surveillance in a given instance could only happen if a court independently authorized it. That has little bearing here. When DOE makes certain products lawful, and the record shows some consumers will want it, and the products are already available abroad, it is unavoidable economic logic that companies will import them for sale here. "When an agency action has a 'predictable effect … on the decisions of third parties,' the consequences of those third party decisions may suffice to establish standing." *New York*, 969 F.3d at 59 (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019)).[3]

Fifth, DOE speculates that companies will not sell high-flow showerheads because DOE's plan to reconsider the Rule has signaled the window for selling the products is short. Opp. 12.[4] By refusing to stay the Rule on its own, and then opposing a judicial stay, DOE has significantly

[3] In *Department of Commerce*, the Supreme Court rejected an "independent decisionmaking" argument just like what DOE offers here. The plaintiffs met their burden for final judgment—higher than petitioners' burden here—by showing that if the Census asked certain questions, some people would avoid responding. 139 S. Ct. at 2566.

[4] DOE dwells on the fact that major domestic manufacturers do not want to make high-flow showerheads. Opp. 12. The Motion said repeatedly the first concern is imports. Mot. 13, 21, 26.

undercut the supposed signal. Given DOE's insistence on preserving the Rule, the public (and the industry) must assume a significant likelihood the Rule will remain after reconsideration. Also, DOE has promised only to reconsider, not what the outcome of that reconsideration will be.[5] Moreover, even if an importer thinks the window to sell under the current Rule is limited, the rational response would be to sell as many of the products as possible quickly, not to avoid sales altogether.

DOE seems to misunderstand 21st-century logistics. Shipping a showerhead from a foreign destination is straightforward. *Cf.* Opp. 12. Petitioners showed domestic distributors will have to invest to compete with those imports. It does not follow that no imports can occur without such investment.

The links in DOE's supposed chain of speculations are, in fact, economically predictable and inevitable; and DOE's hypothetical barriers to harm are nonexistent. ***Thus, this motion comes down to whether there is a substantial risk that high-flow showerheads will be available, here or abroad, for sale in the United States.***

[5] If, after reconsideration, DOE determines to undertake rulemaking to rescind the Rule, there is no promise of how long that might take.

That the answer is "yes" is obvious from petitioners' original submissions:

- Ten years ago, the products were commonplace. 85 Fed. Reg. at 49,290.
- In DOE's certification database, 3% of showerheads are multi-nozzle products. 85 Fed. Reg. at 49,293. Thus, having multiple nozzles is desirable enough that even after DOE "effectively banned" most such products, some manufacturers continue to sell them in the United States.
- Many other countries do not have a 2.5-gpm limitation, so manufacturers in those countries have been free to continue the products that were previously on sale here. Mot. 26; Ex. N ¶¶ 9-11; Ex. M ¶¶ 11-14. DOE parses petitioners' declarations to conclude they say only that foreign manufacturers have the option. No, the point was that products that were widely sold just 10 years ago and are still legal elsewhere are, the Court must infer, still on sale in those other places. Especially since 2.5-gpm-compliant versions remain in demand even here.

Thus, there is clearly at least a "substantial risk" that high-flow multi-nozzle showerheads will be available for sale in this country should that remain permissible.

DOE criticizes petitioners for not identifying specific products. DOE cites no authority that, given the concrete risks petitioners showed, they must identify particular products for sale. In *Remijas*, once hackers broke into a credit-card system, there was a substantial risk of harm to the individuals represented in the database. 794 F.3d at 693. The Court did not need to know who the hackers were or what they specifically did with the data. "Why else would hackers break into a store's database and steal consumers' private information?" *Id.* So too here. DOE's stated intent was to relieve a regulatory ban on products widespread before the ban. The Court does not need to know which specific products will be sold to conclude there is a substantial risk some will be.

Regardless, petitioners now provide evidence of specific products. The Court should not need such evidence, but it can consider these materials, submitted with the reply. *See Del. Dep't of Nat. Res. & Envt'l Control v. EPA*, 785 F.3d 1, 8-9 (D.C. Cir. 2015). AWE has been diligently monitoring the markets, Mot. 13; it cannot hope to spot everything immediately, but it has found at least these products. It is unlikely these are the only ones.

First, the CALICES Overhead Shower by Tender Rain is a four-nozzle assembly with a flow rate of 18 Liters per minute ("Lpm"). The BABORDO,

from the same company, flows 15 Lpm. Exs. P1 & P2. These amounts are 4.7 gpm and 4.0 gpm respectively.[6] The web advertisements target the United States. *Id.*

Second, "Dual Arms with Deluxe Shower Heads." Ex. P3. The flow rate is unspecified but is clearly above 2.5 gpm. For each nozzle within the combination, the website states a separate flow rate of 2.5 gpm. *Id.* For the "Dual Arms," instead of explicitly acknowledging a high flow rate, the advertisement says "you do need good water pressure (approximately 45 psi or more) and you cannot use the dual head set with a low flow mixer valve." *Id.* "Good water pressure" would be necessary to provide adequate supply for two full-flow nozzles. Clearly, at full standard pressure of 80 psi—the pressure at which DOE's standard was defined—each nozzle would flow its full 2.5 gpm and the whole product 5.0 gpm.[7]

This product is on sale in the United States. The attached declarations show consumers can buy it in Colorado and California despite those states'

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[6] The Court can take judicial notice that there are 3.785 Liters in a gallon. Nat'l Inst. of Standards & Tech., Handbook 44, at App C-12 (2020).

[7] *See* ASME-2018, § 5.4.2.3. For testing, all valves would have to be fully open. *Id.* The product as a whole would have been subject to DOE's past standard. Ex. A, at 2 ("[M]ultiple spraying components *sold together as a single unit* designed to spray water onto a single bather constitutes a single showerhead ... .") (emphasis added).

conservation standards. Only DOE's previous nationwide standard, before DOE's unlawful redefinition, could have prevented these sales.

Finally, DOE complains that enjoining "a regulation duly promulgated" harms the public. Opp. 21. The Showerheads Rule was not "duly promulgated." It exceeded DOE's authority and violated specific restrictions under EPCA; and DOE violated statutory procedural requirements. DOE does not deny those faults, so its invocation of the interests of "the public" is not well-taken. Meanwhile, having denied that anybody really wants to sell high-flow showerheads, DOE can hardly claim a stay would cause any other harm.

CONCLUSION

DOE asks the Court to doubt anybody would sell a high-flow showerhead even if the Showerheads Rule remains in force. Given the long-term consequences of any high-flow showerhead sales, the Court does not need certainty that sales are occurring; but the evidence submitted with this reply removes all doubt. The Court should immediately enjoin the Rule for the duration of this litigation.

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Respectfully submitted,

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/s/ Keith Bradley
Keith Bradley

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