UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 13-2187

FRONT RANGE EQUINE RESCUE, THE HUMANE SOCIETY OF THE UNITED STATES, MARIN HUMANE SOCIETY, HORSES FOR LIFE FOUNDATION, RETURN TO FREEDOM, RAMONA CORDOVA, KRYSTLE SMITH, CASSIE GROSS, DEBORAH TRAHAN, and BARBARA SINK, SANDY SCHAEFER, TANYA LITTLEWOLF, CHIEF DAVID BALD EAGLE, CHIEF ARVOL LOOKING HORSE and ROXANNE TALLTREE-DOUGLAS,
Plaintiffs-Appellants,

and THE STATE OF NEW MEXICO,
Plaintiff-Intervenor-Appellant

v.

TOM VILSACK, Secretary U.S. Department of Agriculture; ELIZABETH A. HAGEN, Under Secretary for Food Safety, U.S. Department of Agriculture; and ALFRED A. ALMANZA, Administrator, Food Safety and Inspection Service, U.S. Department of Agriculture,
Defendants-Appellees.

On Appeal From The United States District Court
For The District Of New Mexico (Hon. M. Christina Armijo)

APPELLANTS' REPLY IN SUPPORT OF RULE 8(a) EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Appellees' position in this litigation, and the district court decision under review, depend almost entirely on the erroneous assertion that USDA's grant of inspection to slaughter facilities under the FMIA is a ministerial, "nondiscretionary duty." Fed. Appellees' Mem. ("Fed. Mem.") at 1. But the Agency has previously represented to the Ninth Circuit that whether to grant inspection is "plainly" a "discretionary determination," *see* J. Br. Appellees, *Kluver v. Sheets*, 27 F. App'x 873 (9th Cir. 2001), 2000 WL 33986949, at *24-25, Ex. 21[1], and published a Federal Register notice declaring that "FSIS has broad authority . . . to prescribe the terms and conditions under which inspection will be provided." Rules of Practice, 64 Fed. Reg. 66541 (Nov. 29, 1999) (codified at 9 C.F.R. 304, 305, 327, 335, 381, and 500), Ex. 22.

Pursuant to this "broad authority," USDA has issued rules controlling numerous environmental aspects of slaughterhouse operations, requiring that inspected facilities follow: "water quality standards . . . of the Federal Water Pollution Control Act," 9 C.F.R. § 304.2(c)(1), construction standards, § 416.2(b), procedures to "control odors," § 416.2(d), and rules for plumbing, "discharge waste water," "sewer gases," § 416.2(e), and "sewage disposal," § 416.2(f). The Agency also exercises control over the release of toxic animal drugs from slaughterhouses via its residue testing program, and requires its approval of the "environmental safety" of new slaughterhouse processes that might have adverse effects. Directive Notice, 60 Fed. Reg. 27,714-02, 27,715 (May 25, 1995), Ex. 23.

Thus, despite its claims here, the Agency is deeply involved in regulating the environmental effects of slaughterhouse operations – it is just carrying out these functions *outside* the required NEPA process. But the Agency does not have the authority to unilaterally bypass the mandates of NEPA, in this case or any other. Congress made clear that NEPA broadly applies "to the fullest extent possible" to achieve its goals, 42 U.S.C.

[1] References to Exs. 1-20 are to the exhibits to Appellants' Emergency Motion, and Exs. 21-30 reference the exhibits filed herewith.

§ 4332, and has warned that "[n]o agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." *Jones v. Gordon*, 792 F.2d 821, 826 (9th Cir. 1986) (quoting 115 Cong. Rec. 39703 (1969)).

Appellants seek an injunction because the Agency's legal position is plainly erroneous, because it tainted all other aspects of the Agency's decisionmaking in this case, and because Appellants will otherwise be irreparably harmed. The record shows that horse slaughter operations have devastating impacts on the environment, and includes uncontested declarations from citizens and public officials regarding blood spills, environmental contamination, declining property values, and waste discharge violations. *See* Mot. TRO Prelim. Inj. at 4 n.8, 5 n.11, ECF No. 15, Ex. 24. Multiple expert declarations show that disposal of horse byproducts containing drug residues present a unique threat of groundwater contamination and entry into the food chain. *See* Rulemaking Petition at 61-78, Ex. 5; Decls. of Wood, Larson, Pavlis, Parker, and Greger, Ex. 6; Decls. of Grover, Colella, Hoffman, Vaca, Newberry, Conner, Fitch, and Murphy, Ex. 7.

Indeed, in previous litigation over this Agency's stubborn refusal to follow the mandates of NEPA concerning horse slaughter, USDA did not even "refute Plaintiffs' argument that horse slaughter operations have 'significantly' impacted the environment within the meaning of NEPA." *Humane Soc'y of U. S. v. Johanns*, 520 F. Supp. 2d 8, 19 (D.D.C. 2007). Although Defendants now make a half-hearted effort to belittle the irreparable harm to the communities surrounding the proposed slaughter facilities as "speculative" and "unsubstantiated," Fed. Mem. at 19, this Circuit has already noted that an injury "is not speculative simply because it is not certain to occur." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003). The entire reason a party seeks a preliminary injunction in a NEPA case is to ensure that the risk of such harm is studied in a NEPA analysis *before* it occurs. *See Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) ("[T]o set aside the agency's action at a later date will not necessarily undo the harm" that NEPA seeks to prevent).

Accordingly, this Court should maintain the status quo pending disposition of this appeal. Horse slaughter has not taken place in several years, and an injunction will only require the parties to stay the current course. Without an injunction pending appeal, the environmental effects to be studied under NEPA will occur long before the Agency would be directed to comply with NEPA, rendering whatever final legal guidance this Court issues a virtual nullity. Thus, an injunction is also warranted here to preserve this Court's jurisdiction to review and correct the serious legal errors presented by this appeal.

I. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS.

Appellants are likely to succeed on the merits of their NEPA claims because USDA (1) has ample discretion over environmental issues when making decisions about slaughterhouse inspections and (2) cannot lawfully invoke a CE, instead of preparing an EIS or an EA, prior to granting inspections.

A. By Its Own Admission, USDA Has "Broad Authority" To Decide "The Terms and Conditions Under Which Inspection Will Be Provided."

The district court plainly erred when it accepted USDA's argument that providing inspection services is a mandatory, ministerial act and that USDA cannot consider the environmental effects of horse slaughter when it grants inspection under the FMIA. See Order at 27-32, Ex. 1; Fed. Mem. at 8-11. The FMIA's plain language, and the Agency's own regulations and actions, make absolutely clear that nothing requires USDA to blindly provide inspection services whenever a slaughterhouse submits an application.

The Agency's argument about the use of the word "shall" in the FMIA is entirely misleading. *See* Fed. Mem. at 8-11. While the statute does say that FSIS "shall cause to be made . . . an examination and inspection of all amenable species *before they shall be allowed* to enter" a slaughterhouse, 21 U.S.C. § 603(a) (emphasis added), this cannot be reasonably interpreted as a command that USDA *must* grant a facility authorization to commence operations, regardless of other factors. Instead, it simply means that *without* a grant of inspection, a facility may not slaughter for human consumption.

There is nothing in the language of the FMIA stating that the Agency "shall grant" new inspection applications, and for good reason. To interpret the FMIA in this manner would lead to absurd results, including a situation where meat processors could sue the Agency to compel inspection regardless of whether the facility is in compliance with the numerous environmental conditions for operations set forth in the Agency's regulations. *See John C. Winston Co. v. Vaughan*, 11 F. Supp. 954, 959-61 (D. Okla. 1935) (agency duty under statute discretionary despite use of the word "shall" because construing as mandatory would produce absurd results contrary to the legislative purpose).

This is precisely why, when the Agency was previously sued for *denying* inspection, it represented to the Ninth Circuit a very different position – that the Agency's decision *is* "plainly" a "discretionary determination."[2] Now that the Agency has been sued for *granting* inspection, it has suddenly changed its tune, claiming that the decision was merely a "ministerial act" and one that is so constrained by statute that it may not take into account *any* environmental considerations. This Court should disregard USDA's self-serving litigation position. *See Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600-01 (9th Cir. 1996) ("Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts" by "gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." (citing cases)).

The truth is that the Agency has *already* considered a whole host of factors, embodied in its regulations, that restrict where and when slaughter operations will be allowed – demonstrating the Agency's "broad authority to issue regulations to carry out the provisions of the FMIA . . . including authority to prescribe the terms and conditions under which inspection will be provided." 64 Fed. Reg. 66541, Ex. 22. And these restrictions

[2] *See* J. Br. Appellees, *Kluver v. Sheets*, 27 F. App'x 873 (9th Cir. 2001), 2000 WL 33986949, at *24-*25, Ex. 21. In *Kluver*, USDA and Montana were engaged in a cooperative agreement to jointly administer the state meat inspection program in accordance with the FMIA, and both were sued for denying inspection services.

explicitly include environmental considerations, such as standards to avoid water pollution, odors, sewer gas discharge, and the release of dangerous animal drugs.

Accepting the Agency's invitation to interpret the word "shall" in the FMIA as compelling USDA to rubber stamp slaughterhouse operations – regardless of NEPA or any other legal mandates – would create a dangerous precedent, and would be at odds with the fundamental food safety purpose of the FMIA and the fundamental environmental protection purpose of NEPA. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve.").[3]

The cases cited by Appellees are not to the contrary. While there are certainly statutory mandates that are so circumscribed that they do not give an agency sufficient discretion to use the results of a NEPA analysis in its decisions, this is not that case here. *See, e.g., Johanns*, 520 F. Supp. 2d at 27 (pre-mortem inspection under FMIA Section 603(a) is not mandatory if contradicted by other statutory directives).

In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the applicable statute mandated that the agency "*shall* register a person to provide transportation . . . as a motor carrier if [it] finds that the person is willing and able to comply with" various safety and financial requirements established by the Department of Transportation. 541 U.S. at 766 (quoting 49 U.S.C. § 13902(a)(1)). Because the statute did not provide the agency with any choice but to register a person who could comply with

[3] The legislative history of the FMIA cited by Appellees adds little to this analysis. *See* Order at 32, Ex. 1; Fed. Mem. at 9. Indeed, the very same documents note the FMIA is intended to give USDA "[a]uthority to refuse inspection service," H.R. Rep. No. 90-653, at 16 (1967), Ex. 25, and that "eligibility of an establishment for Federal inspection is based upon a combined evaluation of the operating procedures used by the establishment and the building construction and physical facilities. . . ." S. Rep. No. 90-799, at 4 (1967), Ex. 26. If anything, the legislative history cuts against USDA's theory that the FMIA turns the Agency into an automaton granting inspections to anyone who asks, regardless of other considerations, like NEPA, mandated by Congress.

the criteria, the Court held that the agency had "no discretion to prevent the entry of Mexican trucks" into the United States, and thus was not the "legally relevant 'cause'" of environmental effects arising from the entry of the trucks. *Id.* at 770.

Similarly, in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), the Supreme Court found that the Environmental Protection Agency lacked discretion over its decision to transfer water permitting authority to Arizona because the Clean Water Act provides that the EPA "shall approve [a state's] submitted program" for transfer of permitting authority unless "adequate authority does not exist." 551 U.S. at 650-51 (quoting 33 U.S.C. § 1342(b)). Again, the agency had no option but to grant the transfer if the criteria were met.

As noted above, the plain language of the FMIA, in contrast to both of these statutes, *never mandates approval of a particular facility to join the program*; it only requires that inspections occur before any animal can be slaughtered for human consumption. This is consistent with the Agency's regulations and past practice, which place numerous conditions – including environmental conditions – on the Agency's acceptance of a new facility for inspection. It remains entirely unclear under USDA's theory of the FMIA, for example, how it can compel applicants to demonstrate that their facilities do not "violate the applicable water quality standards . . . of the Federal Water Pollution Control Act," 9 C.F.R. § 304.2(c)(1), if the FMIA does not permit the Agency to consider the environmental effects of slaughter operations. Nor is it clear how the Agency can mandate procedures to "control odors," § 416.2(d), impose rules for plumbing, "discharge waste water," and "sewer gases," § 416.2(e), and mandate standards for "sewage disposal." § 416.2(f). The Agency's litigation position seems to be that while *it* can cherry-pick some environmental impacts to consider in making decisions under the FMIA, *Congress* cannot force it to consider environmental issues under NEPA.

Moreover, the Agency's purported lack of authority to consider environmental issues is inconsistent with its own decisionmaking in this case. As Appellees trumpet in

their brief, the Agency has actively taken measures throughout this process to mitigate or control environmental and public health impacts of horse slaughter – albeit without public involvement. For example, prior to granting any horse slaughter inspections, the Agency issued its new residue testing plan – embodied in the Directive – in an attempt to address the environmental and public health impacts of drug residues in horse flesh. In doing so, the Agency not only conceded that horse slaughter may have potentially significant environmental impacts, but also proved that it has the authority to address those impacts prior to issuing grants of inspection. *See* Directive, Ex. 3; *see, e.g.*, VM CE Memo at AR2471, Ex. 10 ("FSIS has addressed this [public health] risk by implementing a new drug residue testing program that will screen the meat of slaughtered horses for drug residues before the meat is allowed to enter the food supply chain[.]" (citing the Directive)).

In short, the Agency's actions and regulations demonstrate its authority to consider environmental impacts. Its arguments to the contrary are nothing more than an attempt to avoid its obligations under NEPA with an "excessively narrow construction of its existing statutory authorizations. . . ." 115 Cong. Rec. 39703 (1969).

B. USDA's Failure to Undertake Substantive Environmental Review of the Grants of Inspection Was Arbitrary and Capricious.

Because the Agency maintains that it lacks authority to consider environmental factors at all, it did not take the required "hard look" at the environmental consequences of its decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976). Although the Agency issued CEs in this case, those documents are simply further attempts to avoid its NEPA duties, and do not satisfy its mandates. *See United States v. Coal. for Buzzards Bay*, 644 F.3d 26, 34-35 (1st Cir. 2011) ("Coast Guard's reliance on a CE permitted it to avoid any environmental analysis").

The record makes clear that USDA never intended to consider whether authorizing horse slaughter for the first time in many years *may* result in potentially significant

environmental impacts, *see* 7 C.F.R. § 1b.4(a),[4] because it had already determined not to engage in substantive environmental review long before the decision was made.

Indeed, the record shows that the Agency's decision to issue grants of inspection was driven primarily by political calculations, not public health or environmental safety. When USDA should have been preparing an EA or EIS, it was instead wringing its hands about whether the Agency might be seen as "dragging its feet on the equine slaughter issue," and whether further delay could result in "punitive congressional action." Decision Memo at AR1827, Ex. 8. While refusing to follow the process mandated by NEPA, the Agency did find ample time to list out several "cons" associated with undertaking further review, including that it would need to "deflect persistent efforts" to force its hand and allow horse slaughter, that the horse "[i]ndustry would be indefinitely prevented from proceeding with horse slaughter," and that an in-depth review might demonstrate concerns with other USDA programs. *Id*. at AR1827-29. These troubling statements all demonstrate that the Agency's CEs are arbitrary and capricious *per se*. *See Wyoming v. U.S. Dept. of Agric.*, 277 F. Supp. 2d 1197, 1232 (D. Wyo. 2003) (NEPA violated when an action was "driven through the administrative process" for the "political capital" of the administration), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005).

Had Appellees honestly evaluated the potential impacts of authorizing horse slaughter, they would have been forced to conclude that an EA or EIS is required. Instead, USDA simply ignored the massive environmental damage caused by every American horse slaughter facility that existed in the last few decades,[5] despite the fact that this is the *only*

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[4] *See also Utah Envtl. Cong. v. Dale Bosworth*, 443 F.3d 732, 736 (10th Cir. 2006) (categorical exclusion precluded if "'extraordinary circumstances' exist such that 'a normally excluded action may have a significant environmental effect'" (quoting 20 C.F.R. § 1508.4)); *Johanns*, 520 F. Supp. 2d at 35-36 (USDA violated NEPA when it failed to assess its actions environmentally "in any manner whatsoever").

[5] The evidence demonstrates rampant contamination and pollution of land, water, and air and includes uncontested declarations from citizens and public officials regarding blood spills, a severe stench, declining property values, and ongoing waste discharge violations,

available evidence of the environmental effects of horse slaughter. The Agency also chose to discount the fact that disposal of horse byproducts containing drug residues presents a particularly unique environmental threat, including the potential contamination of groundwater and entry into the food chain. *See* Rulemaking Petition at 61-78, Ex. 5. Serious risks of environmental contamination cannot be disregarded where the facilities at issue propose to release as much as 8,000 gallons of wastewater per day from horse slaughter operations. *See* Draft Ground Water Discharge Permit DP-236 for VM at 1, Ex. 28. Appellees' casual dismissal of this highly pertinent information, as well as its dismissal of a history of environmental violations by VM,[6] among other things, was arbitrary and capricious because the Agency "entirely failed" to consider relevant evidence and relied on irrelevant facts.[7] *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574-75 (10th Cir. 1994). At an absolute minimum, an EA was required to assess whether these indisputable potential impacts may be "significant." *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059, 1090 (N.D. Cal. 2007).

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as well as administrative orders documenting these violations. *See* Mot. TRO Prelim. Inj. at 4 n. 8-5, Ex. 24; *see also* Decls. of Tonja Runnels, ECF No. 13 (unable to go outside because of stench of plant, seeing blood spills and animal parts concerned for loss of property values), and Yolanda Salazar, ECF No. 13 (Fort Worth, Texas resident unable to go outside for activities because of stench), Ex. 27.

[6] "For ten years after Ricardo De Los Santos took over Valley Meat, the company repeatedly failed to comply with the rules and conditions of its discharge permit, failing to submit monitoring reports, pumping manifests, groundwater sampling reports, wastewater sampling reports, and reports on the volume of wastewater discharge, and failed to protect the surrounding land by closing out its existing clay and manure lined lagoon. Further, in 2009, Valley Meat simply let its discharge permit expire and kept operating its cow slaughter facility in violation of New Mexico law." Ltr. from Bruce Wagman to Hon. Thomas J. Vilsack *Re: Response to the New Mexico Farm and Livestock Bureau's May 10, 2013 Letter* (May 31, 2013) at AR4270 n.1., Ex. 29.

[7] USDA's original CE Memo for RNM also included a complete falsehood – that RNM would be depositing its wastewater in Gallatin, Tennessee, not Gallatin, Missouri. RNM CE Memo at 10, ECF No. 154-1, Ex. 30.

Moreover, the Agency's argument that there will be no significant environmental effects from horse slaughter operations because it has implemented various measures to address these impacts, *see* Fed. Mem. at 14-15 – including the implementation of the residue testing plan embodied in the Directive – actually proves Appellants' claims. The Agency essentially *admits* the presence of potential environmental impacts, but discounts them and denies the need for an EA or EIS because of non-NEPA procedures that it claims will mitigate the potential harms. *See id.* at 18-21.[8] This is circular reasoning at its finest.

It is the very purpose of an EA or EIS to evaluate impacts and potential mitigation measures, and the Agency cannot avoid such an evaluation by simply asserting that it has everything under control by other means. By choosing to conduct its environmental review outside the NEPA process, the Agency has short-circuited the public disclosure process that is so central to NEPA's purposes. *See N.M. ex rel. Richardson v. B.L.M.*, 565 F.3d 683, 703 (10th Cir. 2009) ("By focusing both Agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decisionmaking by agencies and allows the political process to check those decisions." (citing cases)).

Accordingly, Appellants are likely to prevail on their claim that the Agency must "consider environmentally significant aspects of [the] proposed action[s]" in an EA or EIS, to ensure that the public can participate in that process. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1162 (10th Cir. 2002).

II. THE BALANCE OF THE EQUITIES FAVORS AN INJUNCTION PENDING APPEAL.

A minor delay in the start-up of horse slaughter during this appeal, with no domestic horse slaughter occurring since 2006, is warranted in light of NEPA's primary purpose of requiring all federal agencies to analyze and publicly disclose environmental impacts of

[8] *See also* VM CE Memo at AR2471, Ex. 10 (claiming to have "addressed this risk by implementing a new drug residue testing program that will screen the meat of slaughtered horses for drug residues before the meat is allowed to enter the food supply chain").

their proposals *before* implementing a final decision that could have environmental effects. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-49 (1989). If an injunction fails to issue, then horse slaughter will commence, and even if the Agency's decisions are ultimately set aside, it will be too late to undo the harm. *See Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448–49 (10th Cir. 1996) ("The injury of an increased risk of harm due to an agency's uninformed decision is precisely the type of injury [NEPA] was designed to prevent.").

A. Appellants Will Be Irreparably Harmed if an Injunction Is Denied.

Despite the Agency's efforts to belittle the named individual Appellants' interests – both here and in the decisionmaking process – the neighbors of these facilities will suffer irreparable environmental, recreational, and aesthetic harm if Appellees' inspections are not enjoined, because they will be unable to continue their normal personal and family recreational activities of fishing and camping in and on nearby waterways due to supportable fears of contamination of the waterways from horse slaughter byproducts, including drug residues.[9] *See Davis v. Mineta*, 302 F.3d 1104, 1115-16 (10th Cir. 2002) (irreparable harm where highway project would "impair the aesthetic attributes associated with the [parkway] and [would] disrupt the natural setting and feeling of the park" (internal quotation mark omitted)); *Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1197 (D. Or. 2012) (irreparable harm to plaintiffs who use and enjoy the area for its aesthetics and recreation and for observing wildlife, and because action will degrade water quality and harm fish and wildlife). The test for irreparable harm is met by demonstrating a significant likelihood of harm that cannot be compensated by monetary damages. *Flowers*, 321 F.3d at 1258. That is more than adequately met here.

[9] *See* Smith Decl., ¶¶ 3-7, Trahan Decl., ¶¶ 6-7, Cordova Decl., ¶¶ 6-8, and Sink Decl., ¶¶ 7-8, Ex. 20.

Appellees do not seriously deny the extensive harms that resulted from previous horse slaughter operations. Nor could they, since the potential harms alleged in the individual Appellants' declarations – and the actual harms that befell the residents of the communities where previous horse slaughterhouses operated, *see supra* n. 8; Mot. for TRO and Prelim. Inj. at 4 n.8, 5 n.11, Ex. 24 – are exactly the kinds of harms that courts have repeatedly found to be irreparable. *See Davis*, 302 F.3d at 1115-16; *M.R. v. Dreyfus*, 697 F. 3d 706, 732-33 (9th Cir. 2012) (finding irreparable injury where challenged activity had a significant likelihood of impacting plaintiffs' mental and physical health); *Bowen v. Consol. Elec. Distribs., Inc. Emp. Welfare Ben. Plan*, 461 F. Supp. 2d 1179, 1183-84 (C.D. Cal. 2006) (risk of irreparable harm demonstrated where plaintiff's health appeared to be at risk if defendant's action continued).

Instead, Appellees make a cursory attempt to dismiss the individual Appellants' harms as "speculative" and "unsubstantiated" – apparently because the harm has not yet occurred or is not mathematically certain to occur. *See* Fed. Mem. at 18-19. But an injury "is not speculative simply because it is not certain to occur." *Flowers*, 321 F.3d at 1258. The entire reason why a party seeks an injunction is to ensure that the risk of such harm is actually studied in a NEPA analysis *before* it occurs. *Davis*, 302 F.3d at 1114-15 (recognizing the difficulty of "stopping a bureaucratic steamroller").

As this Court has noted, "Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment." *Davis*, 302 F.3d at 1114-15. An injunction is necessary here because once horse slaughter has begun, there will be nothing this Court or the parties can do to undo the consequences of Appellees' unlawful actions. Indeed, "[t]he injury of an increased risk of harm due to an agency's uninformed decision is *precisely the type of injury NEPA was designed to prevent*." *See Lucero*, 102 F.3d at 448-49 (emphasis added); *id.*

B. Appellees Will Not Be Irreparably Harmed by an Injunction.

Appellees bear no risk of irreparable harm should the Court perpetuate the status quo for a few more months. Notably, the federal Appellees do not even claim to be harmed in any way should inspections be enjoined temporarily. Nor can any alleged loss of potential profits by any of the grantees override the irreparable harm threatening Appellants and the environment. *See Davis*, 302 F.3d at 1116 (potential environmental harm outweighs even "significant financial penalties"); *Colorado Wild v. U.S. Forest Service*, 299 F. Supp. 2d 1184, 1190 (D. Colo. 2004) ("Plaintiff's injury is irreparable while the Forest Service's injury is primarily economic.").

In contrast to the documented adverse environmental impacts of horse slaughter, the financial harms claimed by the prospective horse slaughter plant owners truly are speculative. *See* Intervenor RT's Mem. at 9-11; Intervenor VM and RNM's Mem. at 9-12. Because the status quo for the last six years has been no domestic horse slaughter, and because Intervenors have *never* engaged in horse slaughter, there is no viable basis for assessing what profit, if any, these plants might make over the next few months. Intervenors willingly entered into a highly controversial business. Congress has repeatedly defunded inspections for slaughter, and is poised to defund it again in the near future.[10] Several states have outlawed the practice entirely, and others (including New Mexico) have declared it a violation of existing food safety laws. In this hostile business environment, it is a stretch indeed for Intervenors to claim that their financial losses would be caused by an injunction in this Court, as opposed to their own business decisions. *See Davis*, 302 F.3d at 1116 (discounting "self-inflicted" harms in balancing inquiry); *Bad Ass Coffee Co. of Hawaii, Inc. v. JH Nterprises, LLC*, 636 F. Supp. 2d 1237, 1251 (D. Utah 2009) ("[W]hen a party knowingly takes actions that increase the potential for harm if an injunction is ordered . . . , courts give those harms little weight . . ." (citation omitted)).

[10] Congress may ban the entire horse slaughter industry in the near future. *See* Safeguard American Food Exports (SAFE) Act, S. 541/H.R. 1094.

C. The Public Interest Weighs in Favor of an Injunction Pending Appeal.

Appellees incorrectly attempt to frame the public interest in terms of the FMIA, rather than NEPA, and recycle their misguided argument that the FMIA "mandate[s]" FSIS to conduct inspections. Fed. Mem. at 20. As explained above, the FMIA does not trump NEPA, and NEPA embodies the public interest. *See Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1338 n.9 (10th Cir. 1982) ("Congress has chosen the procedural protections of NEPA to serve the public's interest in protecting the environment."); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (recognizing "public interest in careful consideration of environmental impacts before major federal projects go forward" and in "suspending such projects until that consideration occurs" (internal quotation omitted)); *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998).

The vindication of the public interest driving NEPA is particularly compelling here, where the welfare and quality of life in numerous communities hang in the balance. While there is admittedly a public interest in the safety and inspection of meat products, there is no requirement that the Agency grant the inspections, and there is certainly no requirement that it do so right now, prior to undertaking serious environmental review. The status quo for the past six years has been no horse slaughter, and the public interest favors issuing an injunction to preserve that status quo for the life of this case. *See Davis*, 302 F.3d at 1116 ("[T]he proposed highway construction has not yet begun, and so we are not confronted with equities in favor of completion of a partially-completed project.").[11]

[11] Contrary to Intervenors' claims, there is no requirement for a bond in this proceeding. *See* Fed. R. App. P. 8(a)(2)(E) ("The court *may* condition relief on a party's filing a bond or other appropriate security . . . ." (emphasis added)). And even when a court rule provides explicitly for a bond, *see* Fed. R. Civ. P. 65(c), courts have consistently waived that bond or imposed only a nominal bond in public interest environmental litigation. *See Davis*, 302 F.3d at 1126 ("Ordinarily, where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered.") This Court has even greater discretion pursuant to Fed. R. App. P. 8(a)(2)(E) to decline to impose a bond on the individual Appellants, the non-profits, and the State of New Mexico where

III. CONCLUSION

For all of these reasons, Appellants respectfully request the Court enter a temporary injunction so that the status quo can be maintained pending appellate review.

Dated: November 8, 2013

Respectfully submitted,

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environmental and public interests are at stake. Appellants respectfully request that additional briefing be allowed on the issue if the Court is considering requiring a bond.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that pursuant to Fed. R. App. P. 25(a)(5), all required privacy redactions for the foregoing reply memorandum have been made. I further certify that this reply memorandum has been scanned for viruses using McAfee VirusScan Enterprise version number 8.8.0.777 and, according to that program, is free of viruses.

Dated: November 8, 2013

s/ Sondra A. Hemeryck
SONDRA A. HEMERYCK
SCHIFF HARDIN LLP

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

I further certify that on November 8, 2013, I served the foregoing reply memorandum via the CM/ECF system on all counsel of record.

s/ Sondra A. Hemeryck
SONDRA A. HEMERYCK
SCHIFF HARDIN LLP

EXHIBIT 21

2000 WL 33986949 (C.A.9) (Appellate Brief)
United States Court of Appeals,
Ninth Circuit.

Howard KLUVER, Appellant,
v.
G. H. SHEETS, et al., Appellees.

No. 00-35407.
November 7, 2000.

D.C. No. CV-99-8-H-CCL District of Montana (Helena)
On Appeal from the United States District Court for the District of Montana, Helena Division, The Honorable Charles C. Lovell Presiding

Joint Brief of Appellees

Appearances: * Thomas G. Bowe, Assistant Attorney General, Agency Legal Services Bureau, P.O. Box 201401, Helena, MT 59620-1401, (406) 444-2026, Attorney for State Appellees.

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*1 *JURISDICTIONAL STATEMENT*

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

The judgment was entered by the district court pursuant to Fed. R. Civ. P. 58 on March 31, 2000. The notice of appeal was filed on April 28, 2000, and the appeal is timely under Fed. R. App. P. 4(a)(1). Jurisdiction of this Court exists under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the District Court correctly ruled that there was no genuine issue of material fact and that State and Federal Defendants were entitled to summary judgment as a matter of law because Kluver failed to allege clearly established constitutional violations and because the State and Federal Defendants were entitled to qualified immunity.

2. Whether the District Court properly exercised its discretion in denying Plaintiff's motion under Fed. R. Civ. P. *56(f)* to continue Plaintiff's response to Defendants' summary judgment motions so that Plaintiff could conduct discovery.

3. Whether the District Court properly denied Plaintiff's motion to file a second amended complaint because the motion to amend was untimely and because the proposed amendment would also have been subject to dismissal as a matter of law.

*2 *STATEMENT OF THE CASE*

The initial complaint was filed on February 1, 1999. Excerpt of Record (hereafter “ER”) Tab 29 (CR 1). Plaintiff (“Kluver”) named as defendants the Montana Department of Livestock, numerous present and former members of the Montana Board of Livestock, two former officials of the Department of Livestock, two officials of the United States Department of Agriculture (USDA) (Van Blargan and Thompson), and two fictitious defendants. The individuals were sued in both their individual and official capacities. Kluver claimed civil rights violations under 42 U.S.C. §§ 1983 and 1985(3) and *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The five counts of the complaint claimed denial of procedural due process, taking of property without compensation, denial of equal protection, denial of freedom of association/ right to petition for grievances, and conspiracy to deprive of civil rights.

The original complaint was served only on the Montana officials in their official capacities and upon the Montana Department of Livestock; it was never served on the Federal Defendants in any capacity. The Montana Department of Livestock and the present and former Montana officials in their official capacities moved to dismiss on grounds of Eleventh Amendment immunity, the settled law that state agencies and state officials in their official capacities are not persons ***3** amenable to suit for damages under 42 U.S.C. §§ 1983 and 1985(3), and on the ground that Kluver was not a member of a class protected by § 1985(3).

On April 20, 1999, while the motion to dismiss the original complaint was pending, Kluver filed his first amended complaint. ER Tab 29 (CR 14). The caption of the amended complaint no longer named the Montana Department of Livestock as a Defendant. However, the body of the amended complaint referred to the "Defendant Board of Livestock" and "Defendant Board." ER Tab 1, ¶¶ 23, 32, 33. Kluver continued to name as defendants various former and present state officials in their individual and official capacities and named three additional state officials. Kluver no longer named USDA official Thompson but did name for the first time USDA official Hoffman in his individual and official capacity. However, the body of the amended complaint still referred to "Defendant Thompson." ER Tab 1, ¶ 28.

As amended, the complaint still asserted in five counts the same theories of liability. The state officials, in their official capacities, promptly moved to dismiss for the same reasons they had moved to dismiss the original complaint. ER Tab 29 (CR 18). Subsequently, Kluver began to accomplish personal service upon most of the individually-named Defendants. In June 1999, the State Defendants filed their answer and a motion for summary judgment. ER Tab 29 (CR 41, 42); Supplemental Excerpts of Record (hereafter "SER") 1-9. In July ***4** 1999, the Federal Defendants filed their answer and a motion for summary judgment. ER Tab 29 (CR 48, 49); SER 54-65. The State and Federal Defendants raised a statute of limitations defense and the defense of qualified immunity, and argued that Kluver had failed to allege any violations of constitutional rights. ER 29 (CR 44, 50).

Kluver obtained extensions of time to respond to the summary judgment motions. ER Tab 29 (CR 46-47, 52-53, 55-56). Nevertheless, when the time for filing his brief in opposition to the summary judgment motions arrived, Kluver filed a motion to continue the response until he conducted discovery. ER Tab 29 (CR 57). State and Federal Defendants opposed this motion. ER Tab 29 (CR 59, 61). As ordered by the district court (ER Tab 10), all parties filed prediscovery disclosure statements and preliminary pretrial statements. ER Tab 29 (CR 54, 63-65, 67). The district court held a preliminary pretrial conference on October 6, 1999, and issued an order requiring Kluver to respond to the pending summary judgment motions and scheduled the pending motions for hearing. ER Tab 11; ER Tab 29 (CR 68-69). Paragraph 3 of the order provides, "The court will set down a schedule for discovery, if warranted, following decision on the pending motions." ER Tab 11.

In his brief opposing the State and Federal Defendants' motions for summary judgment, Kluver abandoned his claims based upon the theories of ***5** unconstitutional takings, denial of freedom of association/right to petition for grievances, and conspiracy to violate his civil rights. ER Tab 29 (CR 75). Thus, all that remained were Kluver's claims under procedural due process and equal protection theories. The district court heard argument on the pending motions on December 3, 1999, and took them under advisement. ER Tab 29 (CR 85).

Two months later, while the State and Federal Defendants' motions for summary judgment were still pending decision by the district court, Kluver filed a motion seeking to file a second amended complaint. ER Tab 23-24, 29 (CR 86-87). Kluver's proposed second amended complaint maintained his claims under procedural due process and equal protection theories and added a claim of retaliation against Kluver because of his exercise of First Amendment rights. Four state officials who had been named as defendants in the first amended complaint were not named in the second amended complaint and the Federal Defendants were named only in their individual capacity. ER Tab 23. Both the State and Federal Defendants filed briefs opposing Kluver's motion. ER 29 (CR 88-89).

On March 31, 2000, the district court denied Kluver's motion to amend his first amended complaint and granted the State and Federal Defendants' motions for summary judgment. ER Tab 26, 27, 29 (CR 90-91).

***6** Kluver appeals the denial of his motion under Fed. R.Civ.P. 56(f), the grant of summary judgment in favor of the State and Federal Defendants, and the denial of his motion to amend his first amended complaint.

STATEMENT OF FACTS

Kluver's suit arises from his application dated September 23, 1995, for state inspection services at a meat packing plant in Laurel, Montana. ER Tab 4. However, to understand the claims and defenses of the parties and the relationship of the State and

Federal Defendants, it is necessary to discuss the relationship of federal and state laws providing for meat inspection services, and previous events involving Kluver and his corporation, the Yellowstone Meat Company ("YMC").

I. PERTINENT FEDERAL AND STATE LAWS AND RULES

The Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §§ 601 to 680, contains a Congressional statement of findings that includes the following:

> It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged.

21 U.S.C. § 602.

The FMIA requires the Secretary of Agriculture ("Secretary") or his delegate to cause the inspection of certain livestock, their carcasses, and meat products that are to be used in commerce (21 U.S.C. §§ 603 to 606), and of ***7** facilities that process meat for distribution in commerce (21 U.S.C. § 608). The Secretary may refuse to provide inspection services (or withdraw previously granted inspection services) when the Secretary determines that an applicant for, or recipient of, such services is unfit to engage in any business requiring inspection under the FMIA. An applicant or recipient may be considered unfit to receive federal inspection services when the applicant or recipient, or anyone "responsibly connected" with the applicant or recipient, has been convicted of any felony. Similarly, if an applicant or anyone "responsibly connected" with the applicant has been convicted of more than one violation of any law, other than a felony, based upon the acquiring, handling, or distribution of unwholesome, mislabeled, or deceptively packaged food, or upon fraud in connection with transactions in food, they may be considered unfit to receive federal inspection services. 21 U.S.C. § 671.

Under 21 U.S.C. § 661, the Secretary is authorized to cooperate with an appropriate state agency to develop and administer a state inspection program in any state which has enacted a state meat inspection law that imposes inspection and sanitation requirements that are "at least equal" to those imposed by the FMIA. 21 U.S.C. § 661(a)(1). The State of Montana has enacted such a state meat inspection law, the Meat and Poultry Inspection Act ("MPIA"). Mont. Code Ann. §§ 81-9-216 to -220 and -226 to -236.

***8** The MPIA establishes a state meat inspection program that is supervised by the chief meat inspector, who is appointed by the Board of Livestock ("Board"). Mont. Code Ann. § 81-9-226. A person or entity seeking to process meat may apply to the Board for state meat inspection service. Mont. Code Ann. § 81-9-227(1). In accordance with the cooperative Federal/State arrangement, Montana law directs the Board to "adopt rules consistent with the requirements of the rules of the [USDA] governing meat inspection." Mont. Code Ann. § 81-9-220. In response to that direction, the Board promulgated Mont. Admin. R. 32.6.712, which incorporates many of the Secretary's rules under the FMIA, including 9 C.F.R. § 304, which governs the granting or refusal of applications for inspection services. In addition, the Board is responsible for cooperating with the Secretary in receiving assistance in developing the state program. Mont. Code Ann. § 81-9-233(2).

Because the FMIA requires that the state program impose requirements that are "at least equal" to those imposed by the FMIA (21 U.S.C. § 661(a)(1)), and because USDA officials are authorized to cooperate with a state in developing and administering the state's meat inspection program (9 C.F.R. § 321.1(a)), and because Montana has incorporated many of the Secretary's rules (Mont. Admin. R. 32.6.712), a working relationship exists between the federal and state officials who administer the meat inspection program.

***9 II. HISTORICAL BACKGROUND**

Mr. Rudy Stanko ("Stanko") was convicted in federal court in 1981 of conspiring to violate the FMIA, a felony. In 1984, while on probation, Stanko was again convicted of the felony of conspiring to violate the FMIA. In 1993 Stanko was convicted under Montana law for buying cattle without a dealer's license. In 1994 Stanko was convicted under Montana law for acting as an agent for a livestock dealer without a license and for exporting cattle without a brand inspection. SER 12, 25.

In August 1992, Stanko leased the meat packing facility in Laurel, Montana. In June 1993, the month that Kluver's corporation, YMC, was incorporated, Stanko assigned the lease of the Laurel facility to YMC. YMC then applied for federal meat inspection services for the Laurel facility. SER 13. Federal Defendant Van Blargan reviewed YMC's application. During a telephone conversation with Kluver in September 1993, Van Blargan asked about Stanko's involvement with YMC. Kluver said that Stanko was a consultant who would buy cattle for YMC and advise on its operations. Van Blargan opined that Stanko was responsibly connected to YMC and that YMC's application for inspection services likely would be denied. Later, YMC withdrew its application for federal meat inspection services for the Laurel facility. SER 13-14.

***10** In December 1993, YMC leased a meat processing facility in Forsyth, Montana, known as the Modem Locker Plant from its owner, James Wilson ("Wilson"). Wilson had allowed his prior grant of federal inspection services to lapse. However, in January 1994, Wilson reapplied for federal inspection services and the application was granted. The lease of the plant by YMC was not disclosed on the application. SER 14, 25.

In May 1994, the USDA commenced an administrative action under the FMIA to withdraw federal inspection services from Wilson d/b/a Modem Locker Plant. The complaint named as respondents Wilson, YMC, and Stanko. The basis for the action was that Stanko was responsibly connected to YMC, which was leasing the plant. SER 10. A three-day hearing commenced in Billings, Montana, before Administrative Law Judge ("ALJ") James W. Hunt. YMC was represented during the proceeding by its president, Kluver. SER 11.

In December 1994, ALJ Hunt found that Stanko was responsibly connected with YMC, and that Wilson d/b/a Modern Locker Plant, YMC, and Stanko were unfit to engage in any business requiring inspection service under the FMIA, and ordered that inspection services be indefinitely withdrawn from Wilson d/b/a Modem Locker Plant. SER 26-27. Respondents appealed the decision to the USDA Judicial Officer, who affirmed the ALJ's decision in April 1995. ER Tab 3, ¶ 4d; *In re Wilson*, 54 Agric. Dec. 141 (1995). A petition for review was filed ***11** with the Court of Appeals for the Ninth Circuit. This Court denied the petition for review of the USDA decision on December 20, 1996. *Wilson v. United States Dep't of Agriculture*, No. 95-70403 (9th Cir. Dec. 20, 1996) (SER 28-33).

The ALJ found that "Kluver, by his own admission, is not very knowledgeable about the cattle slaughtering and meat packing business," (SER 11), and that Kluver described Stanko as a "consultant" to YMC who comes to the office of YMC every day and without whom YMC could not operate. SER 15-16. The ALJ determined that Brasel, who was "the titular plant manager" of the Modem Locker Plant, had been hired by Stanko to work for YMC, and had been made a vice president of YMC by Kluver. Brasel testified that Stanko directed operations at the Modern Locker Plant and that he talked with Stanko almost daily. SER 15. Stanko visited Modem Locker Plant two or three times a week, but generally directed operations by telephone from his office at YMC. SER 16.

The ALJ stated, "The evidence in this case is overwhelming that Stanko exercises extensive managerial authority for Yellowstone [YMC] at Modem Locker: He hires workers, including the plant manager; he determines their pay; he buys and sells cattle; he sells the plant's products; he negotiates agreements; he arranges for product transportation; he signs checks and documents on Yellowstone's [YMC's] behalf; and, though he does it mostly by phone, he directs operations at the Modem Locker plant." SER 19.

***12** The ALJ described Stanko's felony convictions as "serious offenses that directly impeded the inspection process," (SER 22), and stated that "the recent conduct of all the respondents in this case--Stanko, Yellowstone [YMC], and Wilson--also does little to inspire confidence that any of them have demonstrated the integrity to be trusted to comply with the inspection standards

required under the [FMIA] to insure that the public's health and safety is not endangered." SER 22. The ALJ characterized the conduct of YMC "as a deliberate attempt to circumvent FSIS [Food Safety and Inspection Service, USDA] and the regulations by surreptitiously entering into a lease arrangement." SER 23. The ALJ declared, "Respondents Yellowstone [YMC], Stanko, and Wilson have offered no explanation or justification for their devious actions." SER 23. The ALJ concluded, "Respondents ... are unfit to engage in any business requiring inspection service under [FMIA]." SER 26.

In September 1995, when Kluver applied for state meat inspection services for the Laurel meat packing plant, State Defendant Sheets, D.V.M., the Chief Meat Inspector, was knowledgeable of these USDA proceedings. ER Tab 3, ¶ 4. While Kluver's application did not mention YMC or Stanko or any other corporation or person as responsibly connected with the proposed meat packing operation, Dr. Sheets was aware of the prior relationship between Kluver, YMC, and Stanko. ER Tab 3, ¶¶ 4a, 5. In fact, Kluver and Stanko had previously met with Dr. Sheets ***13** seeking meat inspection services for YMC at the same location for which Kluver was now seeking such services. ER Tab 5.

Dr. Sheets caused a copy of Kluver's application to be sent to the Federal Defendants, and Dr. Sheets consulted with the Federal Defendants concerning Kluver's application for state meat inspection services and the USDA's administrative determination regarding unfitness and the responsible connection of Stanko to Kluver's plant. SER 60-61, ¶¶ 27, 30. Such consultation was explicitly authorized by law and rule. Mont. Code Ann. § 81-9-233(2); 9 C.F.R. § 321.1(a).

Dr. Sheets, cognizant of his responsibility to protect the public health, believed he could not ignore the prior USDA decision. As a result, on October 27, 1995, he sent a letter to Kluver requesting additional information. ER Tab 3, ¶ 4; Tab 5. Dr. Sheets had specific authority under state law to require this information. Mont. Code Ann. § 81-9-227(1)(e). Nevertheless, Kluver responded by accusing Dr. Sheets of stonewalling his application and refused to provide much of the requested information. Kluver questioned the definition of a "responsibly connected person" and asserted that in his view, he is the only such person. ER Tab 16. By letter dated January 29, 1996, Dr. Sheets again wrote to Kluver and explained what information was still required in order to make the application complete. Dr. Sheets requested satisfactory answers to whether Stanko would be responsibly connected to the operation of the Laurel plant; the name ***14** under which the business would acquire permits and operate; more specific information about plant operating hours; and whether Kluver, who listed his home address as Pompano Beach, Florida, intended to serve as manager of the processing plant. ER Tab 7. Kluver did not provide the information. ER Tab 3, ¶¶ 9-11.

Kluver and Stanko addressed the meeting of the Board of Livestock held in July 1996. SER 37, ¶ 11; 40-41. Kluver requested that the Board approve Stanko's involvement in the operation of a meat packing facility. The Board requested advice from its legal counsel and denied the request at its meeting in September 1996. SER 37, ¶¶ 11-12; 40-47.

In July 1997, Kluver's attorney wrote a letter to Dr. Sheets requesting that the application be granted or denied. ER Tab 3, ¶ 13. The application, however, was still not complete and the Department of Livestock, through its counsel, determined that no action could be taken until the application was completed. SER 34.

Dr. Sheets retired in October 1997. ER Tab 3, ¶ 2.

In January 1998, an attorney representing Kluver addressed the Board at its meeting (SER 37, ¶ 13), and requested that the Board accept or deny Kluver's application (SER 48-50). At its meeting in March 1998, the Board responded to Kluver's attorney by requesting that Kluver submit a new application. SER 37-38, ***15** ¶ 14; 51-52. Defendant Petersen, the Board's executive officer, sent a letter to Kluver's attorney, explaining "that it would be more appropriate under the circumstances for Mr. Kluver to re-apply because the incomplete application has been on file for a period of time and there may have been serious changes which would make the original application out-of-date." The Board requested a list of persons responsibly connected to the proposed operation and a description of their duties. ER Tab 19. By letter dated July 5, 1998, Kluver informed Petersen, "I see no reason to submit yet another application." SER 38, ¶ 15; 53.

In June 1998, Kluver's attorney filed a petition with the Montana Supreme Court as attorney for Stanko. The petition asked the Court to assume original jurisdiction of a declaratory judgment action and named the Department of Livestock, the Board, and Board members as respondents. The petition alleged that the Board would not grant Kluver a license to operate a meat packing plant if Stanko is responsibly connected to the business. On July 21, 1998, the Montana Supreme Court dismissed the petition for not satisfying a criterion for exercising original jurisdiction. SER 38, ¶¶ 16-17.

Kluver's initial complaint in federal court in this matter was filed on February 1, 1999. ER Tab 29 (CR 1).

***16** *SUMMARY OF THE ARGUMENT*

The legal principles that apply in this case are well established. The district court correctly granted the Defendants' motions for summary judgment because they had qualified immunity from suit. The structure for analyzing qualified immunity issues requires a three-part test. First, the plaintiff must satisfy the threshold requirement of alleging the violation of a constitutional or other federally-protected right. Second, the plaintiff must prove that the contours of the constitutional right were clearly established at the time of the challenged conduct. Third, the plaintiff must set forth specific facts and evidence from which the court can conclude that a reasonable official, given the information possessed by the defendant at the time, would have understood that the alleged conduct violated the plaintiff's clearly established right. Kluver failed to allege facts which would show any violations of clearly established constitutional rights, and he failed to provide any cases which would show that the actions of the Federal and State Defendants were not objectively reasonable and lawful under the circumstances of this case.

Similarly, the district court did not abuse its discretion in refusing to stay its ruling on the summary judgment motion so that Kluver could conduct discovery. In the context of actions where defendants have raised their qualified immunity as a bar to suit, the law concerning discovery is well-established. The Supreme ***17** Court explicitly formulated qualified immunity as an objective standard to permit resolution of claims on summary judgment before discovery was allowed. Unless the complaint alleges, in non-conclusory terms, actions which a reasonable person could not have believed lawful and which the defendant disputes having taken, discovery prior to the resolution of the claim to qualified immunity is inappropriate.

The district court did not abuse its discretion in denying Kluver's motion to file a second amended complaint. The district court correctly found that Kluver provided no new facts but rather simply a new theory: retaliation for the exercise of First Amendment rights. The facts relied upon by Kluver for his allegation of retaliation were all facts of which he was aware prior to the filing of the original complaint, and Kluver offered no explanation as to why this theory could not have been brought in the original complaint. Additionally, the district court correctly found that the proposed amendments to the first amended complaint would be subject to dismissal or summary judgment in favor of the State and Federal Defendants and therefore would be futile.

18** ***ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON BEHALF OF STATE AND FEDERAL DEFENDANTS ON THE BASIS OF QUALIFIED IMMUNITY.

Kluver argues on appeal that the district court erred when it determined that there were no issues of material fact and that judgment should be entered on behalf of all the State and Federal Defendants. Kluver argues that his due process rights were violated when he was not provided a hearing prior to the requests for additional information by Dr. Sheets. Kluver also argues that his rights to equal protection were violated when additional information was requested from him and not from other applicants for state inspection services. Appellant's Br. at 35-36.

A. *Standard of Review*

A grant of summary judgment is reviewed de novo. *Eg., Margolis v. Ryan,* 140 F.3d 850, 852 (9th Cir. 1998). The review of the Court of Appeals is governed by the same standard used by the district court under Fed. R.Civ.P. 56(c). *E.g., Jesinger v. Nevada Fed. Credit Union,* 24 F.3d 1127, 1130 (9th Cir. 1994). The appellate court determines whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *Id.* This same standard applies to a review of a district court's discussion regarding qualified immunity in the context of a claim alleging violations of constitutional rights. *Devereaux v. Perez,* 218 F.3d 1045, 1051 (9th Cir. 2000).

19 B. *The District Court Correctly Found That Kluver Failed to Allege Violations of Clearly Established Constitutional Rights and the State and Federal Defendants Were Entitled to Qualified Immunity.

Although this case involves suits under 42 U.S.C. § 1983 against state officials and a *Bivens* action against federal officials, "the qualified immunity analysis is identical under either cause of action." *Wilson v. Layne,* 526 U.S. 603, 609 (1999). The Supreme Court established qualified immunity in actions for damages brought against government employees under § 1983 in the case of *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). As qualified immunity was initially described by the Court, government employees or officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Even though a right may be clearly established as a general principle, defendants could still assert qualified immunity if a reasonable person under the same circumstances would not have known that his/her conduct was illegal. *Id.* at 818-19. A government official is immune unless no reasonably competent official in the defendant's position would believe the conduct to be constitutional. *Malley v. Briggs,* 475 U.S. 335, 341 (1986). Hence, the issue is whether the law was clear in relation to the specific facts confronting the defendant when he/she acted. ***20** *Anderson v. Creighton,* 483 U.S. 635, 639-41 (1987). The intent of qualified immunity is to provide officials with the ability to anticipate when their conduct may give rise to liability. *Id.* at 646.
The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law."

Hunter v. Bryant, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley v. Briggs,* 475 U.S. 335, at 343, 341 (1986)).

The Supreme Court refined the structure for analyzing qualified immunity issues by setting forth a three-part test in *Siegert v. Gilley,* 500 U.S. 226 (1991). First, the plaintiff must satisfy the threshold requirement of alleging the violation of a constitutional or other federally-protected right. Second, the plaintiff must prove that the contours of the constitutional right were clearly established at the time of the challenged conduct. Third, the plaintiff must set forth specific facts and evidence from which the court can conclude that a reasonable official, given the information possessed by the defendant at the time, would have understood that the alleged conduct violated the plaintiff's clearly established right. *Accord Romero v. Kitsap County,* 931 F.2d 624, 627 (9th Cir. 1991).

The plaintiff bears the burden of proving the existence of a clearly established right at the time of the allegedly impermissible conduct. *E.g., Maraziti v. First Interstate Bank,* 953 F.2d 520, 523 (9th Cir. 1992). A right is clearly established if the only reasonable conclusion from binding authority was ***21** that the right existed. *Blueford v. Prunty,* 108 F.3d 251, 255 (9th Cir. 1997). Whether the law was clearly established is a question of law for the Court to decide. *Elder v. Holloway,* 510 U.S. 510, 516 (1994); *Mendoza v. Block,* 27 F.3d 1357, 1360-61 (9th Cir. 1994). That is, the court asks whether a reasonable official could have believed his/her conduct to be lawful, in light of clearly established law and the circumstances surrounding the particular incident. *Wilson v. Layne,* 526 U.S. 603, 615 (1999).

Abstract, generalized allegations about alleged violations of federal rights are insufficient to state a claim that can overcome the bar of qualified immunity:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This

> is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citation omitted). Therefore, a complaint may be dismissed or judgment rendered in favor of defendants where the plaintiff cites no case law to support the contention that the conduct of the defendants violated clearly established constitutional or statutory rights, or cites no case where the defendant had been held liable on similar facts. *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

***22** If, however, the plaintiff proves the existence of a clearly established right, then "the court should ask whether the [defendants] acted reasonably under settled law in the circumstances." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam). It is only after the court first determines that a constitutional violation has occurred that this second step of inquiry is appropriate. *Anderson v. Creighton*, 438 U.S. 635, 640-41 (1987).

In the particularized and relevant sense required by *Anderson v. Creighton*, the district court correctly found that Kluver failed to allege the violation of a clearly established federally-protected right. The district court was also correct in holding that, under the circumstances of this case, it was reasonable for the State and Federal Defendants to have believed that their conduct was lawful. In light of the USDA administrative hearing record (SER 10-27), the suggestion by the Federal Defendants and the decision by the State Defendants to require Kluver to provide additional information was objectively reasonable and not in violation of clearly established law. Therefore, the Defendants are protected by qualified immunity. *Wilson v. Layne*, 526 U.S. 603, 614-18 (1999). Each of these contentions is fully addressed below.

1. Kluver Was Not Denied Procedural Due Process.

Procedural due process is a constitutional right which serves to ensure that a person in jeopardy of the loss of a protected liberty or property right be given ***23** notice of the case against him and the opportunity to be heard on the issues of that case. *Matthews v. Eldridge*, 424 U.S. 319, 348 (1976). Therefore, analysis of a procedural due process claim requires considering whether the plaintiff has been deprived of a protected liberty or property right and, if so, whether the process afforded satisfied constitutional minimums. *Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990); *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972).

Kluver's claim of denial of procedural due process was stated in conclusory terms. ER Tab 1, ¶¶ 41-42. Kluver did not identify the protected interest of which he had been deprived, when the deprivation occurred, or how the process afforded violated constitutional requirements.

> Plaintiff's submissions ... suffer from an excess of allegations, and a glaring absence of any detailed explanations. It is not sufficient to claim that due process has been violated; a party, must state exactly how and when and by whom due process was violated. This burden requires a degree of specificity that Plaintiff's submissions clearly lack.

Smith v. Ricks, 798 F. Supp. 605, 609 (N.D. Cal. 1992) (summary judgment granted for antitrust defendants), *aff'd*, 31 F.3d 1478 (9th Cir. 1994).

Property interests do not have their genesis in the United States Constitution. Property interests are created and defined by existing rules or understandings that stem from such independent sources as state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), For state meat inspection services to ***24** be a property interest, Kluver must "have a legitimate claim of entitlement to" such services. *Id.* Nothing in the Montana MPIA grants Kluver (or anyone else) a clear entitlement to state

inspection services. Under Montana law, "a property right will not exist where there is broad discretion involved in the award of a benefit." *ISC Distrib., Inc. v. Trevor*, 273 Mont. 185, 194, 903 P.2d 170, 175 (1995).

With respect to state meat inspection services, an application must be submitted which includes information required by the chief meat inspector. Mont. Code Ann. § 81-9-227(1)(e). Before inspection services are authorized, the applicant must meet the requirements of the MPIA. Mont. Code Ann. § 81-9-227(2). The Act requires that the Board of Livestock "adopt rules consistent with the requirements of the rules of the U.S. department of agriculture governing meat inspection." Mont. Code Ann. § 81-9-220. The Board has incorporated by reference federal rules on meat inspection. Mont. Admin. R. 32.6.712 (incorporating various rules of the United States Department of Agriculture published in 9 C.F.R.). One of the incorporated rules, 9 C.F.R. § 304.2(b), vests substantial discretion in the chief meat inspector, who "is authorized to grant inspection upon his determination that the applicant and the establishment are eligible therefore and to refuse to grant inspection at any establishment if he determines that it does not meet the requirements."

***25** Plainly, the determination whether an applicant may receive state meat inspection services is a discretionary determination. Thus, applicants for such inspection services have no property right. *Cf. ISC Distrib., Inc. v. Trevor*, 273 Mont. 185, 194-95, 903 P.2d 170, 175 (1995) (business responding to State's request for proposals but not awarded a contract had no property right upon which to base a due process claim under 42 U.S.C. § 1983); *Akhtar v. Van De Wetering*, 197 Mont. 205, 218, 642 P.2d 149, 156 (1982) (denial of tenure to college professor was a discretionary decision that denied no property interest); *Mogan v. City of Harlem*, 238 Mont. 1, 6-7, 775 P.2d 686, 689 (1989) (builder had no property interest in permits for connection to city's water and sewer systems).

While Kluver claimed violation of his rights to due process as to all of the State and Federal Defendants, he has not alleged what specific process was denied him by the Federal Defendants or what property right was denied him by the Federal Defendants. Federal Defendants have no authority under the MPIA either to grant or to deny an application for inspection services. This authority rests in the Montana Board of Livestock. Mont. Code Ann. §81-9-227(2). Therefore, there can be no claim of denial of due process as to the Federal Defendants for failure to grant such an application. The actions of the Federal Defendants in providing assistance to the State Defendants by suggesting additional information which would help to determine who was responsibly connected to the business is ***26** contemplated by law (21 U.S.C. § 661(a); Mont. Code Ann. § 81-9-233(2)) and certainly not in violation of any of Kluver's constitutional rights. Kluver has not argued, nor can he argue, that his rights to due process are somehow violated by the actions of the Federal Defendants.

Kluver's reliance on Montana cases discussing a property right under Montana's Constitution to carry on a business is misplaced. Appellant's Br. at 32. Obviously, a generalized right to carry on a business is not the same as a right to conduct a particular business, such as one requiring state meat inspection services. The Montana Supreme Court recognizes that the right to carry on a business is not absolute. For example, a case cited by Kluver, *Billings Assoc. Plumbing, Heating & Cooling Contractors v. State Bd. of Plumbers*, 184 Mont. 249, 602 P.2d 597 (1979), upheld concurrent regulation of plumbing contractors by the City of Billings and the State of Montana. The court described the regulation of plumbers as "a valid exercise of police power over a lawful business." *Id.*, 184 Mont. at 253, 602 P.2d at 600.

Kluver's argument that he was entitled to a hearing before Dr. Sheets could require him to submit additional information in support of his application for state meat inspection services makes no sense conceptually or legally. Appellant's Br. at 33-34. Kluver was an applicant for state meat inspection services. He did not already have such services for the Laurel plant. Thus, he did not "possess" any ***27** state inspection services of which the state could deprive him. "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972). For this reason, Kluver's reliance on *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989), is misplaced. In that case the plaintiff had a permit which government officials suspended. In contrast, Kluver had no grant of state inspection services. Additionally, the court in *Soranno's Gasco, Inc.* determined that no due process rights were violated when the plaintiff's permits were suspended as adequate procedures were available. *Id.* at 1318.

Even if Kluver had some protected interest in state meat inspection services, he has no constitutional claim unless the state procedures under which the Defendants acted are unconstitutional or state law does not provide an adequate post-deprivation remedy for their conduct. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). Kluver was provided notice and an opportunity to be heard as required by Due Process. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Both letters from Dr. Sheets gave Kluver notice of the reason for the request for additional information. ER Tab 3, ¶¶ 4, 10; Tab 5; Tab 7.

Kluver was given the opportunity to present matters to the Board of Livestock, in person and through counsel. Kluver and Stanko addressed a meeting ***28** of the Board in July 1996. SER 37, ¶ 11; 40-41. Kluver's counsel addressed the Board in January 1998. SER 37, ¶ 13; 48-50. Obviously, due process is not denied simply because the government official does not take the action requested. In addition, Montana's Administrative Procedure Act provided access to state court for review of agency action (and failure to act). Mont. Code Ann. tit. 2, ch. 4, pt. 7; *cf. State ex rel. Great Falls Gas Co. v. Department of Public Serv. Regulation*, 169 Mont. 68, 544 P.2d 815 (1976) (per curiam) (Public Service Commission ordered to act on application for rate increase).

Kluver appears to argue that before Dr. Sheets required additional information from him concerning his application, he should have been provided the same kind of due process which was accorded by the USDA when it filed an administrative complaint to remove federal meat inspection services for Modern Locker Plant. Appellant's Br. at 33-34. While Montana adopted many of the substantive rules promulgated by the Secretary under the FMIA (Mont. Admin. R. 32.6.712), it did not adopt the Secretary's procedural rules (9 C.F.R. pt. 335) as Montana provides this process under the Montana Administrative Procedure Act. Mont. Code Ann. tit. 2, ch. 4, pt. 6. Under 21 U.S.C. § 661(a)(l), a state meat inspection program must impose inspection and sanitation requirements “at least equal” to the federal program. However, the statute does not address the procedures that the state program must follow for requesting information from ***29** applicants for state inspection services. Kluver was not denied any constitutional rights to due process under the facts of this case.

2. Kluver Was Not Denied Equal Protection.

Kluver's equal protection theory is not clearly set forth in his first amended complaint. On the one hand, he avers that his equal protection claim is based upon the additional information requested by Defendant Sheets. Kluver alleges that the “action in insisting that Plaintiff provide the additional information was based solely on the USDA investigation” and that “the facts of that investigation were outdated and irrelevant to the Plaintiffs' [sic] application for a state-licensed meat processing plant.” ER Tab 1, ¶ 30. On the other hand, Plaintiff avers that the rationale for the Defendants' actions is discrimination against Plaintiff because of his friendship with Stanko, who has publicly expressed anti-Semitic sentiments. ER Tab 1, ¶ 35.

The declaration of Dr. Sheets explains that Kluver is unique in that he is the president of a corporation that was found to be unfit for federal inspection services by the USDA. ER Tab 3, ¶¶ 4-7; SER 10-27. Applying the usual framework for Equal Protection analysis shows that Kluver has no claim. To be valid under the Equal Protection Clause of the Fourteenth Amendment, a state action need only have a fair relation to a legitimate public purpose, unless there is invidious discrimination against a suspect class or a burden on the exercise of a fundamental ***30** right. *E.g., Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58 (1988). While the equal protection clause appears only in the Fourteenth Amendment, the Supreme Court has held that the Fifth Amendment Due Process Clause incorporates the principles of equal protection and thus protects against discriminatory legislative classifications by the Federal government as well. See *Adarand Construction. Inc. v. Pena*, 515 U.S. 200, 212-18 (1995).

Montana's Meat and Poultry Inspection Act (Mont. Code Ann. §§ 81-9-216 to - 220 and -226 to -236) is plainly a valid exercise of its police power that is rationally related to the legitimate state purpose of protecting the public health. *E.g., Sligh v. Kirkwood*, 237 U.S. 52, 61 (1915). The request for additional information, as provided for under the MPIA, certainly has a fair relation to a legitimate public purpose.

Additionally, there is no invidious discrimination against a suspect class under the facts of this case. The group consisting of friends of Caucasians with anti-Semitic sentiments (ER Tab 1, ¶ 35) is not a suspect class. *Cf. McCalden v. California Library Ass'n,* 955 F.2d 1214, 1223 (9th Cir. 1992) (group of "Holocaust revisionists" was not a protected class within meaning of 42 U.S.C. § 1985(3)).

Finally, there is no burden on the exercise of a fundamental right. No fundamental right exists to state meat inspection services. *Cf.* ***31** *Plyler v. Doe,* 457 U.S. 202, 217 n.15 (1982) (generally, fundamental rights have source in Constitution).

Kluver ignores his unique circumstances and asserts that he was treated differently from other applicants. Kluver has presented nothing to show that any other applicant had been found to be unfit for federal inspection services. Thus, his equal protection claim fails because there is no unjust discrimination between Kluver and anyone else who is similarly situated. *Cf. Patel v. Penman,* 103 F.3d 868, 875-76 (9th Cir. 1996) (inspection program that led to motel closure could not have violated equal protection rights since similarly situated property owners were inspected).

The affidavit of one of Kluver's attorneys concerning his review of various applications for inspection provides no support for Kluver's equal protection claims. None of the applicants is identified as having been denied federal meat inspection services. The only applicant identified with a felony conviction lists his conviction as for "ASSULT" [sic], which is significantly different from convictions for violations of the FMIA. ER Tab 22, Ex. D.

More fundamentally, Kluver has sued individuals. The affidavit of Kluver's counsel does not identify any Defendant whose signature appears on any of the applications. Examination of the applications attached to the affidavit of Kluver's counsel shows that none of the Defendants signed any of the applications. ER Tab ***32** 22. The application of the only person with a felony conviction is dated "4-16-98." ER Tab 22, Ex. D. State Defendant Dr. Sheets retired in October 1997. ER Tab 3, ¶ 2. State Defendant Dr. Lee did not replace Dr. Sheets as Chief Meat Inspector until June 5, 1998. SER 38, ¶ 18. Neither Dr. Sheets nor Dr. Lee can be faulted for a licensing that occurred during a period of time when neither one of them was the chief meat inspector.

II. THE DISTRICT COURT CORRECTLY DENIED KLUVER'S MOTION, PURSUANT TO FED. R. CIV. P. 56(f), TO STAY A DETERMINATION ON THE STATE AND FEDERAL DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT PENDING DISCOVERY.

Kluver also appeals the district court's denial of his motion to stay a determination on State and Federal Defendants' motions for summary judgment pending the completion of discovery. Kluver argues that he should have been allowed to pursue discovery on the issue of qualified immunity prior to the court's ruling on this issue. Appellant's Br. at 25. As set forth below, the district court's denial of Kluver's Rule 56(f) motion was not an abuse of discretion.

A. *Standard of Review*

The denial of a motion under Fed. R.Civ.P. 56(f) for a continuance of summary judgment pending further discovery is reviewed for an abuse of discretion. *Nidds v. Schindler Elevator Corp.,* 113 F.3d 912, 921 (9th Cir. 1996). The moving party bears the burden of showing how the information sought would ***33** have precluded summary judgment. *E.g., Margolis v. Ryan,* 140 F.3d 850, 853-54 (9th Cir. 1998).

B. *The District Court Correctly Denied the Rule 56(f) Motion Under the Law Governing Discovery in the Context of the Defense of Qualified Immunity.*

In the context of actions where defendants have raised their qualified immunity as a bar to suit, the law concerning discovery is well established. The Supreme Court explicitly formulated qualified immunity as an objective standard to permit resolution of claims on summary judgment before discovery was allowed. In order to defeat the defense of qualified immunity, the plaintiff

must show that the constitutional rights allegedly violated were clearly established at the time of the incident and that the actions of the governmental official were not objectively reasonable under the circumstances. *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). The objective test to determine qualified immunity was developed in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982):

> [W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery....
>
> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.... Until this threshold immunity question is resolved, discovery should not be allowed.

Id. at 817-18 (footnote omitted).

***34** This principle was reaffirmed in *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985), when the Court declared that "[u]nlesses the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery."

> Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits. One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.

Siegert v. Gilley, 500 U.S. 226, 232 (1991).

As stated above, the existence of qualified immunity is framed in terms of objective reasonableness. "A public official is entitled to immunity when his or her conduct is objectively reasonable as measured by reference to law clearly established at the time of the incident in question." *Maraziti v. First Interstate Bank,* 953 F.2d 520, 523 (9th Cir. 1992). "In ruling on qualified immunity, the issue presented is a *question of law:* was defendant's conduct, as set forth in the statement of undisputed material facts, reasonable ... under the law as it existed at the time?" *Tachiquin v. Stowell,* 789 F. Supp. 1512, 1520 (E.D. Cal. 1992). Therefore, unless the complaint alleges, in nonconclusory terms, actions which a reasonable person could not have believed lawful and which the defendant disputes having taken, discovery prior to the resolution of the claim to qualified ***35** immunity is inappropriate. *Anderson v. Creighton,* 483 U.S. 635, 646-47 n.6 (1987).

Kluver has the burden of showing the existence of a constitutional right, that the right was clearly established at the time of the incident, and that reasonable defendants could not have believed their actions were lawful. As illustrated by the Supreme Court's recent observation:

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.

Wilson v. Layne, 526 U.S. 603, 617 (1999). *Accord Maraziti v. First Interstate Bank,* 953 F.2d 520, 523 (1992). Kluver was unable to contradict the material facts that pertain to the State and Federal Defendants' immunity and unable to cite any cases even suggesting that to require additional information from an applicant for state meat inspection services, whose corporation previously was found unfit for federal inspection services, violates any clearly established constitutional right. Under these circumstances, Kluver was not entitled to discovery and the State and Federal Defendants were entitled to summary judgment in their favor.

> If the plaintiff, without the benefit of any discovery, is unable to contradict any of defendant's undisputed material facts, and if those facts establish immunity as a matter of law, the case is over without plaintiff *ever* having the opportunity for discovery.

***36** *Tachiquin v. Stowell,* 789 F. Supp. 1512, 1518 (E.D. Cal. 1992) (emphasis in original).

A district court does not abuse its wide discretion with respect to discovery matters by staying discovery until issues of immunity are resolved. *Little v. City of Seattle,* 863 F.2d 681, 685 (9th Cir. 1988); *cf. Jones v. City & County of Denver,* 854 F.2d 1206, 1211 (10th Cir. 1988) (discovery properly denied where plaintiff failed to show any connection between the information he would seek in discovery and the validity of defendants' qualified immunity). For example, Kluver's counsel averred that she needed to examine State Defendant Sheets about his understanding of the law and his good faith. ER Tab 9, ¶ 6. Such examination would plainly be contrary to established law making qualified immunity a standard of objective legal reasonableness. "The determination of qualified immunity under *Harlow* requires an objective, not subjective, analysis." *Tachiquin v. Stowell,* 789 F. Supp. 1512, 1517 (E.D. Cal. 1992).

Kluver argues that he was disadvantaged by a non-party to the present case, the USDA. Kluver asserts that he was disadvantaged by the "recalcitrant conduct" of the USDA in relation to a request made pursuant to the Freedom of Information Act (FOIA). Appellant's Br. at 25-26. Not only is the FOIA request governed by statutes and regulations particular to such requests and distinct from this action, Kluver's FOIA request was not made until approximately one month after the ***37** original complaint was filed in this matter. ER Tab 25, ¶¶ 4, 9. Additionally, even after the receipt of the requested FOIA materials, Kluver still could provide no facts which would show the violation of any constitutional right.

Kluver also suggests that the local district court rules regarding discovery inhibited his ability to prosecute his case. Appellant's Br. at 24-25. Kluver's discussion of the local district court rules, however, is irrelevant to the question of whether the district court should have allowed any discovery in this matter prior to the determination on the motions for summary judgment. Even had Kluver submitted discovery requests to the State and Federal Defendants, as allowed under the rules, Defendants would have sought an order, based on the law related to the defense of qualified immunity, staying discovery pending the ruling on the motions.

Kluver's Rule 56(f) argument misreads *Anderson v. Creighton,* 483 U.S. 635 (1987). His brief cites *Anderson* in support of his view "that limited discovery shall be allowed and should be tailored to the threshold issue of qualified immunity." Appellant's Br. at 27. In fact, the Court said the opposite:

> Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery.

Id. at 646 n.6.

***38** Similarly, in this case there is no dispute about what Dr. Sheets and the other State and Federal Defendants did. The findings and determination of the administrative law judge outlining the relationships between Stanko, YMC, and Modem Locker Plant and finding them unfit for federal meat inspection services are in the record. SER 10-27. The memo from Federal Defendant Hoffman to Dr. Sheets suggesting the type of additional information which would be helpful to support Kluver's application for state meat inspection services is in the record. ER Tab 13. The letters of Dr. Sheets requiring additional information from Kluver to support his application for state inspection services are in the record. ER Tab 5, 7. The subsequent letter of State Defendant Petersen requesting a new application and answers to two supplemental questions is in the record. ER Tab 19. In his second letter dated January 29, 1996, Dr. Sheets narrowed his requests for additional information to four topics: (1) whether Stanko is responsibly connected to the operation of the plant; (2) the name the plant will operate under; (3) specific

information about the hours of weekly plant operation; and (4) the name of the plant manager. ER Tab 7. The fact is that Kluver refused to provide this information. ER Tab 3, ¶ 11; SER 38-39,¶¶ 15, 20; SER 53.

The motions for summary judgment of State and Federal Defendants presented pure issues of law for the district court to resolve based on the undisputed facts in the record. Kluver's first amended complaint failed to state a ***39** claim and, even if it did, any claim would be barred by limitations and qualified immunity. The information sought through discovery was not necessary to the determination of the motions for summary judgment. The burden was on Kluver (1) to show the existence of some clearly established constitutional right which, given the facts alleged, was violated by either the State or the Federal Defendants, and (2) to show that the actions of the State and Federal Defendants were not objectively reasonable under the circumstances of the case.

Additional discovery was not necessary for the district court's determination of the motions for summary judgment. *City of Springfield v. Washington Pub. Power Supply Sys.*, 752 F.2d 1423, 1427 (9th Cir. 1985). The district court did not abuse its discretion when denying Kluver's Rule 56(f) motion and ordering that a discovery schedule would be set if warranted after the court ruled on the pending motions.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING KLUVER'S MOTION TO AMEND HIS FIRST AMENDED COMPLAINT.

Kluver, as his third issue on appeal, argues that the district court improperly denied his motion to amend his first amended complaint. As set forth below, it is clear that the district court did not abuse its discretion when it denied Kluver's motion to amend. The district court correctly held that he offered no explanation for his failure to assert his claims in the first amended complaint, that he offered ***40** no new facts in support of his retaliation claim, and that his new claim was not only futile but also untimely presented. ER 26.

A. *Standard of Review*

A denial of a request to amend a complaint is reviewed for an abuse of discretion. *E.g.*, *Maljack Prod., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 888 (9th Cir. 1996).

B. *The District Court Correctly Found That Kluver Failed to Justify His Failure to Assert His Proposed New Claims in His First Amended Complaint and That His New Claim Was Not Only Futile but Also Untimely.*

1. Kluver Failed to Justify His Failure to Raise His Proposed Amendments in Either the Original or the Amended Complaint.

Kluver moved to amend his first amended complaint in February 2000. The motion was filed about two months after the district court had heard argument on the State and Federal Defendants' motions for summary judgment. Kluver's proposed second amended complaint maintained his claims of denial of procedural due process based on the allegation that Kluver was deprived of his rights to due process because additional information was requested of him, and because he was not allowed pre- and post-deprivation hearings in relation to his application for state inspection services. It also retained the claim for violation of his right to equal protection based upon the request for additional information and added a ***41** claim of retaliation against him because of his exercise of First Amendment rights. The caption of the proposed second amended complaint no longer listed the State Defendants Bridges, Lee, Hagenbarth, and Espy, and named Federal Defendants Hoffman and Van Blargan in only their individual capacities. However, the named State Defendants were sued in both their individual and official capacities. [1] ER 23.

The affidavit of Kluver's attorney submitted with the motion provided no specific explanation for the addition of the retaliation claim or for the deletion of four defendants. ER Tab 24. Kluver offered no explanation for his failure to assert his retaliation claim from the beginning of his suit. A district court does not abuse its discretion in denying a motion to amend where the

movant presents no new facts but only new theories and provides no satisfactory explanation for his failure fully to develop his contentions originally. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) (citing *Allen v. City of Beverly Hills*, 911 F.2d 367, 374 (9th Cir. 1990)). If the plaintiff fails to show that he could not have discovered the proposed amended material before the motion was submitted, the court may also refuse the amendment. *Hinton v. Pacific Enters.*, 5 F.3d 391, 395-96 (9th Cir. 1993).

***42** The facts relied upon by Kluver for his allegation of retaliation are all facts of which he was aware prior to the filing of the original complaint in this matter. These are facts related to Kluver's actions in 1993 and 1994 when meeting with various state officials, advocating that state governmental officials form their own judgments regarding the licensing of state facilities, his representation of YMC in the USDA administrative hearing in 1994, and his 1995 involvement with the Montana Cattlemen's Association advocating the diminishment of the federal involvement in the regulation of the meat packing industry. ER 23, ¶¶ 67-70.

Additionally, civil rights claims based on a retaliation theory are not new but have been well recognized for more than twenty years. *E.g.*, *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274 (1977). Kluver failed to set forth any facts which would show why he failed to raise this new theory in either his original or first amended complaint.

2. Kluver's Proposed Amendment Would Have Been Futile.

The futility of amendment should be considered in assessing the propriety of a motion for leave to amend. If the complaint as amended would still be subject to dismissal or summary judgment in favor of the defendants, denial of leave to amend is not an abuse of discretion. *Sweaney v. Ada County*, 119 F.3d 1385, 1392-93 (9th Cir. 1997); *Barber v. Hawaii*, 42 F.3d 1185, 1197-98 (9th Cir. 1994).

***43** A claim for wrongful retaliation under the First Amendment and 42 U.S.C. § 1983 requires the plaintiff to prove that: (1) the statement that brought on the retaliation is one of public concern; (2) the constitutionally-protected expression is a substantial or motivational factor in the defendant's adverse decision or conduct; and (3) the interests of the plaintiff in commenting on the matter of public concern outweigh the state's interest in maintaining efficient public services. *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1038 (9th Cir. 1990). The United States Supreme Court in *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274 (1977), formulated a test of causation in a claim for retaliation which distinguishes between a result caused by a constitutional violation and one not so caused. *Id.* at 286. The constitutional principle at stake is sufficiently vindicated if the plaintiff is placed in no worse a position than he would be in if he had not engaged in the conduct. *Id.* at 285-86. In other Words, the issue is whether the defendant would have reached the same decision even in the absence of the protected conduct. *Id.* at 287.

Kluver's proposed second amended complaint does not plead his retaliation theory in accordance with pleading requirements for claims of constitutional violations against state and federal employees in which motive or intent is an element of the claim. Kluver has failed to make nonconclusory allegations, supported by facts, which would show that either State or Federal Defendants ***44** were motivated by unlawful intent. *Branch v. Tunnell*, 14 F.3d 449, 452 (9th Cir. 1994). In support of their motion for summary judgment, State Defendants demonstrated that the decision to request additional information from Kluver was based upon the record of the administrative hearing conducted by the USDA. ER Tab 3, ¶¶ 4-6; SER 10-27; 39, ¶ 20. In his letter dated October 27, 1995, to Kluver requesting further information, Dr. Sheets explained that the USDA had withdrawn inspection services from a plant in Forsyth, Montana, because of the involvement of Yellowstone Meat Company, a corporation of which Kluver is president. ER Tab 5. Thus, Kluver is the president of a corporation that was found to be unfit for federal inspection services by the USDA. The USDA determined that the corporation of which Kluver is president was “responsibly connected” (within the meaning of the FMIA, 21 U.S.C. § 671) to Rudy “Butch” Stanko, a person with federal felony convictions for violations of the FMIA. ER Tab 3, ¶¶ 4-8; SER 25-26. Dr. Sheets was authorized by law to require Kluver to provide information in his application for inspection services pertaining to his relationship with Stanko. Mont. Code Ann. § 81-9-227(1)(e). Indeed, in light of the findings of the USDA, it would have been irrational to ignore the relationship. ER Tab 3, ¶¶ 5-7.

The record before the Court in support of the State and Federal Defendants' motions for summary judgment proves that the request for information from ***45** Kluver was proper and not in retaliation for his exercise of constitutional rights. In light of the USDA administrative hearing record, the decision of Dr. Sheets to request information from Kluver was objectively reasonable and the defense of qualified immunity would be available to all Defendants. Notably, Kluver has never informed the district court or this Court of controlling authority that clearly established the rule on which he seeks to rely so that reasonable officials could not have believed that their actions were lawful under the circumstances of this case. *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

Kluver's new retaliation theory was also futile because it was barred by the applicable statute of limitations. In Montana, the applicable limitations period is three years. Mont. Code Ann. § 27-2-204(1); *cf. Owens v. Okure*, 488 U.S. 235, 250 (1989) (the state's general or residual statute of limitations for personal injury claims applies). Kluver did not file the original complaint until February 1999, which was more than three years after the date of his application for state meat inspection, and of both letters from Dr. Sheets requesting more information, and of his activities in 1993-95 upon which Kluver bases his retaliation claim. ***46** ER Tabs 4-5, 7, 23, ¶¶ 67-70. If Kluver had any cause of action for retaliation, it accrued more than three years before he filed his original complaint and was barred. [2]

Kluver accuses the district court of failing "to define specifically what would be futile about the proposed amendments." Appellant's Br. at 40. This is plainly an inaccurate characterization of the court's 16-page order. ER Tab 26. The district court found that Kluver offered no explanation for his failure to assert his retaliation claim in either the original or his first amended complaint; that he raised only conclusory allegations with no new facts in support of his allegations of retaliation; and that his proposed amendment was futile and untimely presented following submission of the case on summary judgment proceedings. ER Tab 26. The district court did not abuse its discretion in denying Kluver's motion to amend his first amended complaint.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

***47** *STATEMENT OF RELATED CASES*

Wilson v. United States Dep't of Agriculture, No. 95-70403 (9th Cir. Dec. 20, 1996) (SER 28-33). This case is related because it is the judicial review of the USDA decision which was the basis for Defendant Dr. Sheets requesting Kluver to provide additional information in support of his application for state meat inspection services.

Appendix not available.

Footnotes

* Counsel of Record

1 Of course, in their official capacities, the State Defendants are not "persons" subject to suit for damages under 42 U.S.C. § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

2 Although the district court did not discuss the statute of limitations in its ruling granting summary judgment to Defendants on Kluver's first amended complaint (ER Tab 26), both the State and Federal Defendants raised the limitations defense in their motions for summary judgment because the events alleged by Kluver occurred more than three years before Kluver filed his original complaint in February 1999. ER Tab 29 (CR 1, 41, 44, 48, 50); SER 7, 65.

EXHIBIT 22

64 FR 66541-01
RULES and REGULATIONS
DEPARTMENT OF AGRICULTURE
Food Safety and Inspection Service
9 CFR Parts 304, 305, 327, 335, 381, and 500
[Docket No. 95-025F]
RIN 0583-AC34

Rules of Practice

Monday, November 29, 1999

***66541** AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is amending its rules of practice that apply to Agency enforcement actions. FSIS is defining each type of enforcement action that it may take, the conditions under which it is likely to take each of these actions, and the procedures that it will follow in doing so. This rule is part of FSIS's ongoing effort to consolidate, streamline, and clarify the meat and poultry product inspection regulations.
EFFECTIVE DATE: This rule is effective January 25, 2000.

FOR FURTHER INFORMATION CONTACT: Daniel Engeljohn Ph.D., Director, Regulations Development and Analysis Division, Office of Policy, Program Development and Evaluation, FSIS, Room 112, Cotton Annex Building, 300 12th Street, SW, Washington, DC 20250-3700; (202) 720-5627.

SUPPLEMENTARY INFORMATION:

Background

Under the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA), the Secretary of Agriculture is charged with the responsibility of protecting the public health by assuring that meat and poultry products distributed in commerce are wholesome, not adulterated, and properly marked, labeled, and packaged. To accomplish this objective, the statutes require the Secretary to administer a comprehensive inspection program which includes examining live animals prior to slaughter, inspecting all carcasses to be used for human food, and inspecting facilities where meat and poultry products are produced or stored. FSIS has broad authority to issue regulations to carry out the provisions of the FMIA and PPIA, including authority to prescribe the terms and conditions under which inspection will be provided and maintained and pursuant to which the marks of inspection will be applied.

An establishment's failure to comply with regulatory requirements can result in the Agency's inability to determine that products are not adulterated as required by the inspection statutes. Accordingly, FSIS may find it necessary to take action to prevent the production and shipment of product until the Agency is assured that there is compliance with the statutes and their implementing regulations. For example, FSIS can refuse to grant an application for inspection. It can take regulatory control actions to retain product, to reject equipment or facilities, to slow or stop lines, or to refuse to allow the processing of specifically identified product. The Agency may refuse to allow the marks of inspection to be applied to products or suspend inspection by interrupting the assignment of program employees to all or part of an establishment. FSIS also can withdraw inspection or rescind or refuse to approve markings, labels, or containers.

FSIS takes these types of actions when an establishment fails to: (1) develop and implement a HACCP plan or operate in accordance with 9 CFR Part 417; (2) develop, implement, and maintain Sanitation Standard Operating Procedures (Sanitation SOP's) in accordance with 9 CFR Part 416; (3) conduct generic E. coli testing in accordance with 9 CFR 310.25(a) or 381.45(a); (4) comply with the Salmonella performance standard requirements prescribed in sections 9 CFR 310.25(b) or 381.94(b); (5) maintain sanitary conditions; (6) humanely slaughter livestock; or (7) destroy condemned product. FSIS also takes these actions when an applicant for inspection, a recipient of inspection, or anyone responsibly connected with the applicant or recipient is unfit to engage in business because of prior criminal convictions, or when establishment personnel assault, intimidate, or interfere with Federal inspection service.

When FSIS refuses to grant an application for inspection, seeks to withdraw inspection, or refuses to approve markings, labels, or containers, the Agency initiates an administrative action under USDA's "Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes" (7 CFR subtitle A, part 1, subpart H), as supplemented by FSIS's own "Rules of Practice," which have been set out in 9 CFR part 335 for meat or part 381, subpart W, for poultry and are now replaced by 9 CFR part 500. FSIS's supplemental rules of practice also provide for the withholding of the marks of inspection and the suspension of inspection.

When public health is a concern, FSIS immediately suspends inspection until the problem is corrected. FSIS refuses to mark product as "inspected and passed" or retains an establishment's meat or poultry products if the Agency determines that meat or poultry products are adulterated or cannot determine, as required by the statutes, that those products are not adulterated. Such actions typically are discontinued when the adulterated products have been destroyed or properly controlled, or when the deficiencies or noncompliances are corrected satisfactorily. The current supplemental rules also provide for an opportunity to address and correct problems before the Agency files a formal administrative complaint to suspend or withdraw an establishment's grant of inspection.

On January 12, 1998, FSIS issued a proposed rule (63 FR 1797) to reorganize and revise its supplemental rules of practice to better ensure that its enforcement procedures are fair; to eliminate redundancy; to identify the situations that may lead FSIS to take enforcement action which may include refusing to grant or withholding the marks of inspection and suspending or withdrawing inspection; and to establish the procedures FSIS would follow in taking such actions.

Comments

FSIS received 64 comments in response to the proposed rule. Although the commenters supported the consolidation and streamlining of the ***66542** rules of practice, they raised concerns about the actual proposed revisions to the regulations. The following is a discussion of the commenters' issues.

1. FSIS Authority

Several commenters asserted that an establishment's failure to meet the Salmonella performance standards, to carry out and meet generic E. coli testing requirements, or to prevent a HACCP system failure would not provide an adequate basis to suspend or seek withdrawal of inspection. They contend that the FMIA and PPIA authorize FSIS to remove inspectors only when an establishment fails to follow sanitary practices, refuses to destroy condemned carcasses, fails to comply with the Humane Slaughter Act, or is convicted in a criminal proceeding.

FSIS disagrees with this assessment of the Agency's authority. Under the FMIA and the PPIA, FSIS is charged with the duty and the responsibility to protect the public health by developing and implementing an effective, comprehensive, and scientifically valid inspection system that will ensure that meat and poultry products are wholesome, not adulterated, and properly marked, labeled, and packaged. FSIS is required by these statutes to carry out continuous inspection of slaughter and processing operations at Federal establishments and to make the affirmative determination that the meat and poultry products produced at those establishments are wholesome and not adulterated prior to marking the products as "inspected and passed."

FSIS has specified, through regulations, the conditions under which meat and poultry products must be produced [the HACCP/ Pathogen Reduction regulations]. These regulations are essential, integral components of the FMIA and PPIA inspection system, and the failure, inability, or unwillingness of an establishment to comply with these food safety regulations effectively precludes FSIS from making the statutorily-mandated determination that meat and poultry products are wholesome, not adulterated, and entitled to bear the legend “inspected and passed.” The inspection system provided for in the FMIA and PPIA is a continuous and real-time inspection program that, by its very nature, requires real-time and continuous inspection determinations. It is clear that the FMIA and the PPIA contemplate and authorize the Agency to take prompt and, if necessary, immediate action to carry out its public health responsibility to ensure that only products that are marked “inspected and passed” are shipped in commerce. It is the Agency view, therefore, that compliance with FSIS's food safety regulations, including the HACCP/Pathogen Reduction regulations, is a necessary predicate for inspection services and for the application of the marks of inspection under the FMIA and the PPIA, and that FSIS has inherent authority to withhold the marks, to suspend inspection services, and to withdraw inspection when these requirements are not satisfied.

In addition, FSIS is required to prescribe the rules and regulations for sanitation, with which slaughter and processing establishments must comply. The term “sanitation” is comprehensive and encompasses the array of procedures, practices, and controls employed by establishments to ensure that the products they produce are wholesome and not adulterated. Sanitation obviously includes procedures for the cleaning of equipment and facilities; proper sanitation also encompasses practices for ensuring the acceptability of incoming products and ingredients, proper product handling and preparation practices, controlling condemned product, and properly storing product. It is also FSIS's view that the SSOP requirements, the HACCP regulations, the Salmonella performance standards, and the generic E. coli testing requirements are material components of an effective sanitation program that is sufficient to meet the requirements of the FMIA and PPIA. For example, E. coli testing is prescribed in the HACCP/Pathogen Reduction regulations to verify that the establishment is employing sanitary dressing procedures to prevent the fecal contamination of carcasses. Also, the Salmonella performance standards were adopted to ensure that an establishment's procedures, practices, and controls, as embodied in its HACCP plans, are working properly. The Agency has ample statutory authority to withhold, suspend, or seek withdrawal, in accord with the facts of any particular case, when the Agency's sanitation requirements are not satisfied.

2. Due Process: Notice and Opportunity To Achieve Compliance

Commenters also raised concerns that the proposed rules did not provide adequate due process protections for establishments. The commenters argued, for example, that the taking of withholding actions by inspectors, and the resulting interruption of plant operations, without providing the establishment with notice of the deficiencies and an opportunity to demonstrate or achieve compliance is unreasonable and contrary to applicable law. Commenters underscored this point with particular focus on HACCP regulation noncompliances, contending that notice and opportunity to establish compliance were essential in such cases before taking withholding or suspension actions.

Some commenters believed that the proposed rules of practice were inconsistent with other FSIS regulations and policies related to the suspension of inspection. They cited, for example, the Quality Control (QC) regulations and the Progressive Enforcement Action program. Under these regulations and policies, in situations not involving the preparation and distribution of adulterated product, establishments were provided an opportunity to achieve compliance before FSIS terminated a QC program or imposed progressive sanctions.

FSIS is mindful that withholding the marks of inspection and suspending inspection services are significant enforcement actions to be taken only after careful evaluation of the facts and circumstances. At the same time, as discussed above, it is FSIS's statutory responsibility and duty to protect public health by maintaining an inspection system that will ensure that meat and poultry products produced and shipped in commerce are wholesome and not adulterated. FSIS agrees that fundamental fairness requires that appropriate due process be accorded establishments in connection with enforcement actions under the FMIA and PPIA. FSIS believes that the proposed rules of practice, as modified and specified in this document will, in fact, protect the due process rights of all establishments.

As we make clear in this final rule, FSIS will continue to provide notice and an opportunity to demonstrate or achieve compliance in situations where the violations and deficiencies disclosed by inspection or investigation do not, in the Agency's view, present a public health concern that requires immediate action. Where, however, noncompliance with the requirements of the acts and regulations indicates that continued production and shipment of product do pose, in the Agency's view, an imminent threat to public health, FSIS will take immediate action. Accordingly, section 500.3 of the rules of practice sets out the conditions under which FSIS may withhold the marks of inspection or suspend inspection without prior written notification and section 500.4 sets out the conditions under which FSIS may withhold the marks of inspection or suspend ***66543** inspection after providing prior written notification.

Commenters also argued that FSIS's noncompliance records (NRs) should not be deemed adequate to notify an establishment of the Agency's determination that there has been a "system failure."

It is FSIS's view that NRs do constitute valid and effective notice to an establishment that the establishment has not maintained regulatory compliance. An NR informs the establishment of the specific deficiency involved and on its face invites the establishment to respond to the finding and to present in writing its immediate and further planned corrective actions. The NR also specifically notes the right to appeal the inspector's finding and potential regulatory consequences of the NR.

When an NR is issued, it is incumbent upon the establishment to evaluate the NR carefully and to act upon and respond to it promptly and effectively. In particular, it is important that establishments address the NRs related to a HACCP plan noncompliance because such NRs may indicate that the plan is not working properly and should be reassessed. Accordingly, FSIS believes that should the Agency determine that it is necessary to withhold the marks of inspection or to suspend inspection because of multiple or recurring noncompliances, evidenced by NRs, the establishment will have been given appropriate notice as well as ample opportunity to demonstrate or achieve compliance.

Nonetheless, in cases where FSIS has determined that multiple or recurring noncompliances warrant the withholding of the marks of inspection or suspension of inspection, this final rule provides for written notification to the establishment before withholding or suspending inspection when the circumstances do not pose an imminent threat to public health.

Therefore, in response to the comments, FSIS is revising the regulatory language used in the proposed rule. This final rule lists the types of enforcement actions that the Agency may take and identifies the circumstances under which each action may be taken. This final rule also clarifies the procedures FSIS will follow to provide, when appropriate, prior notification to establishments.

Section 500.1 defines a "regulatory control action," "withholding action," and "suspension." A regulatory control action is the retention of product, rejection of equipment or facilities, slowing or stopping of lines, or refusal to allow the processing of specifically identified product. A withholding action is the refusal to allow the marks of inspection to be applied to products. A withholding action may affect all products in the establishment or product produced by a particular process. A suspension is an interruption of the assignment of program employees to all or part of an establishment.

Section 500.2 states that FSIS may take a regulatory control action because of insanitary conditions or practices, product adulteration or misbranding, conditions that preclude FSIS from determining that product is not adulterated or misbranded, or inhumane handling or slaughtering of livestock. These control actions are necessary, indeed essential, in-plant enforcement tools for inspectors to use in cases where the noncompliance is willful or involves public health, interest, or safety. Typically, regulatory control actions involve specific amounts of product or generally well-defined deficiencies such as crushed and open cartons or malfunctioning equipment. If FSIS takes a regulatory control action, it will immediately notify the establishment orally or in writing of the action and of the basis for the action. An establishment may appeal a regulatory control action, as provided in 9 CFR 306.5 and 381.35.

Withholding actions are generally more significant than regulatory control actions and affect a larger part of an establishment or the establishment's processes. In most cases, in-plant inspection personnel take these actions because of systemic problems, such as HACCP plan inadequacies. Typically, the actions necessary to correct the problem that resulted in a withholding action are more complex than those necessary to resolve a problem that resulted in a regulatory control action and are likely to require an establishment to accomplish a HACCP plan reassessment and make any necessary plan modification or to revise its Sanitation SOP.

A suspension of inspection is likely to have an even more significant impact on an establishment than a withholding action. Typically, an FSIS District Manager or Agency official at a higher level suspends inspection after an establishment fails to correct a situation involving a withholding action, or when the nature of the noncompliances are such that the corrective action, such as HACCP plan reassessment or changes in the establishment's operation, may take a significant amount of time to implement.

Section 500.3 states that FSIS may take a withholding or suspension action without providing the establishment prior notification because the establishment produced and shipped adulterated or misbranded product as defined in 21 U.S.C. 453 or 21 U.S.C. 602; the establishment does not have a HACCP plan as specified in section 417.2 of the regulations; the establishment does not have Sanitation SOPs as specified in sections 416.11-416.12 of the regulations; sanitary conditions are such that any products in the establishment are or would be rendered adulterated; an establishment operator, officer, employee, or agent assaulted, threatened to assault, intimidated, or interfered with an FSIS employee; the establishment violated the terms of a regulatory control action; or the establishment did not destroy a condemned meat or poultry carcass, or part or product thereof, in accordance with 9 CFR part 314 or part 381, subpart L, within three days of notification. FSIS also may impose a suspension without providing the establishment prior notification because the establishment is handling or slaughtering animals inhumanely.

Section 500.4 states that FSIS may take a withholding action or impose a suspension after the Agency provides an establishment prior notification and the opportunity to demonstrate or achieve compliance because the HACCP system is inadequate, as specified in 9 CFR 417.6, due to multiple or recurring noncompliances; the Sanitation SOPs have not been properly implemented or maintained as specified in 9 CFR 416.13-16; the establishment has not maintained sanitary conditions as prescribed in 9 CFR 416.2-416.8 due to multiple or recurring noncompliances; the establishment did not collect and analyze samples for Escherichia coli Biotype I and record results in accordance with 9 CFR 310.25(a) or 381.94(a); or the establishment did not comply with the Salmonella performance standard requirements prescribed in 9 CFR 310.25(b) or 381.94(b).

Section 500.5 states that if FSIS takes a withholding action or imposes a suspension without prior written notification, the Agency will notify the establishment orally and, as promptly as circumstances permit, in writing. The written notification will provide the effective date of the action, reasons for the action, products or processes affected by the action, opportunity for the establishment to present immediate corrective action and further planned preventive action, and the appeals procedures. This section also addresses the prior notification provided for in section 500.4. This prior notification will state the type of action that may be ***66544** taken; describe the reason for the proposed action; identify the products or processes affected by the proposed action; advise the establishment of its right to contact FSIS to contest the basis for the proposed action or to explain how compliance has been or will be achieved; and advise the establishment that it will have three business days from receipt of the written notification to respond to FSIS unless the time period is extended by FSIS.

The provisions in section 500.5 also reiterate that an establishment may appeal the withholding action or suspension, as provided in section 9 CFR 306.5 and 381.35. Also, this section provides that if FSIS suspends inspection and does not hold the suspension action in abeyance, the establishment may request a hearing pursuant to the Uniform Rules of Practice, 7 CFR Subtitle A, part 1, subpart H. Upon such request, the Administrator will file a complaint that will include a request for an expedited hearing.

Section 500.6 addresses withdrawal of inspection, and section 500.7 addresses refusal of inspection. These provisions are substantially unchanged from the January 1998 proposal. When FSIS withdraws or refuses inspection, the Agency initiates an

administrative action under USDA's Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 CFR subtitle A, part 1, subpart H). Also, FSIS made no significant changes, other than renumbering the sections, to the provisions that relate to rescinding or refusing approval of marks, labels, and containers, (section 500.8) and refusing or withdrawing inspection for applicants or recipients unfit to engage in business (sections 500.6 and 500.7).

3. Appropriateness of Other Aspects of the Regulations

Some commenters suggested that FSIS should better explain the Agency's practice of allowing an establishment to operate while under a suspension if the establishment presents adequate written assurances that corrective actions are being implemented.

It has been FSIS's experience that some establishments, upon being notified that the Agency intends to suspend inspection, offer a plan to address the circumstances that caused FSIS to issue the notification. In these cases, FSIS has concluded that, even though the basis for a suspension existed, it was appropriate to hold the suspension in abeyance and to allow the establishment to continue to operate under its proposed corrective and preventive actions.

Section 500.5(e) states that FSIS may hold a suspension in abeyance and allow the establishment to operate under the conditions agreed to by FSIS and the establishment.

Some commenters suggested that there should be a third-party review of an establishment's response to the notification of the Agency's intent to take an enforcement action, and that this third party should make the decision on whether the enforcement action is warranted.

FSIS concluded that such third-party review is not appropriate under the meat and poultry inspection statutes. The Agency is required to make the determination that the statutes and regulations have been complied with, and that the products produced meet the statutory requirements. The suggested procedure is clearly inconsistent with the statutory authority and plan embodied in the FMIA and PPIA and would be impractical and contrary to the public interest.

A number of commenters raised concerns about FSIS's appeal policy. Some recommended provisions for alternative dispute resolution instead of an administrative hearing before an Administrative Law Judge in cases where there is a scientific dispute. Under the provisions submitted by the commenters, the Agency would create a standing panel of expert advisors to be called upon on an as needed basis. The establishment and the Agency would be permitted to call witnesses and present relevant evidence, especially scientific evidence, to the panel. The panel's decision along with any dissenting views would be written and shared with the establishment and the Agency. The Administrator, as the ultimate decisionmaker for the government, would give the panel's decision due consideration. Other commenters suggested that FSIS establish a special appeals resolution team in the Technical Service Center to which all appeals from inspection decisions would automatically be sent. Some commenters urged FSIS to specify how long it will take to resolve appeals, to allow establishments to continue operating while an appeal of an FSIS decision to suspend or withdraw inspection is pending, except in the event of an “imminent hazard to health,” and to reimburse regulated establishments for losses during “down time” when they win an appeal from an inspection decision.

As stated in the proposed rule, FSIS is committed to providing establishments with appropriate notice and an effective opportunity to appeal withholding actions and suspensions of inspection. It recognizes the need for timely resolution of all such appeals. The Agency intends to develop regulations to address how appeals are handled. However, since there were no proposed regulations on appeals included in the proposed rules of practice, establishing such rules in this document is outside the scope of this rulemaking. FSIS plans to issue a proposed rulemaking related to the appeals process at a later date.

Until new regulations on appeals are in place, appeals will continue to be heard through the “chain-of-command” process, which is incorporated into FSIS's existing regulations (9 CFR 306.5 and 381.35). In an attempt to ensure the timely review of appeals, FSIS issued FSIS Notice 14-98 on April 20, 1998. This notice explains FSIS's policy regarding the appeal of inspection findings and decisions. It also established the Inspection Appeals Tracking System (IATS) report which the Agency uses to help ensure a timely response to appeals.

Some commenters stated that FSIS should not delete the provisions in section 335.13. In this regulation, FSIS stated that it will notify an establishment of what actions are necessary to correct an insanitary condition and of the time within which corrections must be made.

It is an establishment's responsibility to identify problems and to determine how best to correct them. Section 335.13 appeared by its terms to place the burden for devising and correcting insanitary conditions on the Agency. Such regulations are not consistent with the Pathogen Reduction/HACCP approach. The Agency will identify problems when an establishment fails to do so, but it is the establishment's responsibility to identify problems on a continuing basis and to identify, select, and implement effective action to correct noncompliances. FSIS will verify that establishments have taken the necessary corrective actions. Accordingly, FSIS is removing section 335.13.

Commenters also questioned the elimination of section 335.40, “Present Your Views (PYV)” provisions, which allow establishments believed to have violated the FMIA an opportunity to present their views to the Agency regarding an alleged criminal violation before FSIS refers the violation to the Department of Justice for prosecution. The commenters pointed out that the PYV provisions are a statutory entitlement for poultry processors, and that by rescinding the regulations, the ***66545** Agency is backing away from equity between meat and poultry.

After consideration of these comments, FSIS has reconsidered its proposal and will not remove Part 335, Subpart E.

Executive Order 12866 and Regulatory Flexibility Act

This final rule has been determined to be not significant, and therefore, has not been reviewed by the Office of Management and Budget.

The Administrator has made a determination that this final rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601).

There are no direct costs or benefits associated with this final rule. Costs and benefits are related to the regulatory actions, not the proceedings. At the present time, there is no way to predict whether industry “down time” will increase or decrease under these revised rules of practice. To the extent that resolution of disputes in a timely and efficient manner will be facilitated by these rules, there are potential benefits to consumers, industry, and the government. When disputes are related to public health issues, FSIS may reduce health risks to consumers by stopping an establishment's operations until the problem has been resolved.

There are also costs to industry associated with actions that suspend production operations.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. When this rule becomes final: (1) all state and local laws and regulations that are inconsistent with this rule would be preempted; (2) no retroactive effect would be given to this rule; and (3) administrative proceedings would not be required before parties may file suit in court challenging this rule.

Paperwork Requirements

This final rule does not include any new paperwork requirements.

Additional Public Notification

In an effort to better ensure that minorities, women, and persons with disabilities are made aware of this final rule, FSIS will announce it and provide copies of this Federal Register publication in the FSIS Constituent Update.

FSIS provides a weekly FSIS Constituent Update, which is communicated via fax to over 300 organizations and individuals. In addition, the update is available on line through the FSIS web page located at http:// www.fsis.usda.gov. The update is used to provide information regarding FSIS policies, procedures, regulations, Federal Register Notices, FSIS public meetings, recalls, and any other types of information that could affect or would be of interest to our constituents/stakeholders. The constituent fax list consists of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals and other individuals that have requested to be included. Through these various channels, FSIS is able to provide information with a much broader, more diverse audience. For more information and to be added to the constituent fax list, fax your request to the Office of Congressional and Public Affairs, at (202) 720-5704.

List of Subjects

9 CFR Part 304
Meat inspection.

9 CFR Part 305
Meat inspection.

9 CFR Part 327
Imports, Meat inspection.

9 CFR Part 381
Poultry and poultry products.

9 CFR Part 500
Rules of practice.

For the reasons set forth in this preamble, 9 CFR chapter III would be amended as follows:

PART 304—APPLICATION FOR INSPECTION; GRANT OF INSPECTION
1. The authority citation for part 304 continues to read as follows:

Authority: 21 U.S.C. 601-695; 7 CFR 2.18, 2.53.
9 CFR § 304.2
2. Part 304 is amended by revising the heading to read as set forth above, and amending §304.2 by removing paragraphs (c) and (e), redesignating paragraph (d) as paragraph (c), and revising the last sentence of paragraph (b) to read as follows:
* * * * *9 CFR § 304.2

§304.2 Information to be provided.
* * * * *
(b) * * * Any application for inspection may be refused in accordance with the rules of practice in part 500 of this chapter.
* * * * *

PART 305—OFFICIAL NUMBERS; INAUGURATION OF INSPECTION; WITHDRAWAL OF INSPECTION; REPORTS OF VIOLATION
3. The authority citation for part 305 continues to read as follows:

Authority: 21 U.S.C. 601-695; 7 CFR 2.18, 2.53.
9 CFR § 305.5

§305.5 [Removed]
9 CFR § 305.5
4. Part 305 is amended by removing §305.5.

PART 327—IMPORTED PRODUCTS
5. The authority citation for part 327 continues to read as follows:

Authority: 21 U.S.C. 601-695; 7 CFR 2.18, 2.53.
9 CFR § 327.6
6. Section 327.6 is amended by removing the last four sentences in paragraph (f) and adding in their place one sentence to read as follows:
9 CFR § 327.6

§327.6 Products for importation; program inspection, time and place; application for approval of facilities as official import inspection establishment; refusal or withdrawal of approval; official numbers
* * * * *
(f) * * * Any application for inspection under this section may be denied or refused in accordance with the rules of practice in part 500 of this chapter.

PART 335—RULES OF PRACTICE GOVERNING PROCEEDINGS UNDER THE FEDERAL MEAT INSPECTION ACT
9 CFR § 335.1-335.32

§§335.1-335.32 (Subparts A—D [Removed]
9 CFR § 335.1-335.32
7. Part 335 Subparts A through D (§§335.1-335.32) are removed. Subpart E—Criminal Violations is redesignated as Subpart A.

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS
8. The authority citation for part 381 continues to read as follows:

Authority: 7 U.S.C. 138f; 7 U.S.C. 450, 21 U.S.C. 451-470; 7 CFR 2.18, 2.53.
9 CFR § 381.21
9. Section 381.21 is amended by removing paragraphs (a), (b), and (c); redesignating paragraph (d) as (b); and adding a new paragraph (a) to read as follows:
9 CFR § 381.21

§381.21 Refusal of inspection.
(a) Any application for inspection in accordance with this part may be denied or refused in accordance with the rules of practice in part 500 of this chapter.
* * * * *9 CFR § 381.29

***66546 §381.29 [Removed]**
9 CFR § 381.29
10. Part 381 is amended by removing §381.29.

9 CFR § 381.230-381.236

§§381.230-381.236 (Subparts VI) [Removed]
9 CFR § 381.230
11. Part 381 is amended by removing Subpart W (§§381.230—381.236).

SUBCHAPTER E—REGULATORY REQUIREMENTS UNDER THE FEDERAL MEAT INSPECTION ACT AND THE POULTRY PRODUCTS INSPECTION ACT
12. Subchapter E is amended by adding a new Part 500 to read as follows:

PART 500—RULES OF PRACTICE
9 CFR § 500.1

§500.1 Definitions.

Sec.

500.1 Definitions.

500.2 Regulatory control action.

500.3 Withholding or suspension of inspection without prior notification.

500.4 Withholding action or suspension of inspection with prior notification.

500.5 Notification, appeals, and actions held in abeyance.

500.6 Withdrawal of inspection.

500.7 Refusal to grant inspection.

500.8 Procedures for rescinding or refusing approval of marks, labels, sizes, and containers.
Authority: 21 U.S.C. 451-470, 601-695; 7 U.S.C. 450, 1901-1906; 7 CFR 2.18, 2.53.

(a) A “regulatory control action” is the retention of product, rejection of equipment or facilities, slowing or stopping of lines, or refusal to allow the processing of specifically identified product.

(b) A “withholding action” is the refusal to allow the marks of inspection to be applied to products. A withholding action may affect all product in the establishment or product produced by a particular process.

(c) A “suspension” is an interruption in the assignment of program employees to all or part of an establishment.
9 CFR § 500.2

§500.2 Regulatory control action.
(a) FSIS may take a regulatory control action because of:

(1) Insanitary conditions or practices;

(2) Product adulteration or misbranding;

(3) Conditions that preclude FSIS from determining that product is not adulterated or misbranded; or

(4) Inhumane handling or slaughtering of livestock.

(b) If a regulatory control action is taken, the program employee will immediately notify the establishment orally or in writing of the action and the basis for the action.

(c) An establishment may appeal a regulatory control action, as provided in sections 306.5 and 381.35 of this chapter.
9 CFR § 500.3

§500.3 Withholding action or suspension without prior notification.
(a) FSIS may take a withholding action or impose a suspension without providing the establishment prior notification because:

(1) The establishment produced and shipped adulterated or misbranded product as defined in 21 U.S.C. 453 or 21 U.S.C. 602;

(2) The establishment does not have a HACCP plan as specified in §417.2 of this chapter;

(3) The establishment does not have Sanitation Standard Operating Procedures as specified in §§416.11-416.12 of this chapter;

(4) Sanitary conditions are such that products in the establishment are or would be rendered adulterated;

(5) The establishment violated the terms of a regulatory control action;

(6) An establishment operator, officer, employee, or agent assaulted, threatened to assault, intimidated, or interfered with an FSIS employee; or

(7) The establishment did not destroy a condemned meat or poultry carcass, or part or product thereof, in accordance with part 314 or part 381, subpart L, of this chapter within three days of notification.

(b) FSIS also may impose a suspension without providing the establishment prior notification because the establishment is handling or slaughtering animals inhumanely.
9 CFR § 500.4

§500.4 Withholding action or suspension with prior notification.
FSIS may take a withholding action or impose a suspension after an establishment is provided prior notification and the opportunity to demonstrate or achieve compliance because:

(a) The HACCP system is inadequate, as specified in §417.6 of this chapter, due to multiple or recurring noncompliances;

(b) The Sanitation Standard Operating Procedures have not been properly implemented or maintained as specified in §§416.13 through 416.16 of this chapter;

(c) The establishment has not maintained sanitary conditions as prescribed in §§416.2 through 416.8 of this chapter due to multiple or recurring noncompliances;

(d) The establishment did not collect and analyze samples for Escherichia coli Biotype I and record results in accordance with §§310.25(a) or 381.94(a) of this chapter;

(e) The establishment did not meet the Salmonella performance standard requirements prescribed in §§310.25(b) or 381.94(b) of this chapter.
9 CFR § 500.5

§500.5 Notification, appeals, and actions held in abeyance

(a) If FSIS takes a withholding action or imposes a suspension, the establishment will be notified orally and, as promptly as circumstances permit, in writing. The written notification will:

(1) State the effective date of the action(s),

(2) Describe the reasons for the action(s),

(3) Identify the products or processes affected by the action(s),

(4) Provide the establishment an opportunity to present immediate and corrective action and further planned preventive action; and

(5) Advise the establishment that it may appeal the action as provided in §§ 306.5 and 381.35 of this chapter.

(b) The prior notification provided for in §500.4 of this part will:

(1) State the type of action that FSIS may take;

(2) Describe the reason for the proposed action;

(3) Identify the products or processes affected by the proposed action;

(4) Advise the establishment of its right to contact FSIS to contest the basis for the proposed action or to explain how compliance has been or will be achieved; and

(5) Advise the establishment that it will have three business days from receipt of the written notification to respond to FSIS unless the time period is extended by FSIS.

(c) An establishment may appeal the withholding action or suspension, as provided in §§306.5 and 381.35 of this chapter.

(d) If FSIS suspends inspection and does not hold the suspension action in abeyance as provided in paragraph (e) of this section, the establishment may request a hearing pursuant to the Uniform Rules of Practice, 7 CFR Subtitle A, part 1, subpart H. Upon such request, the Administrator will file a complaint that will include a request for an expedited hearing.

(e) FSIS may hold a suspension in abeyance and allow the establishment to operate under the conditions agreed to by FSIS and the establishment.

9 CFR § 500.6

§500.6 Withdrawal of inspection.

The FSIS Administrator may file a complaint to withdraw a grant of Federal inspection in accordance with the Uniform Rules of Practice, 7 CFR Subtitle A, part 1, subpart H because:

(a) An establishment produced and shipped adulterated product;

(b) An establishment did not have or maintain a HACCP plan in accordance with part 417 of this chapter; ***66547**

(c) An establishment did not have or maintain Sanitation Standard Operating Procedures in accordance with part 416 of this chapter;

(d) An establishment did not maintain sanitary conditions;

(e) An establishment did not collect and analyze samples for Escherichia coli Biotype I and record results as prescribed in §§310.25(a) or 381.94(a) of this chapter;

(f) An establishment did not comply with the Salmonella performance standard requirements as prescribed in §§310.25(b) and 381.94(b) of this chapter;

(g) An establishment did not slaughter or handle livestock humanely;

(h) An establishment operator, officer, employee, or agent assaulted, threatened to assault, intimidated, or interfered with an FSIS program employee; or

(i) A recipient of inspection or anyone responsibly connected to the recipient is unfit to engage in any business requiring inspection as specified in section 401 of the FMIA or section 18(a) of the PPIA.
9 CFR § 500.7

§500.7 Refusal to grant inspection.
(a) The FSIS Administrator may refuse to grant Federal inspection because an applicant:

(1) Does not have a HACCP plan as required by part 417 of this chapter;

(2) Does not have Sanitation Standard Operating Procedures as required by part 416 of this chapter;

(3) Has not demonstrated that adequate sanitary conditions exist in the establishment as required by part 308 or part 381, subpart H, and part 416 of this chapter;

(4) Has not demonstrated that livestock will be handled and slaughtered humanely; or

(5) Is unfit to engage in any business requiring inspection as specified in section 401 of the FMIA or section 18(a) of the PPIA.

(b) If the Administrator refuses to grant inspection, the applicant will be provided the opportunity for a hearing in accordance with the Uniform Rules of Practice, 7 CFR Subtitle A, part 1, subpart H.
9 CFR § 500.8

§500.8 Procedures for rescinding or refusing approval of marks, labels, and containers.
(a) FSIS may rescind or refuse approval of false or misleading marks, labels, or sizes or forms of any container for use with any meat or poultry product under section 7 of the FMIA or under section 8 of the PPIA.

(b) FSIS will provide written notification that:

(1) Explains the reason for rescinding or refusing the approval;

(2) Provides an opportunity for the establishment to modify the marking, labeling, or container so that it will no longer be false or misleading; and

(3) Advises the establishment of its opportunity to submit a written statement to respond to the notification and to request a hearing.

(c) If FSIS rescinds or refuses approval of false or misleading marks, labels, or sizes or forms of any container for use with any meat or poultry product, an opportunity for a hearing will be provided in accordance with the Uniform Rules of Practice, 7 CFR Subtitle A, part 1, subpart H.

Done at Washington, DC on: November 17, 1999.

Thomas J. Billy,

Administrator.

[FR Doc. 99-30603 Filed 11-26-99; 8:45 am]

BILLING CODE 3410-DM-P

EXHIBIT 23

60 FR 27714-02
NOTICES
DEPARTMENT OF AGRICULTURE
Food Safety and Inspection Service
[Docket No. 95-015N]

Guidelines for Preparing and Submitting Experimental Protocols for In-Plant Trials of New Technologies and Procedures

Thursday, May 25, 1995

***27714** AGENCY: Food Safety Inspection Service, USDA.

ACTION: Notice.

SUMMARY: The Food Safety and Inspection Service has issued Directive 10,700.1, establishing guidelines for preparing and submitting experimental protocols for in-plant research or trials of new technologies and procedures in federally inspected meat and poultry plants. This notice summarizes Directive 10,700.1 and announces its availability to interested persons.

ADDRESSES: To obtain a copy of FSIS Directive 10,700.1, "Guidelines for Preparing and Submitting Experimental Protocols for In-Plant Trials of New Technologies and Procedures," contact Ms. Diane Moore, Docket Clerk, room 4352, South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 720-3813.

FOR FURTHER INFORMATION CONTACT: Dr. Pat Basu, Director, Technology Assessment and Research Coordination Division, Science and Technology, Food Safety and Inspection Service, U.S. Department of Agriculture, room 302, Annex Building, 300 12th Street SW., Washington, DC 20250, (202) 720-8623.

SUPPLEMENTARY INFORMATION:

Background

The Food Safety and Inspection Service (FSIS) periodically issues directives that either explain internal administrative policies and procedures or, as in the case of Directive 10,700.1, clarify FSIS regulations and procedures regarding meat and poultry product safety and inspection. While these directives are intended for FSIS inspectors and other employees, they are also regularly sent to other interested persons, including meat and poultry plant management, trade associations, and State and local governments. To ensure that all interested persons are aware of the substance and availability of this directive, FSIS is publishing this notice.

Directive 10,700.1

As part of its comprehensive strategy to reduce the occurrence and numbers of pathogenic organisms in meat and poultry for the purpose of reducing the incidence of foodborne illness associated with consumption of those products, FSIS has proposed a series of new requirements applicable to all federally inspected meat and poultry plants ("Pathogen Reduction; Hazard Analysis and Critical Control Points (HACCP) Systems"; February 3, 1995, 60 FR 6774-6889). In order to meet the requirements proposed in that document, the meat and poultry industries may find it useful to develop innovative technologies and procedures that more effectively protect meat and poultry products from microbiological ***27715** and other hazards. FSIS is committed to fostering such innovation.

In the past few years, innovative technologies and procedures have been developed by the meat and poultry industry and allied enterprises to enhance industry productivity and profitability. FSIS believes that industry innovation should also be directed to improving food safety. FSIS intends as part of its comprehensive long-term food safety strategy to increase the incentives for such innovation by establishing public health-driven targets, guidelines, and standards that establishments will be held accountable for meeting. Also, FSIS is redoubling its efforts to facilitate experimentation in the meat and poultry industries.

Specifically, FSIS is encouraging in-plant experimentation, which both aids in the development of new production and processing techniques and provides the requisite confirmation that new technologies and procedures are efficacious, practical, and manageable in commercial plant environments. FSIS has reviewed its policies and procedures governing review and approval of in-plant experimentation with the intention of simplifying them to the maximum extent possible, while ensuring that important safety and efficacy issues are considered. As a result, on April 11, 1995, FSIS issued Directive 10,700.1, "Guidelines for Preparing and Submitting Experimental Protocols for In-Plant Trials of New Technologies and Procedures."

Directive 10,700.1 explains that a written proposal and protocol must be submitted to FSIS, reviewed, and approved prior to any in-plant research or demonstration of technologies and procedures that could affect product safety, worker safety, environmental safety, or inspection procedures. The written proposal and protocol must contain a statement of purpose, a scientific literature review, including data from laboratory studies supporting further in-plant trials, a detailed description of the research methodology to be used, and other administrative information. Also, proposals for research on technologies or procedures that could alter inspection procedures, affect food safety, or are to be approved for general use must include a detailed study design and a commitment to submit final research results. Applicants must submit proposals and protocols at least 60 days before any experiments begin, so that FSIS may have adequate time to both review the proposal and notify, if necessary, the local FSIS inspection staff who would observe the approved experiment.

FSIS will not approve any proposal or protocol for in-plant experimentation that could result in an increased risk for the public and accordingly has placed certain restrictions on experiments involving the artificial contamination of food products. For example, in experiments where researchers artificially contaminate carcasses with fecal material that may contain human pathogens, any products from these carcasses must be removed from commercial channels or reconditioned to be wholesome and fit for sale. Also, in tests where researchers artificially contaminate carcasses with surrogate organisms that approximate the growth or spread of human pathogens, trimming of treated areas followed by an antimicrobial wash is required before product can be moved into commerce. Furthermore, while FSIS will not approve experiments that unreasonably interfere with our inspection responsibilities, requests for modest changes in inspection during an experiment will be considered on a case-by-case basis.

FSIS requires that certain proposal and protocol submissions include approvals from other agencies. If any chemical reagents or other such materials are to be used in an experiment, those materials must have been approved by Food and Drug Administration. Also, certain proposals for experiments that may affect worker safety must be accompanied by appropriate regulatory citations or by written approval from the Environmental Protection Agency (EPA) and/or the Occupational Safety and Health Administration. And, some proposals for experiments that may impact environmental safety must be accompanied by approvals from EPA.

During approved in-plant experimentation, FSIS reserves the right to have on-site observers present and to review interim data. Should unexpected safety concerns arise at any time, for example, if food products affected by the experiment are in violation of food safety statutes or present an increased risk to the public, FSIS will require termination of the experiment. FSIS also reserves the right to have an approved proposal, as well as experimental results, reviewed by outside parties, as long as proprietary rights are safeguarded. Further, FSIS reserves the right to request the "raw" data initially collected from the experiment when evaluating the results of in-plant experiments.

FSIS has established a new unit, the Technology Assessment and Research Coordination Division (TARCD), which will function as the single point of entry for in-plant research protocols and experimental results. TARCD will perform the initial

review of proposals for acceptability and completeness and then forward the proposals to teams within FSIS for technical review. TARCD also will be responsible for conveying results from FSIS technical reviews to the researchers requesting approval for in-plant experiments. TARCD will similarly coordinate the review of results and facilitate the policy decision process.

Proposals and protocols that are unapproved or in the approval process will be unavailable to the public. Approved proposals and protocols will be available and on file in the FSIS Freedom of Information Act (FOIA) reading room. FSIS will ensure FOIA protection for proprietary information contained in proposals and protocols available to the public.

Development and dissemination of these guidelines, as well as the establishment within FSIS of a single office for receiving proposed protocols for in-plant research, is intended to encourage the technological and procedural innovation necessary to enhance food safety within the meat and poultry industries.

Done at Washington, DC on May 19, 1995.

Michael R. Taylor,

Acting Under Secretary for Food Safety.

[FR Doc. 95-12883 Filed 5-24-95; 8:45 am]

BILLING CODE 3410-DM-P

End of Document

EXHIBIT 24

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FRONT RANGE EQUINE RESCUE; THE HUMANE SOCIETY OF THE UNITED STATES; MARIN HUMANE SOCIETY; HORSES FOR LIFE FOUNDATION; RETURN TO FREEDOM; RAMONA CORDOVA; KRYSTLE SMITH; CASSIE GROSS; DEBORAH TRAHAN; and BARBARA SINK,

Plaintiffs,

v.

TOM VILSACK, Secretary U.S. Department of Agriculture; ELIZABETH A. HAGEN, Under Secretary for Food Safety, U.S. Department of Agriculture; and ALFRED A. ALMANZA, Administrator, Food Safety and Inspection Service, U.S. Department of Agriculture,

Defendants.

Case No. CV-13-3034-YGR

ERRATA TO NOTICE OF MOTION AND MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

(Administrative Procedure Act Case)

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NOTICE OF MOTION AND MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs hereby move for a temporary restraining order and a preliminary injunction. This motion is being filed along with the Complaint in the above-captioned case on July 2, 2013, with a request for a hearing as soon as the Court is available. No hearing date or time has been set. This motion is made pursuant to Federal Rule of Civil Procedure 65 and is supported by the accompanying memorandum of points and authorities, declarations and other attached exhibits, a proposed order, and such additional information as may be presented to the Court at or before the hearing.

Plaintiffs seek a temporary restraining order and a preliminary injunction against Defendants to prevent them from carrying out inspections or grants of inspections of domestic horse slaughter facilities pending a resolution of the merits of this case. Because Defendants have decided to grant horse slaughter inspection and adopt a new residue testing plan without undertaking the environmental review required by the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, they have acted contrary to law and the decision must be set aside under the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* Without this relief, plaintiffs will suffer irreparable harm, as described in the memorandum of points and authorities and the accompanying declarations. Further, the balance of equities tips in Plaintiffs' favor, and emergency relief is in the public interest. Accordingly, Plaintiffs seek this emergency relief to allow for meaningful judicial review.

Dated: July 2, 2013

SCHIFF HARDIN LLP

By: */s/ Bruce A. Wagman*
BRUCE A. WAGMAN
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs challenge Defendants' grant of inspection under the Federal Meat Inspection Act ("FMIA") to horse slaughter facilities throughout the United States and the creation of a new horse meat drug residue testing plan, without conducting the necessary environmental review required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*. Plaintiffs seek a temporary restraining order ("TRO") and preliminary injunction ("PI") to enjoin Defendants from allowing horse slaughter for human consumption to occur at domestic facilities pending resolution of the merits. Plaintiffs seek only a brief continuation of the longstanding status quo of no horse slaughter in the United States, to allow the Court to review USDA's actions.

There has been no horse slaughter in America in six years. However, in 2011, Congress authorized funding for horse slaughter facility inspections. Shortly thereafter, defendant USDA received several applications for inspection from facilities seeking to slaughter horses.[1] At the time of this filing, USDA has given one grant of inspection, and indicated that more are imminent.

In April 2012, Plaintiffs Front Range Equine Rescue (FRER) and The Humane Society of the United States ("The HSUS") submitted a Petition for Rulemaking requesting that USDA promulgate rules ensuring horse meat intended for human consumption is not adulterated under the FMIA (the "Rulemaking Petition"), attached as Exhibit 1 to Declaration of Bruce Wagman in Support of Temporary Restraining Order ("Wagman Decl."). The Rulemaking Petition documented concrete risks to public health from consuming meat from American horses, who are administered numerous substances throughout their lives that are prohibited for use in food animals. The Rulemaking Petition was denied on June 28, 2013.

Prior to initiating this action, FRER and HSUS notified Defendant Vilsack in writing that a decision by USDA to authorize horse slaughter without preparing any environmental review would violate NEPA. In addition, on April 16, 2013, FRER and HSUS also notified Defendant Vilsack that

[1] These include Valley Meat Co., LLC ("Valley Meat") in Roswell, New Mexico; Responsible Transportation in Sigourney, Iowa; Rains Natural Meats located in Gallatin, Missouri; American Beef Company/Unified Equine, LLC in Rockville, Missouri; Trail South Meat Processing Co. in Woodbury, Tennessee; and Oklahoma Meat Company in Washington, Oklahoma.

Plaintiffs intended to file suit under the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), if USDA granted inspection to Valley Meat without consulting with the U.S. Fish and Wildlife Service concerning the impact of Valley Meat's horse slaughter operations on threatened and endangered species and their critical habitat near Valley Meat's facility.

Defendants have now granted inspection for horse slaughter without undertaking sufficient environmental review. Defendants have also established their new residue testing plan for drug residues and inspections at *all* domestic horse slaughter facilities, again without any substantive NEPA review. Defendants may also grant additional inspections for horse slaughter facilities at any time. Thus, Defendants' actions have implications that are far-reaching in scope.

As explained in detail below, Plaintiffs are likely to succeed on the merits of their claim that Defendants violated NEPA by granting inspection to domestic horse slaughter facilities and by creating a new residue testing plan without conducting any substantive environmental review. Defendants have abdicated their Congressionally-mandated obligation to evaluate all reasonably foreseeable environmental impacts of horse slaughter, and ignored the substantial information presented to the agency by Plaintiffs regarding these impacts and the public health risks associated with the grant of inspection and creation of the new residue testing plan. Absent emergency relief from this Court, Defendants' actions will allow horse slaughter to occur, altering the status quo and potentially causing substantial environmental impacts.

Absent emergency relief, Defendants' actions will also cause irreparable harm to Plaintiffs Ramona Cordova, Krystle Smith, Cassie Gross, Deborah Trahan, and Barbara Sink, who all live close to the proposed plants, and to members of The HSUS, supporters of FRER, and other members of the public living near the plants. *See* Declarations of Ramona Cordova, Krystle Smith, Cassie Gross, Deborah Trahan, Barbara Sink, and Lawrence Seper, Wagman Decl., Exs. 20-25. As shown by the history of horse slaughter operations in this country, residents near horse slaughter plants suffer significant and irreparable environmental, health, property, and aesthetic harms.[2] On the other hand, an order maintaining the status quo will simply add a short delay to what has already been

[2] *See* Wagman Decl., Exs. 2-13 (declarations of residents near slaughterhouses); *see also The Humane Society of the United States v. Johanns*, No. 06-cv-265-CKK (D.D.C. 2006), ECF No. 5.

years of dormancy for domestic horse slaughter facilities.

II. FACTUAL BACKGROUND

A. Horses Are Not Raised for Slaughter for Human Consumption.

Horses are unique companion animals with a special place in American culture. Accordingly, the horse slaughter industry is highly controversial. Approximately 80% of Americans surveyed oppose horse slaughter for human consumption.[3] A March 2013 survey confirmed that 70% of registered voters in New Mexico oppose horse slaughter.[4] Nevertheless, every year more than 140,000 American horses are sold to slaughter.[5] Because those horses are not raised in regulated industries, but rather as pets, on racetracks, and as working animals, their slaughter can potentially cause serious environmental and public health issues because of the tainted nature of their flesh. *See* Rulemaking Petition, pp. 61-65, Wagman Decl., Ex. 1. Almost all American horses are given a wide variety of drugs and other substances that render their blood and tissue contaminated and dangerous to consume.[6] The discard of the byproducts of horse slaughter poses environmental and public health risks when the tissue and blood seep into the ground and water supply. *See* Song W. *et al*., *Selected Veterinary Pharmaceuticals in Agricultural Water and Soil from Land Application of Animal Manure*, 39 J. Environ. Qual. 4, 1211-17 (2010).

B. Horse Slaughter Causes Significant Environmental Harms.

USDA's grant of inspection to domestic horse slaughter plants is the first federal

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[3] American Society for the Prevention of Cruelty to Animals ("ASPCA") Survey by Lake Research Partners, *Research Findings on Horse Slaughter for Human Consumption* (Jan. 2012), available at http://www.apnm.org/mailbox/horseslaughter/Poll%20Memo%20-%20ASPCA%20Horse%20Slaughter%20Research.pdf; *see also* Press Release, HSUS, *USDA Threatened with Suit if Court Order Not Followed Before Horse Slaughter Resumes* (Feb. 3, 2012), http://www.humanesociety.org/news/press_releases/2011/11/usda_threatened_02032012.html.

[4] *Press Release, ASPCA, New Research Reveals New Mexicans Strongly Oppose Slaughter of Horses for Human Consumption* (Apr. 4, 2013), http://www.aspca.org/Pressroom/press-releases/040413.

[5] U.S. Gov't Accountability Office, GAO-11-228, *Horse Welfare: Action Needed to Address Unintended Consequences from Cessation of Domestic Slaughter*, at 12 (June 2011), available at http://www.gao.gov/assets/320/319926.pdf.

[6] Plaintiffs have provided USDA with undisputed evidence in the Rulemaking Petition that virtually every American horse who goes to slaughter has received medications that federal law specifically states cannot be used on animals intended to be eaten. Rulemaking Petition, pp. 31-34, 46-48, Exh. 1 to Wagman Decl.

authorization of this controversial practice in six years. By its nature, the operation of a horse slaughter plant causes significant environmental impacts in the community, including an overpowering noxious stench, blood in the water supply, and lost property values. The environmental havoc caused by horse slaughterhouses dumping blood, entrails, urine, feces, heads, and hooves into local water systems, overwhelming local waste water infrastructures, and causing numerous environmental violations is well documented in the record before the agency.[7]

The last three American horse slaughter plants were closed in 2007, and caused extensive environmental and other harms, including the destruction of community members' ability to enjoy the area surrounding the slaughterhouse, and the tragic contamination of the waste management and disposal systems.[8] The Cavel plant in DeKalb, Illinois repeatedly violated its state and federal discharge limits for wastewater.[9] Even the mayor of Kaufman, Texas felt it necessary to speak out about the tragic environmental consequences of horse slaughter in her town, which "robbed [ ] citizens of the quiet and peaceful enjoyment of their property." Declaration of Paula Bacon ("Bacon Decl."), at ¶ 4, Wagman Decl., Ex. 13. Dallas Crown "caused massive economic and environmental

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[7] *See* Jane Allin, *When Horse Slaughter Comes to Town, p.* 3 (Mar. 2011), available at *http://www.horsefund.org/resources/When_Horse_Slaughter_Comes_to_Town_Updated_March_2011.pdf* ("When Slaughter Comes to Town"). *See* also Eckhoff, Vickery, "Horse Slaughterhouse Investigation Sounds Food Safety and Cruelty Alarms," Forbes, Dec. 6, 2011, available at http://www.forbes.com/sites/vickeryeckhoff/2011/12/06/horse-slaughterhouse-investigation-sounds-food-safety-and-cruelty-alarms.

[8] *See* Declaration of Robert Eldridge ("Eldridge Decl.") (Kaufman, Texas resident "unable to use [his] yard" because of stench of plant, seeing blood spills and animal parts, concerned for loss of property values), Wagman Decl., Ex. 2; Declaration of Tonja Runnels ("Runnels Decl.") (same), Wagman Decl., Ex. 3; Declaration of Juanita Smith ("J. Smith Decl.") ("blood in my bathtub, sinks, and toilets," unable to have family over because of "severe stench on daily basis"), Wagman Decl., Ex. 4; Declaration of Yolanda Salazar ("Salazar Decl.") (Fort Worth, Texas resident unable to go outside for activities because of stench), Wagman Decl., Ex. 5; Declaration of Margarita Garcia ("Garcia Decl.") ("constantly exposed to the severe stench of the plant;" cannot open windows because "odor is unbearable"), Wagman Decl., Ex. 6; Declaration of Mary Farley ("Farley Decl.") (DeKalb, Illinois resident stating that "smell was so bad, and it would linger in my head for the rest of the day"), Wagman Decl., Ex. 7; Declaration of Elizabeth Kershisnik ("Kershisnik Decl.") (describing "ongoing water pollution violations"; "polluted, green foam oozing from the plant's wastewater treatment tank"), Wagman Decl., Ex. 8; and Declaration of James Kitchen ("Kitchen Decl.") (same), Wagman Decl., Ex. 9.

[99] *See* Administrative Orders in *In Re the Matter of: Cavel Int'l, Inc.*, DeKalb Sanitary District: (Mar. 17, 2005) (Cavel found to be in "'significant' non-compliance" with discharge permit for first six months of 2004), Wagman Decl., Ex. 10; (Jan. 30, 2006) (Cavel in "'significant' non-compliance" with discharge requirements for first eleven months of 2005), Wagman Decl., Ex. 11; and (Oct. 18, 2006) (Cavel found to be in "'significant' non-compliance" with discharge permit for first nine months of 2006), Wagman Decl., Ex. 12.

problems since its inception. It has also violated . . . a multitude of local laws pertaining to waste management, air and water quality, and other environmental concerns." *Id.* at ¶ 5. The stench from the plant "has permeated the community and adversely affected [its] citizens, who continuously complain about the odor deriving from the plant." *Id.* at ¶ 8.[10] In fact, on multiple occasions, Kaufman residents' faucets delivered blood and horse tissue instead of water.[11] Dallas Crown's environmental contamination and repeated local waste water code violations altogether imposed environmental, aesthetic, public health, and economic harms on its host community.[12]

As noted in the Rulemaking Petition, the disposal of horse blood and offal presents a particularly grave environmental threat because of the drugs and substances horses, as opposed to traditional food animals, are given throughout their lives. The byproducts of horse slaughter – especially blood, sludge, and waste water – may contaminate groundwater and even enter the food chain in the event that the sludge is distributed on crops.

C. <u>For Six Years The Status Quo Has Been No Domestic Horse Slaughter.</u>

Until 2006, FSIS inspected horse slaughter plants. In an amendment to the 2006 Agricultural Appropriations Act, Congress withdrew funding for the inspection of horses. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. 109-97, § 794, 119 Stat. 2120, 2164 (A.R. 51) (Nov. 10, 2005). Because the Federal Meat Inspection Act prohibits the sale of meat for human consumption without federal inspections, the defund amendment effectively shut down the horse slaughter plants. The funding prohibition was reinstated annually through 2011.

After the 2006 defund amendment passed, USDA enacted a rule allowing "fee-for-service"

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[10] A local physician reported, "I myself and my staff have been nauseated and sick with this smell. Our patients have also been sick with this smell…" *Id.* The president of a local hospital declared that the "pollution caused by [the horse slaughterhouse] is causing a health threat that [a]ffects the emotional and physical well being of our patients and families." *Id.* In late 2005, the City's Zoning Board of Adjustments "unanimously declared that [the horse slaughterhouse] constituted a public nuisance…." *Id.* at ¶ 10.

[11] Former Mayor Paula Bacon, *Open Letter to State Legislatures Considering Pro-Horse Slaughter Resolutions* (Feb. 2009), *available at* http://animallawcoalition.com/open-letter-to-state-legislatures-considering-pro-horse-slaughter-resolutions ("Paula Bacon Letter").

[12] Paula Bacon Letter, *supra* note 11.

horse slaughter inspections, to go around Congress' decision to shut down horse slaughter. However, the U.S. District Court for the District of Columbia held that USDA had violated NEPA by doing so, stating that "any notion that USDA may avoid NEPA review simply by *failing* even to consider whether a normally excluded action may have a significant environmental impact flies in the face of the [Council on Environmental Quality] regulations." *Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8, 34 (D.D.C. 2007) (internal quotation omitted; emphasis in original).

Congress failed to renew its ban on funding for FSIS's horse slaughter inspections in 2011, opening the door for horse slaughter to resume in this country. However, due to the extraordinarily controversial nature of horse slaughter, bipartisan Congressional efforts were immediately undertaken to prevent resumption of this inhumane, unpopular, environmentally destructive, and health-threatening industry. Several members of Congress from both parties sponsored the Safeguard American Food Exports (SAFE) Act, S. 541/H.R. 1094, which would end all horse slaughter for human consumption in the U.S. and would also prohibit exporting American horses for slaughter abroad. In addition, President Obama's 2014 budget proposal recommended that Congress once again remove all funding for any inspections of horse slaughter plants in the U.S. *See* Office of Mgmt. & Budget, Exec. Office of the President, Budget of the United States Government, Fiscal Year 2014, Dept. of Agriculture, Title VII, Sec. 725 (Apr. 10, 2013). In response, both the House and Senate Appropriations Committees amended the FY2014 Agriculture Appropriations bills to eliminate funding for the inspections.[13] That defund may become law within the very near future.

D. Defendants Granted Inspection Without Environmental Review.

Defendants are aware that Valley Meat committed numerous egregious violations of environmental laws and regulations when it operated a cattle slaughter facility from 2010-2012.[14]

[13] Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2014, Sec. 749, H. R. 2410 [Report No. 113–116] (Jun. 18, 2013), available at http://www.gpo.gov/fdsys/pkg/BILLS-113hr2410rh/pdf/BILLS-113hr2410rh.pdf; *Press Release, U.S. Senator Mary Landrieu, Landrieu Horse Slaughter Ban Passes Appropriations Committee* (Jun. 20, 2013), available at http://www.landrieu.senate.gov/?p=press_release&id=3816.

[14] *See, e.g.*, Letter from William C. Olson, Chief, Ground Water Quality Bureau, New Mexico Environment Department ("NMED"), to Richard De Los Santos, President, Pecos Valley Meat Packing Co., Re: Notice of Violation, Pecos Valley Meat Packing Company, DP-236 (May 7, 2010), Wagman Decl., Ex. 14; Letter from Dr. Ron Nelson, Denver District Manager, USDA

(Footnote continued on next page)

Indeed, FSIS itself first documented Valley Meat's extensive maggot-infested piles of decaying animals on its property – some as high as fifteen feet. *See* Nelson Letter, Wagman Decl., Ex. 15. Valley Meat's environmental violations persisted for years, despite several warnings from USDA and New Mexico regulators, before FRER urged state officials to take action. In August 2012, the Solid Waste Bureau of the New Mexico Environment Department found that Valley Meat was in violation of the solid waste laws and that it should be fined $86,400.[15] Nevertheless, Defendants have now granted Valley Meat approval to slaughter horses without substantive NEPA review.

USDA has also failed to conduct any NEPA review of its new equine residue testing plan, so that dangerous byproducts of horse slaughter may contaminate the environment.

III. STATUTORY AND REGULATORY BACKGROUND

A. National Environmental Policy Act.

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and the Council for Environmental Quality (CEQ) regulations, 40 C.F.R. parts 1500-1508, require federal agencies to conduct environmental impact analyses for regulatory actions. NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA seeks, among its purposes, to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321.

Federal agencies must take a "hard look" at the potential environmental consequences of their projects *before* taking action and must make "relevant information [ ] available to the larger public audience." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) (internal citations omitted); *see also* 42 U.S.C. § 4332(C).

NEPA established the Council on Environmental Quality ("CEQ") to formulate regulations

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FSIS, FO, to Director, New Mexico Health Department, regarding rotting cattle carcasses *and blood on De Los Santos's property* (Jan. 22, 2010) ("Nelson Letter"), Wagman Decl., Ex. 15; *Letter from George W. Akeley, Jr., Manager, Enforcement Section, NMED, to Ricardo and Sarah De Los Santos, Owners, Valley Meat Company, LLC, Regarding Notice of Violation-Valley Meat Company, LLC Composting Facility* (January 4, 2011), Wagman Decl., Ex. 16; E-mail from Auralie Ashley-Marx, NMENV, to Troy Grant, Enforcement Officer, Solid Waste Bureau, NMED, regarding failure of Pecos Valley Meat Company to dispose of legacy waste (April 18, 2012 5:51 p.m.), Wagman Decl., Ex. 17.

[15] *N.M. Env't Dep't v. Valley Meat Company, LLC*, SWB 12-16 (CO) (N.M. Env't Dep't Oct. 31, 2012) (stipulated final order).

for implementing NEPA. CEQ regulations define "effects" to encompass both direct and indirect effects and impacts, including but not limited to ecological, aesthetic, historic, cultural, economic, social, or health effects, whether direct, indirect, or cumulative. 40 C.F.R. § 1508.8. USDA has expressly adopted all of CEQ's NEPA implementing regulations. *See* 7 C.F.R. § 1b.1(a).

NEPA requires that federal agencies prepare one of the following three levels of documentation based on the significance of an action's possible impact on the environment: (1) the environmental impact statement ("EIS"); (2) the environmental assessment ("EA"), which may lead to either a finding of no significant impact ("FONSI") or a decision to produce a complete an EIS; and (3) the categorical exclusion ("CE"). *See* 40 C.F.R. §§ 1507.3(b), 1501.4(a).

An agency is required to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). "'Major Federal action' includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. "Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals." *Id.* § 1508.18(a). Major federal action also includes "formal documents establishing an agency's policies which will result in or substantially alter agency programs," "[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive" and the "[a]pproval of specific projects . . . [including] approv[al] by permit or other regulatory decision as well as federal and federally assisted activities." *See id.* § 1508.18(b)(1), (3)-(4).

Whether an action "significantly" affects the environment requires considerations of both "context" and "intensity". *See id.* 40 C.F.R. § 1508.27. For a site-specific action, such as the grant of inspection to horse slaughter plants in the United States, "significance would usually depend upon the effects in the locale rather than in the world as a whole." *Id.*

For intensity, relevant considerations include but are not limited to "[t]he degree to which the proposed action affects public health or safety," "[t]he degree to which the effects on the quality of

the human environment are likely to be highly controversial," "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks," "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration," "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973," and "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." *Id.* Courts have found that the presence of one or more of these "significance" factors should result in an agency decision to prepare an EIS. *See Border Power Plant Working Grp. v. Dep't of Energy*, 260 F. Supp. 2d 997, 1019 (S.D. Cal. 2003) (citing *Public Citizen v. Department of Transp.*, 316 F.3d 1002, 1023 (9th Cir.2003))*; Johanns*, 520 F.Supp.2d at 19-20.

An EIS is not required if an agency determines, based on a more limited analysis in an EA, that its proposed action would not have a significant environmental impact. *See Bair v. California Dep't of Transp.*, C 10-04360 WHA, 2011 WL 2650896, at *4 (N.D. Cal. July 6, 2011). The EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. § 1508.9(a).

An agency need not prepare an EIS or an EA if the agency instead lawfully invokes a "categorical exclusion". *See* 40 C.F.R. § 1501.4(a)(2). A "categorical exclusion" exempts from full NEPA review a category of actions which do not have a significant effect on the human environment and "for which, therefore, neither an [EA nor an EIS] is required." *See id.* § 1508.4. A categorical exclusion may only be invoked for those actions which do not "individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementing [the CEQ] regulations." *Id.* Moreover, an agency's procedures for determining categorical exclusions must "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." *See id.* § 1508.4; *see also id.*at 40 C.F.R. § 1507.3(b)(2)(ii); *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1096 (9th Cir. 2013) ("[E]ven where an action falls into a categorical exclusion, an agency must nevertheless provide *procedures* for determining whether 'extraordinary circumstances'

exist.") (emphasis added).

USDA regulations state that FSIS actions, which include the grant of inspection to domestic horse slaughter facilities and the new horse meat residue testing plan, "are categorically excluded from the preparation of an EA or EIS *unless the agency head determines that an action may have a significant environmental effect*." 7 C.F.R. § 1b.4(a) (emphasis added); *see also* 40 C.F.R. § 1508.4 (CEQ regulation to implement NEPA requiring that "[a]ny procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.").

Thus, according to USDA's own regulations, a determination that there is a mere *possibility* of an action having a significant environmental effect is sufficient to remove the action from the cover of a CE. Furthermore, USDA has an ongoing affirmative obligation to analyze whether a CE continues to be appropriate for the category. *See* 7 C.F.R. § 1b.3(c) ("Agencies shall continue to scrutinize their activities to determine continued eligibility for categorical exclusion."); *see also California v. Norton*, 311 F. 3d 1162, 1168 (9th Cir. 2002) (in "extraordinary circumstances, a categorically excluded action would nevertheless trigger preparation of an EIS or an EA"); *Reed v. Salazar*, 744 F. Supp. 2d 98, 103 (D.D.C. 2010) (finding that if a proposed action falls within a categorical exclusion, then "the agency must then determine whether there are any '[e]xtraordinary circumstances' that nevertheless require the agency to perform an environmental evaluation") (quoting 40 C.F.R. § 1508.4).

Agencies must complete the necessary NEPA process "before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). Therefore, "NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

B. Administrative Procedure Act.

The Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* ("APA"), provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *See id.* § 702. "[F]inal agency action for which there is no other adequate remedy in a court" is subject to judicial

review. *Id.* § 704. A reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law." *Id.* §§ 706(2)(A), (C), and (D).

C. Federal Meat Inspection Act.

The Federal Meat Inspection Act, 21 U.S.C. § 601 *et seq.* ("FMIA"), is a comprehensive statutory inspection scheme designed both to prevent "adulterated" meat products from entering the human food supply and to prevent "inhumane slaughtering." 21 U.S.C. § 603. In order to be eligible for federal inspection, a horse slaughter facility must apply to FSIS for inspection. Review of an application for inspection necessarily involves FSIS assessing detailed paperwork regarding the applicant's premises, standard operating procedures, and management of waste-streams, including sewage and water. 9 C.F.R. § 416.2. Facilities may not slaughter horses for human consumption unless and until FSIS grants inspection and conditional approval.

FSIS has discretion in granting inspection applications. *See id.* § 304.2 (establishing that FSIS Administrator has the authority to grant or deny an application for inspection). The FMIA provides that USDA may refuse or withdraw inspection services under circumstances where the applicant for or recipient of such services has been declared unfit to engage in any business requiring inspection services. *See* 21 U.S.C. § 671. Furthermore, the FSIS Administrator may file a complaint to withdraw a grant of Federal inspection from an establishment for, among other reasons, producing or shipping an adulterated product, not handling or slaughtering livestock humanely, or being otherwise unfit to engage in any business requiring inspection. *See* 9 C.F.R. § 500.6.

IV. ARGUMENT

A. Applicable Legal Standard.

A plaintiff seeking a temporary restraining order or a preliminary injunction must establish that: (1) he is substantially likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The same standard applies to both temporary restraining orders and preliminary injunctions, which are often

granted in NEPA cases. *See Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995); *Sierra Club v. Bosworth*, 510 F. 3d 1016, 1033 (9th Cir. 2007) (injunctive relief is appropriate when government action "may significantly degrade some human environmental factor").

The Ninth Circuit employs a "sliding scale" approach to *Winter*'s four-element test, so that where a plaintiff shows that the balance of hardships tips strongly in its favor, it need only raise "substantial questions" going to the merits of its claim. *Id*. at 1135. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). "While an injunction does not automatically issue upon a finding that an agency violated NEPA, 'the presence of strong NEPA claims gives rise to more liberal standards for granting an injunction.'" *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004) (quoting *American Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 965 (9th Cir.1983)). As set forth below, Plaintiffs make a strong showing on each of the four requirements for injunctive relief, and thus the Court should issue a TRO and a PI.

B. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

1. *Defendants Violated NEPA and the APA by Failing to Prepare an EIS.*

A reviewing court must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," as well as agency action that is taken "without observance of procedure required by law." 5 U.S.C. § 706(2); *see also Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 781 (9th Cir. 2006). Courts "will defer to an agency's decision [not to prepare an EIS] only if it is fully informed and well considered." *High Sierra Hikers*, 390 F.3d at 640 (quotation omitted).

USDA is required to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). "The purpose of an EIS is to apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at a time when they retain a maximum range of options." *Pit River Tribe*, 469 F.3d at 785 (quotation omitted). Both acts challenged here – granting inspection to domestic horse slaughter facilities and creating a new residue testing plan – trigger the EIS requirement. Defendants have deprived decisionmakers and the public of a frank discussion of the potentially far-reaching environmental

impacts of starting up numerous horse slaughter facilities in this country after many years of dormancy.[16]

a) Defendants' Actions are "Major Federal Actions".

It is without question that Defendants' grant of inspection to domestic horse slaughter plants constitutes a "major Federal action" under the CEQ regulations. *See* 40 C.F.R. § 1508.18. Defendants' acts are clearly within the CEQ regulations' definition of "major federal action", which includes "projects and programs . . . regulated, or approved by federal agencies," "new or revised agency rules, regulations, plans, policies, or procedures," "formal documents establishing an agency's policies which will result in or substantially alter agency programs," or "[a]doption of programs," and the "[a]pproval of specific projects . . . [including] approv[al] by permit or other regulatory decision." *See id*. §§ 1508.18(a), (b)(1), (3)-(4).[17]

Defendants' new horse meat residue testing plan is also a "major federal action," as it will be the standard operating protocol for every horse slaughter facility across the country, governing all FSIS testing and inspections and determining when a slaughter facility has either received animals with excess residue levels, or when it has produced horse meat with dangerous drug residues. This is just the kind of program that demands NEPA review.[18]

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[16] As a threshold matter, it is clear that the grant of inspections to domestic horse slaughter facilities and the implementation of a new residue testing plan change the status quo, and thus constitute Federal "action" as defined in CEQ regulations. *See* 40 C.F.R. §1508.18. As the District Court for the District of Columbia has previously held, a change in the "legal or regulatory status quo" triggers the requirement for NEPA review. *Johanns*, 520 F. Supp. 2d at 29.

[17] *Johanns*, 520 F. Supp. 2d at 28; *see also Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) ("[I]f a federal permit is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute major federal action and the federal agency involved must conduct an EA and possibly an EIS before granting it."); *Methow Valley*, 490 U.S. at 336 (Forest Service's decision to issue recreational special use permit constitutes major federal action within the meaning of NEPA); *Ctr. for Biological Diversity v. Salazar*, 791 F. Supp. 2d 687, 697 n.6 (D. Ariz. 2011) *reconsideration denied*, CV-09-8207-PCT-DGC, 2011 WL 2550392 (D. Ariz. June 27, 2011) and *aff'd*, 706 F.3d 1085 (9th Cir. 2013) (noting that "[a]ll parties agree that issuance of [a free use permit for removing road-repair gravel] was a major federal action"); *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1036-37 (9th Cir. 2009) (Army Corp of Engineers' issuance of a discharge permit is a major federal action); *Friends of the Earth, Inc. v. U.S. Army Corps of Engineers*, 109 F. Supp. 2d 30, 40 (D.D.C. 2000) (Army Corps of Engineers' decision to issue permit to casino builders is a major federal action); *Davis v. Morton*, 469 F.2d 593, 596-97 (10th Cir. 1972) (approving leases on federal land constitutes major federal action).

[18] *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1048-49 (E.D. Cal. 2009) (agency took major federal action by provisionally accepting and implementing U.S. Fish and Wildlife Service's biological opinion concerning the impact of coordinated operations of

(Footnote continued on next page)

b) Defendants' Actions May Significantly Affect the Environment.

The grant of inspection and the new horse meat residue testing plan will, or at the very least may, have a significant effect upon the quality of the human environment, thus mandating the preparation of an EIS. 42 U.S.C. § 4332(C). As explained above, American horses are given a pharmacopeia of different drugs during their lives, and those drugs are given without any consideration of the federal laws restricting the administration of drugs to animals intended for human consumption. Rulemaking Petition, pp. 31-34, 46-48, 61-65, Wagman Decl., Ex. 1. The fact that American horses are not intended for human consumption also means that there is a high likelihood that horse slaughter operations could affect the human environment surrounding the horse slaughter plants, because the discarded parts, organs and blood could be dangerous to the natural environment. Rulemaking Petition, pp. 50-52, Wagman Decl., Ex. 1. Past horse slaughter plants' operations and the evidence in the Rulemaking Petition are proof that Defendants' actions may significantly harm the environment. *See* Rulemaking Petition, pp. 27-29, Wagman Decl., Exhibit 1; Bacon Decl., Wagman Decl., Ex. 13; Administrative Orders regarding Cavel's "significant" non-compliance, Wagman Decl., Exs. 10, 11, 12; *see also Johanns,* 520 F. Supp. 2d at19.

The evidence of environmental impacts is well-beyond the threshold to trigger the agency's duties under NEPA. In order to prevail on their claim here, plaintiffs need only raise "substantial questions whether a project may have a significant effect" on the environment to prevail on a claim that a federal agency violated its statutory duty to prepare an EIS. *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1212 (9th Cir.1998), *cert. denied,* 527 U.S. 1003 (1999) (quotation omitted). The plaintiff does not have to show that significant effects will in fact occur.

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state water projects on threatened delta smelt because that decision "substantially alter[ed] the status quo" of project operations); *Native Ecosystems Council & Alliance for the Wild Rockies v. U.S. Forest Serv. ex rel. Davey*, 866 F. Supp. 2d 1209, 1227 (D. Idaho 2012) (Forest Service's adoption of a revised map delineating analysis units for Canada lynx within a national forest was a major federal action requiring preparation of an EIS); *Ramsey*, 96 F.3d at 437 (National Marine Fisheries Service issuing an incidental take statement for salmon populations that would guide state fishing plans was a major federal action requiring at least an EA and possibly an EIS); *see also New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 476-77 (D.C. Cir. 2012) (a decision by an agency that "will be used to enable licensing decisions" and that "renders uncontestable general conclusions about the environmental effects of plant licensure that will apply in every licensing decision" constitutes a major federal action).

Id.; *see also California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1012 (9th Cir. 2009) (threshold for requiring an EIS "is relatively low: 'It is enough for the plaintiff to raise substantial questions whether a project may have a significant effect on the environment.'") (quoting *Blue Mountains*, 161 F.3d at 1212); *Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 977 (D. Haw. 2008) *modified in part*, CIV. 07-00254DAELEK, 2008 WL 2020406 (D. Haw. May 9, 2008) (Navy's EA prepared for its use of mid-frequency active sonar was insufficient to satisfy NEPA where plaintiffs raised substantial questions as to whether the sonar would have a significant impact on the environment). As outlined below, Plaintiffs have presented Defendants with clear evidence that Defendants' actions implicate numerous CEQ "significance" factors and may cause significant environmental effects, and thus have certainly at minimum raised substantial questions as to such effects, sufficient to warrant injunctive relief.

For example, in *Johanns*, the District Court for the District of Columbia found that horse slaughter may cause potentially severe environmental effects. 520 F. Supp. 2d at 19. That fact has not changed since the court issued its decision, and the evidence makes clear that the potential for serious environmental impacts from horse slaughter facilities is ongoing, including overwhelming the area around the slaughterhouse with a noxious stench, potentially polluting local groundwater and water supplies with toxic horse blood and tissue, and attracting pests and vermin to the area. *See* Eldridge Decl., ¶¶3-5 ("blood spills and animal parts left outside to rot" attract vermin and insects), Ex. 2 to Wagman Decl.; Runnels Decl., ¶¶3-5 (same), Ex. 3 to Wagman Decl.; J. Smith Decl., ¶¶3-4, 6-7 ("blood in my bathtub, sinks and toilets"), Ex. 4 to Wagman Decl.; Salazar Decl., ¶¶3-4, 6, Ex. 5 to Wagman Decl.; Garcia Decl., ¶¶3-4, Ex. 6 to Wagman Decl.; Farley Decl., ¶4, Ex. 7 to Wagman Decl.; and Bacon Decl., ¶¶4-7 (Dallas Crown plant issued "[t]wenty-nine citations for wastewater violations"), Ex. 13 to Wagman Decl.

Thus, given the evidence of past environmental harms at horse slaughter facilities, *see generally* Declarations, *supra*, and the possibility for similar harms to occur upon Defendants' authorizations, Defendants have violated NEPA and the CEQ regulations by allowing horse slaughter facilities to begin slaughtering horses for human consumption without first preparing an EIS. *Reed v. Salazar*, 744 F. Supp. 2d 98 (D.D.C. 2010) (NEPA violation where the Department of

Interior failed to conduct environmental review or even to consider whether a categorical exclusion properly could be invoked before signing a new land management agreement with a party who had mismanaged the property under a prior agreement).[19]

Moreover, granting inspection to a horse slaughter facility in combination with the creation of a new horse meat residue testing plan implicates several CEQ "significance" factors, thus requiring an EIS, or at minimum a detailed environmental assessment. *See* 40 C.F.R. § 1508.27.

First, Defendants' grant of inspection and new residue testing plan both pose serious risks to public health or safety and unique or unknown health and safety risks. *See* 40 C.F.R. § 1508.27(b)(2), (5). There is a very long list of the unknown ramifications of starting horse slaughter operations – regardless of where the plant is located. As documented in the Rulemaking Petition, there are dozens of drug and chemical residues that may have been given to American horses that are specifically "not intended for use" in horses who will be eaten. *See* Exhibit 1 to the Rulemaking Petition, Wagman Decl., Ex. 1. That the federal agencies have gone so far as to expressly ban the use of those drugs for horses destined for slaughter and human consumption, combined with the fact that virtually every American horse has been administered most of those drugs, in itself should trigger a comprehensive review of the public health impacts of authorizing any horse slaughter plants to operate. *See* Exhibit 1 to the Rulemaking Petition, Wagman Decl., Ex. 1; *see also* Rulemaking Petition, pp. 14-23, Wagman Decl., Ex. 1. Some are indisputably known to be unsafe, and there is no minimal residue that scientists can guarantee is safe. Rulemaking Petition, pp. 61-62, Wagman Decl., Ex. 1; *see also* Nicholas Dodman, Nicolas Blondeau, Ann M. Marini, "*Association of phenylbutazone usage with horses bought for slaughter: A public health risk*", Food and Chemical Toxicology 48 (2010) 1270–74, Exhibit 20 to the Rulemaking Petition, Wagman Decl., Ex. 1. Not only are the drugs not to be used for horses who are eaten, and the horse meat "adulterated" under the Food, Drug, and Cosmetic Act by virtue of the use of these drugs,[20] but the

[19] Valley Meat's history of contempt for environmental laws suggests that it will conduct itself in a similar manner when operating a horse slaughter facility. This fact alone makes clear that the act of granting inspections to Valley Meat may cause significant environmental impacts.

[20] *See, e.g.*, 21 U.S.C. § 342(a).

waste byproducts from horse slaughter may also contain dangerous residues, capable of contaminating local ecosystems and water and soil supplies.[21] Indeed, recent studies have shown that veterinary pharmaceuticals can be present in animal manure and can persist in the environment following land application. For example,

> [A] certain fraction of the pharmaceuticals [given at subtherapeutic levels to livestock] are excreted into animal manures. Land application of these manures contaminates soils with the veterinary pharmaceuticals, which can subsequently lead to contamination of surface and groundwaters . . . High concentrations of pharmaceuticals in soils were generally observed at the sites where the respective concentrations in surface water were also high . . . These results suggest that soil is a reservoir for veterinary pharmaceuticals that can be disseminated to nearby surface water via desorption from soil, surface runoff, and soil erosion.

Song W., *et al*., *Selected Veterinary Pharmaceuticals in Agricultural Water and Soil from Land Application of Animal Manure*, 39 J. Environ. Qual. 4, 1211-17 (2010). In addition, a recent study conducted by Kansas State University examined the environmental fate of pharmaceuticals that are introduced into soils with animal waste land application. The study found

> A significant portion of these chemicals remained un-degraded during wastewater treatment and was transferred to the biosolids. The use of biosolids containing high concentrations of [veterinary pharmaceuticals] raises concerns about their use as agricultural soil amendments. Future studies should investigate the feasibility of treating the biosolids to ensure removal of [veterinary pharmaceuticals] prior to their application on agricultural lands.

See Kan. State Univ., *Environmental Fate Of Pharmaceuticals In Animal Wastes*, U.S. Dep't of Agric. REEIS, http://www.reeis.usda.gov/web/crisprojectpages/0189154-environmental-fate-of-pharmaceuticals-in-animal-wastes.html (last visited July 1, 2013).

Finally,

> A recent study by the Toxic Substances Hydrology Program of the U.S. Geological Survey (USGS) shows that a broad range of chemicals found in residential, industrial, and agricultural wastewaters commonly occurs in mixtures at low concentrations downstream from areas of intense

[21] Plaintiffs note that the recently released "Residue Testing of Equine" provides no protection to the environment or consumers. Food Safety & Inspection Serv., *FSIS Directive 6130.1, Ante-Mortem, Postmortem Inspection of Equines and Documentation of Inspection Tasks*, U.S. Dept. of Agric. (June 28, 2013), http://www.fsis.usda.gov/wps/wcm/connect/6d64bdd1-53d9-4130-adbe-89c657f6d901/6130.1.pdf?MOD=AJPERES. All horses have an "increased likelihood of a violative residue" and horse meat is adulterated whenever a horse receives a prohibited substance, regardless of the presence of residues – therefore the slight increase in residue testing of horses, suggested by last week's Directive, is meaningless.

> urbanization and animal production. The chemicals include human and veterinary drugs (including antibiotics), natural and synthetic hormones, detergent metabolites, plasticizers, insecticides, and fire retardants. One or more of these chemicals were found in 80 percent of the streams sampled. Half of the streams contained 7 or more of these chemicals, and about one-third of the streams contained 10 or more of these chemicals.

See U.S. Dep't of the Interior, *Pharmaceuticals, Hormones, and Other Organic Wastewater Contaminants in U.S. Streams*, USGS: Science for a Changing World, (June 2002) http://toxics.usgs.gov/pubs/FS-027-02/pdf/FS-027-02.pdf ("*Pharmaceuticals*").

"Where the environmental effects of a proposed action are highly uncertain or involve unique or unknown risks, an agency must prepare an EIS." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 870 (9th Cir. 2005) (quotations and citations omitted). It is undisputed that there have been no studies or research done on the environmental effects related to the special nature of horse meat and the byproducts and offal of horse slaughter. It is also clear from the foregoing that serious questions are raised about the possible negative effects of horse slaughter on the human environment. There is a significant likelihood that the wastewater and biosolids generated at domestic horse slaughter facilities will contain detectable concentrations of phenylbutazone and other veterinary drugs that are generally associated with horses, but which are not associated with cattle, swine, sheep or goats.

Second, the human health and environmental impacts of the agency's actions are not yet understood and are highly controversial, implicating another CEQ significance factor. A recent United States Geological Survey study of wastewater-related organic chemicals in water, including veterinary drugs, noted that "there is little information about the extent or occurrence of many of these compounds in the environment." *Pharmaceuticals, supra*. Moreover, as detailed above, a frightening number of the drugs administered to horses over their lifetimes have not been tested on humans, so their potential toxicity and adverse reactions to their consumption by humans are completely unknown. *See* Exhibit 1 to the Rulemaking petition, Wagman Decl., Ex. 1. The impact and reliability of Defendants' new testing protocols, which attempt to address the serious problem of

horse meat drug residues, are also highly controversial within the meaning of the CEQ factors.[22] USDA's new residue testing plan requires testing only 4 of each 100 or more horses slaughtered, so that ninety-six per cent of the byproducts of slaughtered horses will flow into the local groundwater and waterways, and ninety-six percent of normal-looking horses need not be tested for residues. Food Safety & Inspection Serv., *FSIS Directive 6130.1, Ante-Mortem, Postmortem Inspection of Equines and Documentation of Inspection Tasks*, U.S. Dept. of Agric. (June 28, 2013), http://www.fsis.usda.gov/wps/wcm/connect/6d64bdd1-53d9-4130-adbe-89c657f6d901/6130.1.pdf?MOD=AJPERES. Whether this approach is adequate to address the impacts stemming from the drugs present in horse flesh is highly controversial.

Third, Defendants' actions implicate the degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the ESA. *See* 40 C.F.R. § 1508.27(b)(9). As documented in Plaintiffs' April 16, 2013 letter to Defendant Vilsack, Valley Meat is located near South Spring River, Pecos River, Bitter Lake Wildlife Refuge, and Bottomless Lakes State Park. *Letter from Bruce A. Wagman to USDA Secretary Tom Vilsack Re: Sixty-Day Notice of Intent to Sue the United States Department of Agriculture Pursuant to the Endangered Species Act* (Apr. 16, 2013), Wagman Decl., Ex. 18**.** Threatened and endangered species are found within the vicinity of Valley Meat, and their continued existence, as well as their critical habitats, may be jeopardized by Valley Meat's horse slaughter operations. *Id*. Multiple species may be affected. *See id*. Thus, Defendants' decision to approve inspection at Valley Meat "may adversely affect an endangered or threatened species or its habitat that has been determined to be critical," which alone is sufficient for triggering the EIS requirement. 40 C.F.R. § 1508.27(b)(9). And of course similar concerns may arise at other proposed horse slaughter facilities.

[22] *See Bair v. Cal. Dep't of Transp.*, C 10-04360 WHA, 2011 WL 2650896, at *7 (N.D. Cal. July 6, 2011) (a project is "highly controversial" if there is "a substantial dispute about [its] size, nature, or effect") (internal quotation omitted); *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Zielinski*, 187 F. Supp. 2d 1263, 1271 (D. Or. 2002) (finding agency's plan to burn timber "controversial" where there was substantial dispute about its nature or effect, as agency discounted scientific evidence opposing the logging and failed to provide hard data supporting a critical assumption for its environmental mitigation plan); *Silva v. Romney*, 342 F. Supp. 783, 784 (D. Mass. 1972) (proposed Federal housing development was "controversial" where there was "considerable opposition" to it and disagreement about the drainage facilities between the agency and town residents).

Fourth, Defendants' actions implicate the "degree to which the action may establish a precedent for future actions with significant effects." 40 C.F.R. § 1508.27(b)(6). Both actions – the grant of inspection to a horse slaughterhouse for the first time in six years, along with the new drug residue testing plan – will establish a significant precedent for the granting of inspections to any future horse slaughter plants, with wide-ranging future consequences. The grant of inspection for domestic slaughter of horses suggests (incorrectly) that USDA can ensure the safety of the horse meat that will be produced, and of the environment and consumers, for this and future slaughter plants. Moreover, the new residue testing plan will be used to conduct, evaluate, and analyze horse meat for all horse slaughter facilities in the country, both those currently known and all of those unknown.

As of March 2013, there were at least six applications for inspection of horse slaughter facilities on file with Defendants. All of those facilities create similar problems and will be governed by Defendants' new testing protocol. Defendants created the new residue plan without proper environmental review, so all of the public health and environmental risks generated by the chemical and drug residues in horse meat accumulate across all of the horse slaughter facilities that Defendants authorize. It is evident that Defendants' new residue protocol is the governing, controlling document for all horse slaughter facilities – current and future. When an agency establishes such guiding implementation principles for a new program, it is subject to NEPA review. *See Native Ecosystems Council & Alliance for the Wild Rockies v. U.S. Forest Serv.*, 866 F. Supp. 2d 1209, 1230 (D. Idaho 2012) (agency's adopting of a map delineating analysis units for Canadian lynx required an EIS as it "opened nearly 400,000 acres of land to precommercial thinning. The fact that no other precommercial thinning projects have been identified does not diminish the fact that the adoption of the 2005 map represents a decision in principle about the future use of the land."). Defendants' actions plainly "establish a precedent for future actions with significant effects." 40 C.F.R. § 1508.27(b)(6).

Fifth, Defendants' grant of inspection and new residue testing plan required implicate the CEQ significance factor regarding "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." 40 C.F.R.

§ 1508.27(b)(10). For example, Defendants know that Valley Meat has repeatedly committed gross violations of New Mexico environmental laws and regulations when it was in the business of slaughtering cattle. *See, e.g.*, Letter from William C. Olson, Wagman Decl., Ex. 14; Nelson Letter, Wagman Decl., Ex. 15; Letter from George W. Akeley, Wagman Decl., Ex. 15; E-mail from Auralie Ashley-Marx, Wagman Decl., Ex. 16. Moreover, Defendants know that the last three horse slaughter plants in the U.S. that were shut down in 2007 wreaked environmental havoc on their host communities, which included violations of environmental regulations. *See Johanns*, 520 F. Supp. 2d at19; Bacon Decl., Wagman Decl., Ex. 13; Administrative Orders, Wagman Decl., Exs. 10-12. And as just stated, Valley Meat's operation threatens violations of the Endangered Species Act. Wagman Decl., Ex. 18. Finally, Valley Meat has been in violation of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, for years, operating without a permit or an official exclusion from the permitting process. *See* Wagman Decl., Ex. 19. Defendants' actions implicate the CEQ significance factor of threatened violations of environmental laws or regulations, which alone is sufficient to trigger the requirement to prepare an EIS.

Finally, and importantly, NEPA review is required here because of the "cumulative impact" of the grant of inspection to the current horse slaughter plants and the likely grant of inspection to future facilities . 40 C.F.R. §§ 1508.7, 1508.8. "Cumulative impact" is the

> impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7.

A comprehensive analysis of cumulative impacts is mandated by NEPA and the CEQ regulations. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1076 (9th Cir. 2011) ("[W]here several actions have a cumulative ... environmental effect, this consequence must be considered in an EIS.") (citing *Te–Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 602 (9th Cir.2010)); 40 C.F.R. § 1508.25(a)(2), (c). "The purpose of this requirement is to prevent an agency from dividing a project into multiple actions, each of which individually has

an insignificant environmental impact, but which collectively have a substantial impact." *N. Plains Res. Council,* 668 F.3d at 1087 (quoting *Great Basin Mine Watch v. Hankins,* 456 F.3d 955, 969 (9th Cir.2006)).

The regulations make clear that cumulative impact analysis requires a careful review of all reasonably foreseeable future activities. *N. Plains Res. Council,* 668 F.3d at 1076 ("A cumulative impact analysis must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.") (internal quotation omitted). And "[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided … by breaking [an action] down into small component parts." 40 C.F.R. § 1508.27(b)(7).

Here, the compounding of potential problems is obvious. There has been no horse slaughter in America for six years. There are serious environmental threats to each and every community and its surroundings from horse slaughter, as elaborated in this brief and the complaint in this action, with potentially tremendous nationwide impacts to numerous communities. Moreover, with each additional horse slaughterhouse, the domestic horse slaughter industry will grow and strengthen, adding momentum and encouraging and facilitating the opening of additional slaughter plants. And, with each additional request for inspection it will be harder for the agency to undertake meaningful review, having already set a precedent for granting inspection to previous facilities without undertaking a detailed review. In short, now is the time to undertake meaningful review of the environmental and public health impacts of horse slaughter facilities, not later after the cumulative damage is done. Thus, in order to perform proper NEPA analysis and the requisite "hard look," USDA needs to consider the cumulative impact of future horse slaughterhouses, including those identified in the six applications currently pending. *See N. Plains Res. Council*, 668 F.3d 1067 at 1078 ("[P]rojects need not be finalized before they are reasonably foreseeable."); *Gov't of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37, 47 (D.D.C. 2010) (failure to consider other "reasonably foreseeable" projects is "a glance at the issue, not a hard look").

Defendants' actions implicate multiple CEQ significance factors, and they were required to prepare an EIS *prior* to acting, or at least a detailed EA. *See W. Watersheds Project v. Abbey*, 11-

35705, 2013 WL 2532617, at *12 (9th Cir. June 7, 2013) (EA for a particular site's grazing management plan failed to include the required "hard and careful look" at no grazing and reduced grazing alternatives); *Border Power Plant Working Grp. v. Dep't of Energy*, 260 F. Supp. 2d 997, 1033 (S.D. Cal. 2003) (EA for building electricity transmission lines was inadequate where agency failed to consider relevant issues including the project's potential for controversy, impacts on water, alternatives to the project, and cumulative impacts); *Anacostia Watershed Society v. Babbitt*, 871 F. Supp. 475, 482 (D.D.C. 1994) (setting aside a land exchange that was not preceded by either an EA or an EIS); *Fund For Animals v. Espy*, 814 F. Supp. 142, 150-151 (D.D.C. 1993) (enjoining the removal of bison from a National Park without first preparing an EA or an EIS).

Given the negative environmental, aesthetic, economic, and cultural effects that past horse slaughter facilities inflicted on their host communities, environmental review in this instance is crucial to inform Defendants and the public of the possible environmental effects of their actions, and so that the public can ascertain: (1) whether local waste disposal system and water, air, and soil systems are being adequately protected against dangerous and foul contaminants from horse slaughter facilities operations; (2) whether there is any threat to local ecosystems or local endangered species; (3) whether FSIS inspectors have the minimally adequate procedures and training to ensure that adulterated meat is not making it to market; and (4) whether local waterways will be safe from contamination. Preparing an EIS "provide[s] full and fair discussion of significant environmental impacts and [informs] decision makers and the public of reasonable alternatives that would minimize adverse environmental impacts." *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1012 (9th Cir. 2009). USDA has not made any relevant information regarding its environmental analysis for horse slaughter available to the public.[23]

[23] Nor can defendants rely on a Categorical Exclusion to avoid full NEPA review in this case, since numerous CEQ significance factors implicated in their actions cut off any possible application of a categorical exclusion. According to USDA's own regulations implementing NEPA, all FSIS actions are categorically excluded from NEPA review "unless the agency head determines that an action may have a significant environmental effect." 7 C.F.R. § 1b.4(a). In other words, application of a categorical exclusion is precluded by the mere *possibility* of significant environmental harm. As discussed in detail above, that minimal threshold is clearly met here in light of the application of not one, but several of the CEQ significance factors.

C. Plaintiffs Will Suffer Irreparable Harm in the Absence of a TRO.

Injunctive relief is appropriate when government action "may significantly degrade some human environmental factor," and the court can apply more liberal standards for granting an injunction when "strong NEPA claims" are present. *Sierra Club v. Bosworth*, 510 F. 3d 1016, 1033 (9th Cir. 2007). Thus, even after the Supreme Court's ruling in *Winter*, the Ninth Circuit has provided a deferential preference for plaintiffs seeking injunctions in NEPA cases, with respect to the irreparable harm prong.

The Ninth Circuit has noted the tight link between a NEPA violation and the irreparable injury that results: "In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action." *High Sierra Hikers*, 390 F. 3d at 643 (citing *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir.1985)). *See also Save Our Ecosystems v. Clark*, 747 F. 2d 1240, 1250 (9th Cir. 1984) ("Irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action.") Irreparable harm is "compounded by the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with public comment) of the likely effects of their decision on the environment." *Bosworth*, 521 F. 3d at 1034 (quoting *Citizens for Better Forestry v. U.S. Dep't. of Agric.*, 341 F.3d 961, 971 (9th Cir. 2003).[24]

Moreover, the named individual plaintiffs have clearly demonstrated that they will be irreparably harmed if Defendants' grant of inspection is not enjoined, as set out in detail in their declarations. Specifically, plaintiffs and the other declarants have established that they will be immediately and irreparably harmed because:

[24] Further, by granting inspection to domestic horse slaughter facilities without NEPA review, Defendants have harmed Plaintiffs by depriving them of their statutory right to participate in the NEPA review process and threatening concrete injury caused by the resumption of horse slaughter in their communities. *See City of Sausalito v. O'Neill*, 386 F. 3d 1186, 1197 (9th Cir. 2004) ("[A] cognizable procedural injury exists when a plaintiff alleges that a proper EIS has not been prepared under [NEPA] when the plaintiff also alleges a 'concrete' interest—such as an aesthetic or recreational interest—that is threatened by the proposed action."); *Cottrell*, 632 F. 3d at 1137-38 (9th Cir. 2011) ("AWR was harmed by its inability to participate in the administrative appeals process, and that harm is perpetuated by the Project's approval. The administrative appeals process would have allowed AWR to challenge the Project under . . . NEPA, and to seek changes in the Project before final approval.").

1. They will be subjected to regular viewing of horses going to slaughter, waiting to be slaughtered, and to viewing the trucks leaving Valley Meat with the horse meat produced there. Plaintiffs Ramona Cordova, Krystle Smith, Cassie Gross, and Barbara Sink regularly drive by the horse slaughter plant in their communities and the stockyards where some of the slaughter facilities' horses would be held prior to slaughter, and their ability to enjoy their lives and daily activities would be seriously harmed by seeing the trucks filled with horses going in to the slaughterhouse, and the trucks filled with dead horses, horse meat, and the remains of the horses, coming back out of the facility.[25] They would also be detrimentally impacted by the sight of horses who are about to be slaughtered at the slaughter facility in their town waiting in the holding pens. *See* K. Smith Decl., ¶ 12, Wagman Decl., Ex. 20; Gross Decl., ¶¶ 17-18, Wagman Decl., Ex. 22; Cordova Decl., ¶ 10, Wagman Decl., Ex. 23; Sink Decl., ¶ 9, Wagman Decl., Ex. 24; and Seper Decl., ¶ 8, Wagman Decl., Ex. 25.

In similar circumstances, courts have found that irreparable harm exists where plaintiffs suffer real emotional and aesthetic injury from the knowledge that animals will be unjustifiably killed. *See Humane Society of the U.S. v. Bryson*, 2012 WL 1952329, *6 (D. Or. May 30, 2012) (unreported) ("The individual Plaintiffs will suffer a real emotional and aesthetic injury from the knowledge that [California Sea Lions] have been killed as a result of the authorizations, and this injury is not compensable with monetary damages."). "People have a cognizable interest in viewing animals free from inhumane treatment." *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 433 (D.C. Cir. 1998) (*en banc*) (internal citations omitted).

2. If the horse slaughterhouses in the Plaintiffs' respective communities begin horse slaughter operations, plaintiffs will be unable to continue their personal and family recreational

[25] *See* Declaration of Krystle Smith ("Smith Decl."), ¶¶ 11-16, Wagman Decl., Ex. 20 (being "directly confronted with the view of horses in holding pens" will "cause [her] intense aesthetic injury"); Trahan Decl., ¶ 12, Wagman Decl., Ex. 21 (will experience an "immediate and long-lasting injury from viewing those trucks and animals"); Declaration of Cassie Gross ("Gross Decl."), ¶¶ 17-18, Wagman Decl., Ex. 22; Declaration of Ramona Cordova ("Cordova Decl."), ¶¶ 10-11, Wagman Decl., Ex. 23 (seeing trucks carrying horse carcasses "will affect [her] deeply"); Declaration of Barbara Sink ("Sink Decl."), ¶¶ 9-11, Wagman Decl., Ex. 24 (she "will suffer distress" upon seeing "horses on their way to the auction and then to slaughter at Rains Natural Meats."); and Declaration of Lawrence Seper ("Seper Decl."), ¶ 8, Wagman Decl., Ex. 25.

activities of fishing and camping in and on waterways that may be tainted by the discharge of contaminated horse slaughter byproducts. Cordova Decl., ¶¶ 6-8, Wagman Decl., Ex. 23; Sink Decl., ¶¶ 7-8, Wagman Decl., Ex. 24; K. Smith Decl., ¶¶ 3-7, Wagman Decl., Ex. 20; Trahan Decl., ¶¶ 6-7, Wagman Decl., Ex. 21. For example, Deborah Trahan and her family, along with several of the other Plaintiffs, engage in camping and fishing activities in lakes and streams in proximity to and downstream from Valley Meat. All of these lakes and streams connect with the waterways closest to Valley Meat, such that any contamination from the slaughter facility will eventually get into the lakes and streams used by the Trahan family. Trahan Decl., ¶¶ 6-7, Wagman Decl., Ex. 21. Given that direct connection, the Trahans will be compelled to curtail their recreational activities in the area. *Id*. at ¶ 6. This is aesthetic and recreational injury of the highest order, and is shared by other individual plaintiffs. *See* Cordova Decl., ¶¶ 6-8, Wagman Decl., Ex. 23; Sink Decl., ¶¶ 7-8, Wagman Decl., Ex. 24; K. Smith Decl., ¶¶ 3-7, Wagman Decl., Ex. 20.

Courts have granted injunctions in similar cases where aesthetic interests would be irreparably harmed in the absence of relief. *See Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1197 (D. Or. 2012) (granting motion for injunction where project will "irreparably harm plaintiff and its members and supporters that use and enjoy the area at issue for its aesthetics, recreation such as hiking, camping, fishing, and photography, as well as watershed research, education and observing wildlife. Plaintiff and its members will further be harmed because the Project will degrade water quality, diminish aesthetic values and harm fish and wildlife in and around the Project area").

3. The horse slaughter process and the possibility of contaminated runoff into local waterways threaten the Plaintiffs' health and their communities. *See, e.g.*, Trahan Decl., ¶¶7-11, Wagman Decl., Ex. 21. In the context of a preliminary injunction courts have found a showing of irreparable harm where the movant's health is in danger. *See Bowen v. Consol. Elec. Distrib., Inc. Emp. Welfare Ben. Plan*, 461 F. Supp. 2d 1179, 1184 (C.D. Cal. 2006) ("[C]onsidering that plaintiff's health appears to be at risk if the defendant continues to withhold plaintiff's benefits under the Plan, the Court concludes that the risk of irreparable harm to the plaintiff is sufficiently great."); *M.R. v. Dreyfus*, 697 F. 3d 706, 732 (9th Cir. 2012) (finding irreparable injury where challenged activity established a significant likelihood of impacting plaintiffs' mental and physical health).

In addition to these harms, FRER's thousands of supporters in New Mexico, Missouri, and Iowa and The HSUS's thousands of members in New Mexico, Missouri, and Iowa who are interested in observing and enjoying horses, and otherwise protecting these animals from slaughter, will be irreparably harmed if Defendants permit horse slaughter facilities to open. And once horse slaughter has begun, there will be nothing the Court or Plaintiffs can do to restore or replace all of the horses rounded up, transported, and killed as a result of Defendants' unlawful agency actions. Without a temporary restraining order and preliminary injunction pending resolution of this case, horse slaughterhouses throughout the United States will begin slaughtering horses, at which time Plaintiffs, and other similarly situated Americans near other facilities, face substantial likelihood of suffering these irreparable harms to their health, environmental, economic, aesthetic, cultural, and other interests. As the Supreme Court recognized in *Amoco Prod. Co. v. Village of Gambell*, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money" and, thus, "the balance of harms will usually favor the issuance of an injunction." 480 U.S. 531, 545 (1987). Therefore, for NEPA violations, "there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance." *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977). *See also Amoco*, 480 U.S. at 545 (where plaintiff shows that injury is "sufficiently likely, the balance of the harms will usually favor the issuance of an injunction").

D. The Balance of Equities Favors Plaintiffs.

There is certainly no harm whatsoever to Defendants by not inspecting domestic horse slaughter facilities while proper NEPA review is conducted with respect to both the slaughter operations and the residue testing plan. USDA has discretion related to the grant of inspection, and there is no limitations period for its decision making process. Far greater harm will occur to the agency and the public if a grant of inspection is approved without putting the proper safeguards in place or properly ascertaining the extent of environmental impacts resulting from these actions. Nor would any loss of income to any party be sufficient to override the harm to Plaintiffs set out above. Any harm that could be potentially claimed by Defendants or any of the slaughterhouses certainly does not outweigh the substantial harms that would be suffered by Plaintiffs in the absence of relief.

See Humane Society of U.S. v. Gutierrez, 523 F. 3d 990, 991 (9th Cir. 2008) (issuing an emergency stay halting the state's lethal removal of sea lions in order to conserve the salmon run, which was "by definition, irreparable," where the stay would only affect the salmon run for one year, and where the salmon run in that year was unusually larger than in past years); *Eckerd*, 564 F. 2d at 456 ("The substantial additional costs which would be caused by court-ordered delay may well be justified by the compelling public interest in the enforcement of NEPA."). And because Defendants' grant of inspection is the first authorization of horse slaughter in six years, the injunction will merely "require the defendants to maintain a course of conduct that they have pursued for many years." *Nat'l Senior Citizens Law Center v. Legal Serv. Corp.*, 581 F. Supp. 1362, 1373 (D.D.C. 1984).

Lastly, USDA currently is facing furloughs of employees. As noted in the letter from Congressman Moran to Defendant Vilsack, "federal meat inspectors will be furloughed, impacting the operations of over 6,000 food processing businesses." Letter from Congressman Jim Moran to Secretary Vilsack, Mar. 25, 2013, available at http://moran.house.gov/press-release/moran-calls-usda-deny-horse-slaughter-facility-permits. Requiring USDA inspections of horse slaughter plants would only worsen the impact of the furloughs felt by traditional slaughter industries and reduce the FSIS inspection funding available for beef, chicken, and pork inspections – "meat actually consumed by Americans." *Id.* For all of these reasons, Defendants will not suffer irreparable harm if an injunction is issued, so the equities balance in favor of granting injunctive relief to prevent irreparable harm to Plaintiffs.

E. The Requested Injunction Is in the Public Interest.

The public interest weighs heavily in favor of a temporary restraining order and preliminary injunctive relief. There is no question that the public interest is advanced by having NEPA carried out as intended by Congress. *See Cottrell*, 632 F. 3d at 1138 ("This court has also recognized the public interest in careful consideration of environmental impacts before major federal projects go forward, and we have held that suspending such projects until that consideration occurs comports with the public interest."). Additionally, the vast majority of Americans are strongly opposed to horse slaughter, regardless of their age, gender, geographic location, or personal experience with or

ownership of horses.[26] In New Mexico, seventy percent of registered voters in New Mexico oppose horse slaughter for human consumption and also are opposed to a horse slaughter plant being located in their communities.[27] Polls done in Iowa and Missouri collected similar results.[28] Therefore, it is in the public interest to require Defendants to conduct environmental analysis before saddling any community with a major environmental liability that it itself does not even want.

There is a "well-established public interest in preserving nature and avoiding irreparable environmental injury." *See Cottrell*, 632 F. 3d at 1138. The public must have access to and knowledge of the detrimental environmental effects caused by horse slaughter facilities before residents start seeing horse blood in their faucets, piles of rotting carcasses at the slaughterhouse operating in their communities, polluted waterways, and news that our meat supply has been contaminated by adulterated horse flesh. Defendants have not presented any reason as to why horse slaughter must begin *now* as opposed to after completion of the required environmental review, and so injunctive relief is appropriate. *See Save Our Ecosystems*, 747 F. 2d at 1250. It is evident that Plaintiffs' requested relief of temporarily maintaining the status quo is truly modest when compared to what is at stake if Defendants are permitted to proceed by completely ignoring NEPA.

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[26] American Society for the Prevention of Cruelty to Animals ("ASPCA") Survey by Lake Research Partners, *Research Findings on Horse Slaughter for Human Consumption* (Jan. 2012), available at http://www.apnm.org/mailbox/horseslaughter/Poll%20Memo%20-%20ASPCA%20Horse%20Slaughter%20Research.pdf.

[27] Survey on Attitudes Regarding Horse Slaughter in New Mexico, April 2, 2013, http://www.aspca.org/Pressroom/press-releases/040413.

[28] *Press Release, ASPCA, New Research Reveals New Mexicans Strongly Oppose Slaughter of Horses for Human Consumption* (April 2, 2013), http://www.aspca.org/Pressroom/press-releases/040413.

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V. CONCLUSION

For the reasons presented herein, Plaintiffs request that the Court issue a TRO enjoining Defendants from authorizing horse slaughter at a domestic horse slaughter facility pending consideration of the merits of Plaintiffs' claims.

Dated: July 2, 2013

SCHIFF HARDIN LLP

By: */s/ Bruce A. Wagman*
Bruce A. Wagman
Attorneys for Plaintiffs

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EXHIBIT 25

90TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 653

FEDERAL MEAT INSPECTION ACT

SEPTEMBER 21, 1967.—Committted to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. POAGE, from the Committee on Agriculture, submitted the following

REPORT

together with

SUPPLEMENTAL VIEWS AND ADDITIONAL SUPPLEMENTAL VIEWS

[To accompany H.R. 12144]

The Committee on Agriculture, to whom was referred the bill (H.R. 12144) to clarify and otherwise amend the Meat Inspection Act, to provide for cooperation with appropriate State agencies with respect to State meat inspection programs, and for other purposes, having considered the same, report favorably thereon with amendments and recommed that the bill do pass.

The amendments are as follows:

Page 3, line 13, strike the word "territory" and insert in lieu thereof the word "Territory".

Page 3, line 18, strike the word "territory" and insert in lieu thereof the word "Territory".

Page 3, line 19, strike the word "territory" and insert in lieu thereof the word "Territory".

Page 3, line 22, strike the word "territories" and insert in lieu thereof the word "Territories".

Page 10, line 19, strike the word "or" and insert in lieu thereof the word "of".

Page 20, line 13, strike the period and insert the following:

: *Provided further*, That nothing in this section shall apply to any individual who purchases meat or meat products outside the United States for his own consumption except that the total amount of such meat or meat products shall not exceed fifty pounds.

interstate business will receive inspection service similar to that now provided, without cost, at federally inspected plants. Under the new legislation, products produced by these plants will be eligible to bear the marks of Federal inspection.

We do not anticipate any serious interference in the operation of these plants due to requirements of H.R. 12144. They will be asked to complete an application for inspection and an establishment number will be assigned to each one. We plan to provide an 18-month period for submittal of drawings showing the layout of their facilities and additional time will be provided as necessary where improvement in facilities is planned.

Our experience with these plants over the past years has been very good. Most of them are owner operated and take real pride in maintaining good facilities and producing high-quality products.

Sincerely yours,

ORVILLE L. FREEMAN,
Secretary.

ADMINISTRATION POSITION

Officials of the U.S. Department of Agriculture appeared before the subcommittee during the hearings and testified in favor of H.R. 6168 which was the basis for and was superseded by H.R. 12144. The Department's statement is as follows:

STATEMENT OF RODNEY E. LEONARD, DEPUTY ASSISTANT SECRETARY OF AGRICULTURE, ACCOMPANIED BY MRS. LOTUS PROKOP, ATTORNEY, ROBERT K. SOMERS, DEPUTY ADMINISTRATOR, AND JAMES PAYNE, ASSISTANT TO DEPUTY ADMINISTRATOR, CONSUMER AND MARKETING SERVICE, U.S. DEPARTMENT OF AGRICULTURE

Mr. LEONARD. I am here today to urge favorable action by this committee on H.R. 6168, a bill to amend the Meat Inspection Act.

This legislation seeks to further improve the programs which have helped to build meat packing and processing into an industry with $16 billion in annual gross sales, and which, in turn, have created nearly $13 billion in yearly sales of livestock by American farmers.

The availability of these markets for American livestock—the prosperity and potential for the American food industry—all rest on one basic fact: the continued confidence of today's homemaker in the integrity of our meat supply.

Thus, we must insure that every effort is made to provide her with the full assurance that the meat she buys for her family is safe and wholesome: a guarantee that today is taken for granted. To do this adequately, we must forge a viable Federal-State partnership through which the consumer is fully protected, the packing industry continues to prosper, and the producer is assured of an expanding market for his livestock.

The proposed Wholesome Meat Act is designed to accomplish just that.

It recognizes the role of the States as a vitally important link in this creative program, and seeks to provide a positive

means by which the States can integrate their efforts into a stronger, more unified system of meat inspection.

It proposes much-needed reforms in the present Federal system, to close existing loopholes and make it more responsive to all in the years ahead.

Sixty years ago—after the consumer's confidence in her meat supply was shattered by disclosures of vast irregularities in the meatpacking industry—Congress passed legislation under which a Federal inspection system was established for meat and meat products moving in interstate and foreign commerce. This legislation, which actually is only an appropriations measure, has become known as the Meat Inspection Act.

The system developed, basically, is a good one. It has served us well over the intervening years, and has come to be recognized as a model for the world. Refinements to it are constantly being made within the legal boundaries established by Congress.

Yet, this legislation contains several flaws in light of modern conditions—flaws which we believe require coorrective action by the Congress.

The most serious flaw is an absence in the present act of any provisions for coordinating Federal and State meat inspection efforts.

The role of the States is a vital one. The Federal law applies only to products moving in interstate and foreign commerce. Thus, the States have sole responsibilility for the products of intrastate commerce.

The volume of these nonfederally inspected products is significant. Approximately 15 percent of the commercially slaughtered animals—over 19 million head—are slaughtered animals—over 19 million head—are slaughtered for intrastate commerce only. In addition, about one-fourth of the commercially processed meat products—an estimated 8.75 billion pounds—are processed and sold without crossing State lines.

Significant amounts of these intrastate products are sold without any form of Government inspection. The remaining amounts are subject to inspection by State or local governments. Inspection under these programs is generally well below Federal standards. Yet, these products are intermingled in many retail stores with federally inspected products for sale to the unknowing public.

There exists considerable disparity between statutory provisions of Federal, State, and local laws which creates a form of economic separation that carries with it significant competitive advantage for the unregulated.

Excessive water and extenders, chemicals that mask the true condition of a product, and misleading or deceptive labeling are typical examples. This variation in consumer protection at the State and local levels is demonstrated by a few statistics.

Nine States do not have any laws specifically covering the inspection of meat, although they have a general type food

law which partially affects meatpacking from the standpoint of specified sanitation and/or labeling requirements.

There are 41 States with some form of a meat inspection statute—two require only mandatory licensing of packers with no provisions for actual inspection of meat, 13 provide for only voluntary programs, and 26 have mandatory inspection laws.

Only 26 States provide for mandatory inspection of animals before and after slaughter—the basic foundation for effective meat inspection protection. Further, only 25 States provide for mandatory inspection of processed meat products—an important area of potential adulteration and mislabeling.

Of the 41 States with meat inspection laws, 20 derive their funds solely from State appropriations, 14 utilize a combination of appropriated funds and packer assessments, and the remaining seven derive all funds from assessments on the users.

These figures relate only to State statutes. In addition, the degree of authority, implementation, and effectiveness of State inspection programs varies greatly from State to State. Even greater variation is found between State and local inspection programs, where local inspection exists.

Administrators of State meat inspection programs generally admit that they have neither the money nor manpower to conduct an intensive, continuous inspection service for both slaughtering and processing operations. State legislators, veterinary associations, industry groups, and others have tried repeatedly to obtain meaningful legislation and enforcement.

Nevertheless, the need for stronger, more effective and more uniform State inspection programs is of critical importance. In the past couple of years, there has been a tremendous upsurge among the States to initiate or improve existing programs. Eighteen States actively considered meat inspection legislation during the past year—eight of whom are among these without any present meat inspection law. The other 10 were attempting to upgrade and strengthen existing statutes.

These efforts by the States must be fostered and encouraged by the Federal program if this Nation is to achieve adequate, overall protection of the consumer with resulting prosperity for the industry and the producer. By providing legislative authority for meaningful Federal-State cooperation, a uniform framework can be constructed which will provide consumer protection for all citizens, regardless of where their meat originates.

The second basic flaw in the present Meat Inspection Act is related to the revolution that has swept through the meatpacking industry.

Advancing technology, rapid transportation and communication, intensified marketing, and new food preservation methods have revolutionized the industry's ability to produce meat products in tremendous volume. Major changes have

taken place just in the past decade which have greatly altered the structure of the industry.

For example, plants engaged in slaughtering have moved from highly centralized locations around key metropolitan areas—such as Chicago—to widely decentralized locations in livestock feeding areas. On the other hand, plants which process and manufacture meat products have become highly specialized. They tend to locate away from production areas and nearer to large consumer markets.

In addition, there has been a sharp increase in the number of products which are ready for home use with a minimum of preparation. They are processed to a higher degree with more sophisticated techniques. Thus, they offer greater opportunity for adulteration with unwholesome meat or extenders, as well as deceptive labeling as to composition and quality that would not be obvious to the purchaser.

With the source of supply of meat more distant from the processing plants, a substantial market has developed for frozen boneless meat—particularly beef. Moving this meat in frozen blocks facilitates handling and protects against spoilage. New machinery has been developed which will flake, shred, or slice frozen blocks of meat at high speed without defrosting. In fact, beef can now be processed more efficiently in a frozen state than in the natural state, cutting labor, and processing time to a minimum.

Along with the high-speed equipment and use of frozen meat have come chemical and other "fast" curing processes, artificial tenderizing, artificial smoking, coloring agents, and other additives that are potentially deceptive or dangerous to one's health when their use is not regulated.

These sophisticated changes greatly complicated inspection procedures. Inspection of meat for wholesomeness, without using chemical analysis, is most effective when meat is in a fresh state. Thus, frozen meat must be defrosted prior to inspection. If there is any suspicion of adulteration or unwholesomeness, it must be examined and tested closely, oftentime requiring complicated laboratory analysis.

Adequate inspection of a complex processing line is mechanically and physically more difficult than is the visual examination of carcasses and fresh meat. Compounding the problem is the fact that in modern processing, there is often less opportunity for inspectors to check each stage of the operations.

Thus, the massive technological advancements in the industry have begun to greatly complicate our efforts to protect the consumer—we are dealing with problems not conceived by those who drafted the original legislation 60 years ago.

For example, the act does not provide specific authority for supervising certain types of independent operations where adulteration of our meat supply can occur—such as boning establishments, cold storage warehouses, wholesalers, jobbers, et cetera.

The act does not provide sufficient tools of enforcement to checkmate and unscrupulous operator who seeks to pollute the Nation's meat supply with unwholesome products. It is far too easy—in the absence of more positive preventive measures—for dealers in dead animals, renderers, animal food handlers, and others to divert unfit meat into human food channels. As of now, we do not even have the authority to seize or detain meat which we know is unfit and is intended for human consumption when it is outside of a federally inspected plant.

The act now provides only implied and/or fragmented authority in some areas that greatly hinders effective administration and enforcement. Authority to refuse inspection service when warranted, adequate measures to deal with certain types of packaging, labeling, and standards of composition, all are presently lacking.

Thus, the act passed 60 years ago—and amended only once since then in a minor way—is becoming increasingly inadequate to deal with the problems of today's modern, aggressive industry, and for dealing with the industry in the years ahead.

We cannot rest upon old laurels. It is necessary that today's consumer, eating meat products produced in highly mechanized meat plants operated by highly skilled workmen, be protected by a 1967 meat inspection law—not a 1906 appropriations measure.

Thus, the proposed Wholesome Meat Act includes amendments to:

Broaden the present act to authorize cooperative arrangements with State and local authorities, through which the Federal Government could provide manpower and financial assistance for developing effective State meat inspection programs under State administration.

Provide tools of enforcement not presently authorized with which to checkmate the distribution of unwholesome and adulterated meat products.

Clarify and broaden authority over meat and meat products capable of use as human food, to replace vaguely defined, implied authority which has hindered effective administration.

Make additional "housekeeping" changes which are necessary to renovate a 60-year-old statute, clarify codification, and consolidate several related statutes into one.

FEDERAL-STATE COOPERATION

The proposed legislation would enhance the role of the States by providing for Federal cooperation with appropriate State agencies in developing and administering State meat inspection programs. To qualify, a State must have a meat inspection law imposing mandatory inspection and sanitation requirements for intrastate operators that are consistent with Federal requirements.

Cooperation would include furnishing advisory assistance in planning and developing a meat inspection program, fur-

EXHIBIT 26

Calendar No. 785

90TH CONGRESS 1st Session } SENATE { REPORT No. 799

FEDERAL MEAT INSPECTION ACT

NOVEMBER 21, 1967.—Ordered to be printed

Mr. MONTOYA, from the Committee on Agriculture and Forestry, submitted the following

REPORT

[To accompany S. 2147]

The Committee on Agriculture and Forestry, to which was referred the bill (S. 2147) to clarify and otherwise amend the Meat Inspection Act, to provide for cooperation with appropriate State agencies with respect to State meat inspection programs, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

SHORT EXPLANATION

This bill would amend the Federal Meat Inspection Act to—

(1) Add a new title III (i) authorizing Federal assistance (including grants) to State meat inspection programs, such assistance not to exceed 50 percent of the cost of the cooperative program; (ii) extending the Federal program to intrastate transactions in States which request such extension or fail to develop adequate State systems; and (iii) providing immediate authority to cover intrastate plants producing adulterated products which endanger the public where the State does not remove such danger.

(2) Extend the Federal program to commerce wholly within the District of Columbia or within any territory not having a legislative body (new sec. 1(h));

(3) Add a new title II (A) prohibiting commerce in animal products not intended for human use unless denatured, properly identified as not intended for human use, or naturally inedible; (B) providing for recordkeeping by certain slaughterers and handlers; registration of certain handlers; and regulation of certain handlers of dead, dying, disabled, or diseased animals and their products (including in each case those engaged in intrastate commerce if not regulated by State law);

85-010—67——1

(4) Authorize regulation of meat storage and handling to prevent adulteration or misbranding (new sec. 24);

(5) Add a new title IV providing for withdrawal or refusal of inspection service, detention, seizure and condemnation, injunction, and investigations as new enforcement tools;

(6) Subject meat imports to the same requirements as domestic meats (amended sec. 20); and

(7) Otherwise revise and clarify the Federal Meat Inspection Act.

COMMITTEE DELIBERATIONS

The committee held full and complete hearings on November 9, 10, 14, and 15, 1967. Three bills were before the committee: H.R. 12144, S. 2147 introduced by Senator Montoya, and S. 2218 introduced by Senator Mondale.

Except for typographical errors and certain minor differences they differed only as follows:

(1) H.R. 12144 and S. 2147, as it was introduced, authorized Federal assistance to State inspection programs but did not require intrastate inspection of meats, while S. 2218 extended Federal inspection to intrastate commerce (subject to waiver in any State with an adequate inspection program).

(2) H.R. 12144 subjected imported meats to the same inspection and sanitary requirements as domestic meats (but excepted individuals purchasing not more than 50 pounds); while S. 2147 and S. 2218 subjected imports to "substantially equivalent" requirements.

At the beginning of the hearings Senator Montoya, a member of the Committee on Agriculture and Forestry and sponsor of S. 2147, proposed an amendment to his bill which among other things would, in effect, have provided a 2-year interim period during which States would have the opportunity to enact and enforce State standards for intrastate commerce equivalent to Federal inspection requirements. In the absence of such enactment and enforcement, and under certain conditions, the Secretary would impose Federal inspection on intrastate commerce in meats and meat products with reversion to State control upon meeting Federal standards.

The Department of Agriculture testified that there were 12 States with voluntary meat inspection statutes. These are Arizona, Colorado, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, Pennyslvania, and Texas.

Seven States have no meat inspection statutes as follows: Alabama, Alaska, Delaware, Maryland, Minnesota, New Hampshire, and South Dakota. Some of these States have general food and/or sanitation laws, but no State meat inspection statutes as such. Municipal systems operate in some of these States.

Twenty-nine States have statutes imposing mandatory ante and post mortem inspection. These are Arkansas, California, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana (effective 1970), Iowa, Massachusetts, Missouri, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio (effective January 1, 1968), Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia (effective July 1, 1968), Washington, West Virginia, Wisconsin (effective January 1, 1968), and Wyoming. The Department further testified that only 27 States have statutes imposing mandatory processing inspection. These are Arkansas, California, Florida,

Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee (effective January 1, 1968), Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

The hearings also determined that about 15 percent of commercially slaughtered animals is not prepared for distribution in interstate or foreign commerce and, therefore, under present law is subject to State and not to Federal inspection at the time of slaughter. Approximately 25 percent of commercially processed meat food products is prepared without Federal inspection and to a significant degree is not subject to adequate State or local inspection.

After consideration of all viewpoints, the Committee on Agriculture and Forestry is recommending a bill which it feels would—

(1) broaden the present meat inspection program by establishing a Federal-State cooperative arrangement under which the Federal Government would provide financial, technical, and scientific assistance to State agencies in order to improve the quality of State meat-inspection services. This financial aid could amount to as much as one-half the cost of a State program;

(2) modernize and combine present statutes relating to meat inspection;

(3) give the Secretary of Agriculture needed authority over wholesalers, truckers, warehousemen, brokers, renderers, and animal food manufacturers in order to control the traffic in unfit meat and meat products. This would provide additional insurance against the possibility of these products being sold to unsuspecting consumers for use as human food;

(4) provide the Secretary of Agriculture with authority to immediately impose Federal standards on intrastate commerce at the request of a Governor; and

(5) provide, in any event, that the Secretary of Agriculture may impose Federal standards on any intrastate plant if he determines that the plant is producing adulterated meat or meat food products for distribution which would clearly endanger the public health. Under this provision the Secretary would notify the Governor of the State of the transgression and would take affirmative action only if the Governor failed to do so.

The committee feels that these and other provisions will assure consumers of wholesome and healthy meat products, and further, that livestock producers and conscientious meatpackers and operators will benefit by the elimination of the unscrupulous in the meat industry.

Under this new bill Federal standards will be applied to approximately 15,000 plants not now under Federal standards or equal State standards. Many of these plants are smaller facilities, some located in remote areas, which produce small quantities of meat and meat food products. The committee feels that Federal standards must be required of all meat and meat food products sold for human consumption in this country. It is understood, however, that some of the Federal standards for plant construction may sometimes be unrealistic, and it would be unreasonable to arbitrarily apply them when the operational practices of a smaller facility enables them to meet Federal or equal State standards. In this regard the committee expects

the Secretary to approach this problem in the spirit reflected in the testimony of the Department's witness:

> There appears to be some misunderstanding of physical structure requirements for intrastate establishments thus made subject to Federal inspection. However, the facts are that the eligibility of an establishment for Federal inspection is based upon a combined evaluation of the operating procedures used by the establishment and the building construction and physical facilities rather than upon a separate evaluation of these factors. Thus, if the operating procedures are patterned so as to insure the sanitary handling of product within the establishment and result in wholesome food, the establishment could be declared eligible for Federal inspection.

However, the committee wants it clearly understood that the requirements on wholesomeness, additives, labeling, and the other Federal regulations are not to be compromised and must be at least equal to Federal standards.

Committee Amendments

The Committee amendments would—

(1) provide for extension of Federal inspection to intrastate operations in any State upon request of the Governor, or upon a finding that the State has not within 2 or 3 years after enactment of the bill developed an inspection system at least equal to the Federal system;

(2) provide for extension of Federal inspection to particular intrastate plants found to be distributing adulterated products dangerous to the public health;

(3) preserve the Secretary's existing authority to exempt retail butchers and retail dealers in appropriate cases;

(4) strike out the provision giving the Secretary authority to make additional exemptions in the District of Columbia and unorganized territories; and

(5) make a number of changes designed to conform the provisions to those contained in H.R. 12144 as passed by the House of Representatives, to correct typographical errors, or to make other technical corrections.

Comparison of S. 2147 With H.R. 12144

The major differences between S. 2147, as reported, and H.R. 12144, as passed by the House of Representatives, are the committee amendments described in paragraphs (1), (2), (3), and (4) above. In addition, S. 2147 in section 17 would require the Secretary to submit more detailed reports regularly on the operations and products covered by the act. The only other differences are nonsubstantive technical corrections.

Section-by-Section Analysis

Section 1. Short titles—Title and section designations

Present legislation authorizing Federal meat inspection primarily consists of provisions in the Department of Agriculture Appropriation

EXHIBIT 27

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE HUMANE SOCIETY OF THE UNITED STATES, ET AL. Plaintiffs, v. **MIKE JOHANNS, ET AL.** Defendants.	Civ. No. 1:06CV00265 (CKK)

DECLARATION OF TONJA RUNNELS

I, TONJA RUNNELS, declare as follows:

1. I am a plaintiff in the above-entitled action.

2. I am a resident of Kaufman, Texas, and have lived there for my entire life. Since 1989, I have resided at 207 Booker Street, which is located approximately seventy-five feet from the Dallas Crown horse slaughter plant.

3. I have endured the noxious odor that emanates from Dallas Crown for over a decade. It is the kind of odor that makes you sick. I continue to endure the severe stench on a daily basis.

4. During the summer, the stench is especially unbearable, and I am unable to use my yard for any recreational activities, such as barbequing or spending time with family and friends.

5. There are blood spills and animal parts left outside on Dallas Crown's property. This attracts many vermin and insects to the neighborhood that, because of their large numbers, are hard to remove from my property.

6. I often see the slaughter trucks on the streets and entering the Dallas Crown property. Sometimes the trucks are not covered, and I can view the horses. This is very upsetting, because the horses look very frightened and uncomfortable, and I know the horses are going to be slaughtered.

7. Every evening, I am disturbed, and continue to be disturbed, by the noise of horses crying and whining as they enter the kill chute. The horses' cries wake me up in the night, and upset me so much that I have trouble sleeping.

8. My mother, Stella Jones, resides at 203 Booker Street, in Kaufman, Texas, which is located two houses down from the Dallas Crown horse slaughtering plant. She also endures, and continues to endure, the noxious odor of the plant. My mother's life has also been disrupted by the loud music that the plant's workers play during the early morning hours. She is also awakened most nights by the upsetting sounds of horses screaming and whining and therefore has trouble sleeping.

9. My sister, Vonda Prox, resides at 205 Booker Street, in Kaufman, Texas, which is located one house down from the Dallas Crown property. My sister has endured, and continues to endure, the severe stench and odor from the horse slaughter plant, and because of the stench she is unable to enjoy her yard. Her sleep is also disturbed, because she is awakened by the upsetting noise of horses crying and whining.

10. My personal and financial well-being, and that of my family, is being damaged by defendants' new rule allowing horse slaughter to continue, because this program will allow the Dallas Crown slaughterhouse to remain in operation. Unless the court orders otherwise, Dallas Crown's operations will continue to prohibit me and my family from even enjoying our own

homes and our neighborhood. It greatly upsets me that my close family members are suffering the same kinds of problems associated with the plant that I am.

11. Because almost my entire family lives in close proximity to the plant, I believe that I should have been given the right to express my views to the agency before it made a decision that has a massive impact on all of our lives.

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Tonja Runnels

Tonja Runnels

Dated: February 20, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE HUMANE SOCIETY OF THE UNITED STATES, ET AL. Plaintiffs, v. **MIKE JOHANNS, ET AL.** Defendants.	Civ. No. 1:06CV00265 (CKK)

DECLARATION OF YOLANDA SALAZAR

I, YOLANDA SALAZAR, declare as follows:

1. I am a plaintiff in the above-entitled action.

2. I am a resident of 3722 North Terry Street, Fort Worth, Texas, and have lived there for four years. My home is located approximately one block from the Beltex Corporation horse slaughter plant, and I can view the plant from my home. I reside at my home with my husband, teenage daughter, and twenty-two year old son.

3. My family and I must endure the repugnant odor that emanates from Beltex. It is the kind of odor that makes it difficult to breathe. My family and I continue to endure the severe stench on a daily basis.

4. The odor is especially intolerable during the late afternoon and early evening hours. The noxious stench makes me concerned for my children's health. As a result, my family is unable to use our yard for barbequing or other social gatherings. I also love to garden, but am unable to do so because of the smell.

5. I was raised on a ranch and grew up around horses. I am an avid horse lover, and

members of my family rode, and continue to ride, horses. I often see the slaughter trucks entering the Beltex property and can view the horses on the trucks. It deeply saddens me to see the horses on their way to slaughter.

6. There are horse bones left outside on Beltex's property, and sometimes, horse bones also fall off the trucks onto the neighborhood streets. Our dogs often bring these bones home, causing much anxiety to me and my family.

7. My quality of life, and that of my family's, is being damaged by defendants' new rule allowing horse slaughter to continue, because this program will allow the Beltex slaughterhouse to remain in operation. Unless the court orders otherwise, Beltex's operations will continue to prohibit me and my family from even enjoying our own home and our neighborhood.

8. Because my family and I live in such close proximity to the plant, I believe that I should have been given the right to express my views to the agency before it made a decision that has a massive impact on all of our lives. I desire to obtain advance notice from USDA concerning the fee-for-service horse inspection program, so I can use that advance notice to participate in and comment on any rulemaking process concerning the program. I also wish that my comments be considered by the USDA before the Final Rule is issued.

9. These harms would be redressed if the Court were to enjoin the defendants from carrying out the fee-for-service inspection program.

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Yolanda Salazar
Yolanda Salazar

Dated: February 20, 2006

EXHIBIT 28

GROUND WATER DISCHARGE PERMIT RENEWAL
Valley Meat Company, DP-236

I. INTRODUCTION

The New Mexico Environment Department (NMED) issues this Discharge Permit Renewal (Discharge Permit), DP-236, to Valley Meat Company, LLC, (permittee) pursuant to the New Mexico Water Quality Act (WQA), NMSA 1978 §§74-6-1 through 74-6-17, and the New Mexico Water Quality Control Commission (WQCC) Regulations, 20.6.2 NMAC.

NMED's purpose in issuing this Discharge Permit, and in imposing the requirements and conditions specified herein, is to control the discharge of water contaminants from Valley Meat Company (facility) for the protection of ground water and those segments of surface water gaining from ground water inflow, for present and potential future use as domestic and agricultural water supply and other uses, and to protect public health. In issuing this Discharge Permit, NMED has determined that the requirements of Subsection C of 20.6.2.3109 NMAC have been or will be met. Pursuant to Section 20.6.2.3104 NMAC, it is the responsibility of the permittee to comply with the terms and conditions of this Discharge Permit; failure may result in an enforcement action(s) by NMED (20.6.2.1220 NMAC).

The activities which produce the discharge, the location of the discharge, and the quantity, quality and flow characteristics of the discharge are briefly described as follows:

Up to 8,000 gallons per day (gpd) of livestock processing wastewater is discharged from a slaughter facility. Wastewater generated from the slaughter facility and occasional washdown of the receiving pens collects in two concrete (septic) tanks for solids settling before flowing into the first of two synthetically lined impoundments for disposal by evaporation. The discharge contains water contaminants which may be elevated above the standards of Section 20.6.2.3103 NMAC and/or the presence of toxic pollutants as defined in Subsection WW of 20.6.2.7 NMAC.

The facility is located at 3845 Cedarvale Road, approximately six miles east of Roswell, in Section 17, Township 11S, Range 25E, Chaves County. Ground water most likely to be affected is at a depth of approximately 10 feet and has a total dissolved solids concentration of approximately 4,080 milligrams per liter.

The original Discharge Permit was issued on November 22, 1982, and subsequently renewed and/or modified on November 23, 1987, March 19, 1993, September 8, 1998, and May 19, 2004. The application (i.e., discharge plan) consists of the materials submitted by Ricardo De Los Santos, President of Valley Meat Company, LLC, on behalf of the permittee, dated June 3, 2010, and materials contained in the administrative record prior to issuance of this Discharge Permit. The discharge shall be managed in accordance with all conditions and requirements of this Discharge Permit.

Pursuant to Section 20.6.2.3109 NMAC, NMED reserves the right to require a Discharge Permit Modification in the event NMED determines that the requirements of 20.6.2 NMAC are being or may be violated or the standards of Section 20.6.2.3103 NMAC are being or may be violated.

This may include a determination that structural controls and/or management practices approved under this Discharge Permit are not protective of ground water quality, and that more stringent requirements to protect ground water quality may be required by NMED. The permittee may be required to implement abatement of water pollution and remediate ground water quality.

Issuance of this Discharge Permit does not relieve the permittee of the responsibility to comply with the WQA, WQCC Regulations, and any other applicable federal, state and/or local laws and regulations, such as zoning requirements and nuisance ordinances.

The following acronyms and abbreviations may be used in this Discharge Permit:

Abbreviation	Explanation		Abbreviation	Explanation
Cl	chloride		SDDS	surface disposal data sheet(s)
gpd	gallons per day		TDS	total dissolved solids
LADS	land application data sheet(s)		TKN	total Kjeldahl nitrogen
mg/L	milligrams per liter		total nitrogen	= TKN + NO_3-N
mL	milliliters		UPC	Uniform Plumbing Code
NMAC	New Mexico Administrative Code		WQA	New Mexico Water Quality Act
NMED	New Mexico Environment Department		WQCC	Water Quality Control Commission
NMSA	New Mexico Statutes Annotated		WWTF	Wastewater Treatment Facility
NO_3-N	nitrate-nitrogen			

II. FINDINGS

In issuing this Discharge Permit, NMED finds:

1. The permittee is discharging effluent or leachate from the facility so that such effluent or leachate may move directly or indirectly into ground water within the meaning of Section 20.6.2.3104 NMAC.

2. The permittee is discharging effluent or leachate from the facility so that such effluent or leachate may move into ground water of the State of New Mexico which has an existing concentration of 10,000 mg/L or less of TDS within the meaning of Subsection A of 20.6.2.3101 NMAC.

3. The discharge from the facility is not subject to any of the exemptions of Section 20.6.2.3105 NMAC.

4. This Discharge Permit contains conditions associated with the following potential contamination sources:
   a) **Process Water Pond (PWRS; South)** - authorized for use by this Discharge Permit.
   b) **Evaporation Pond (North)** - authorized for use by this Discharge Permit.

III. AUTHORIZATION TO DISCHARGE

Pursuant to Section 20.6.2.3104 NMAC, it is the responsibility of the permittee to ensure that discharges authorized by this Discharge Permit are consistent with the terms and conditions herein.

1. The permittee is authorized to discharge up to 8,000 gpd of wastewater generated by a livestock slaughter facility. Wastewater generated from the slaughter facility and occasional washdown of the receiving pens collects in two concrete (septic) tanks for solids settling before flowing into the first of two synthetically lined impoundments for disposal by evaporation.

2. The permittee is authorized to use the following impoundments for the following purposes:
   a) **Process Water Pond (PWRS; South)** - authorized to receive wastewater for disposal by evaporation. This impoundment exists as of the effective date of this Discharge Permit and is synthetically lined. Wastewater from the slaughter facility flows into this impoundment and is transferred to Evaporation Pond. This impoundment is located east of the slaughter facility and south of Evaporation Pond.
   b) **Evaporation Pond (North)** – authorized to receive wastewater for disposal by evaporation. This impoundment exists as of the effective date of this Discharge Permit and is synthetically lined with 40-mil HDPE. Wastewater is transferred from the PWRS into this impoundment. This impoundment is located north of the PWRS.

[20.6.2.3104 NMAC, Subsection C of 20.6.2.3106 NMAC, Subsection C of 20.6.2.3109 NMAC]

IV. CONDITIONS

NMED issues this Discharge Permit for the discharge of water contaminants subject to the following conditions:

A. OPERATIONAL PLAN

#	Terms and Conditions
1.	The permittee shall implement the following operational plan to ensure compliance with Title 20, Chapter 6, Parts 1 and 2 NMAC. [Subsection C of 20.6.2.3109 NMAC]
2.	The permittee shall operate in a manner such that standards and requirements of Sections 20.6.2.3101 and 20.6.2.3103 NMAC are not violated. [20.6.2.3101 NMAC, 20.6.2.3103 NMAC, Subsection C of 20.6.2.3109 NMAC]

Operational Actions with Implementation Deadlines

#	Terms and Conditions
3.	Within 180 days following the effective date of this Discharge Permit (**by DATE**), the permittee shall submit an up-to-date diagram of the layout of entire facility to NMED. The diagram shall include the following elements: • north arrow • effective date of the diagram • overall facility layout • sumps • solids/grease separators • wastewater impoundments • ground water monitoring wells • meters measuring wastewater discharges to the impoundment system • fixed pumps for discharge and transfer of wastewater • wastewater distribution pipelines • wastewater sampling locations • septic tanks and leachfields Any element that cannot be directly shown due to its location inside of existing structures, or because it is buried without surface identification, shall be on the diagram in a schematic format and identified as such. [Subsection C of 20.6.2.3106 NMAC, Subsection A of 20.6.2.3107 NMAC]
4.	Within 180 days following the effective date of this Discharge Permit (**by DATE**), the permittee shall measure the thickness of the settled solids in *each* impoundment and report the results of the solids depth measurements to NMED.

	The permittee shall measure the thickness of settled solids in accordance with the following procedure. a) The total surface area of the impoundment shall be divided into nine equal sub-areas. b) A settled solids measurement device (core sampler) shall be utilized to obtain one settled solids thickness measurement (to the nearest half-foot) per sub-area. c) The nine settled solids measurements shall be averaged. In the event the average solids accumulation indicates that the free liquid capacity of the impoundment is not adequate to meet the capacity requirements of this Discharge Permit, the permittee shall complete the following: Within 270 days following the effective date of this Discharge Permit (**by DATE**), the permittee shall remove solids from the impoundment and contain, transport, and dispose of them in accordance with all local, state, and federal regulations. [Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]

Operating Conditions

#	**Terms and Conditions**
5.	Domestic wastewater generated at the facility shall not be co-mingled with wastewater generated by the processing of livestock. Domestic wastewater shall be treated or disposed of in accordance with one of the following: a) Liquid Waste Permit issued pursuant to 20.7.3 NMAC b) Ground Water Discharge Permit issued pursuant to 20.6.2 NMAC for the discharge of domestic wastewater c) Discharged to a municipal sewer system [Subsection C of 20.6.2.3109 NMAC]
6.	Wastewater impoundments intended to dispose of wastewater by evaporation shall be designed to contain the maximum daily discharge volume authorized by the Discharge Permit for disposal by evaporation, while preserving two feet of freeboard. This capacity requirement may be satisfied by a single wastewater impoundment or by the collective capacity of multiple impoundments intended to dispose of wastewater by evaporation. The permittee shall operate and maintain the wastewater impoundment system for the purpose of disposing of wastewater at the facility. In order to maintain the required capacity, solids shall be removed from the impoundment as needed in a manner that is protective of the liner. Solids shall be stored and transported off-site in accordance with the conditions of this Discharge Permit. [Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]

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7.	The permittee shall remove all manure solids from the facility in a manner and at a frequency necessary to prevent the contamination of ground water. Management practices for manure stored at the facility prior to removal shall minimize generation and infiltration of leachate by diverting stormwater run-on and run-off and by preventing the ponding of water within areas used for manure stockpiling. [Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]
8.	The permittee shall remove all offal, blood, and hides from the facility in a manner and frequency necessary to prevent the contamination of ground water. Offal and blood generated on the kill floor shall be collected in barrels and removed from the facility by an offsite renderer or disposed of at an offsite landfill in accordance with New Mexico Solid Waste Management Regulations. Hides shall be either removed by an offsite tanner or renderer or disposed of at an offsite landfill in accordance with New Mexico Solid Waste Management Regulations. Any leachate generated while these items are temporarily stored onsite prior to offsite removal, shall be contained and discharged to the synthetically lined evaporative impoundment system. [Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]
9.	The permittee shall maintain the impoundment liner(s) in such a manner as to avoid conditions which could affect the structural integrity of the impoundment(s) and/or impoundment liner(s). Such conditions include or may be characterized by the following: • erosion damage • animal burrows or other damage • the presence of vegetation including aquatic plants, weeds, woody shrubs or trees growing within five feet of the top inside edge of a sub-grade impoundment, within five feet of the toe of the outside berm of an above-grade impoundment, or within the impoundment itself • the presence of large debris or large quantities of debris in the impoundment • evidence of seepage • evidence of berm subsidence Vegetation growing around the impoundment shall be routinely controlled and removed ~~by mechanical removal~~ in a manner that is protective of the impoundment liner. The permittee shall visually inspect the impoundment(s) and surrounding berms on a monthly basis to ensure proper maintenance. In the event that inspection reveals any evidence of damage that threatens the structural integrity of an impoundment berm or liner, or that may result in an unauthorized discharge, the permittee shall enact the contingency plan set forth in this Discharge Permit. [Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]

#	Terms and Conditions
10.	The permittee shall preserve a minimum of two feet of freeboard between the liquid level in the impoundment(s) and the elevation of the top of the impoundment liner. In the event that the permittee determines that two feet of freeboard cannot be preserved in the impoundment, the permittee shall enact the contingency plan set forth in this Discharge Permit. [Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]
11.	The permittee shall inspect the two concrete (septic) tanks used for solids settling on a quarterly basis for the accumulation solids. In the event that the settled solids level is within 12 inches of the intake of the outlet tee, the contents shall be pumped by a licensed hauler. The pumpings shall be disposed of offsite in accordance with all local, state and federal regulations. The permittee shall maintain a record of tank inspections and solids removal and disposal, including date, volume of solids removed, and method of disposal. [Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]

B. MONITORING AND REPORTING

#	Terms and Conditions
12.	The permittee shall conduct the following monitoring, reporting, and other requirements listed below in accordance with the monitoring requirements of this Discharge Permit. [Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]
13.	METHODOLOGY – Unless otherwise approved in writing by NMED, the permittee shall conduct sampling and analysis in accordance with the most recent edition of the following documents: a) American Public Health Association, Standard Methods for the Examination of Water and Wastewater (18^{th}, 19^{th} or current) b) U.S. Environmental Protection Agency, Methods for Chemical Analysis of Water and Waste c) U.S. Geological Survey, Techniques for Water Resources Investigations of the U.S. Geological Survey d) American Society for Testing and Materials, Annual Book of ASTM Standards, Part 31. Water e) U.S. Geological Survey, et al., National Handbook of Recommended Methods for Water Data Acquisition f) Federal Register, latest methods published for monitoring pursuant to Resource Conservation and Recovery Act regulations g) Methods of Soil Analysis: Part 1. Physical and Mineralogical Methods; Part 2. Microbiological and Biochemical Properties; Part 3. Chemical Methods, American Society of Agronomy

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	[Subsection B of 20.6.2.3107 NMAC]
14.	The permittee shall submit quarterly monitoring reports to NMED for the most recently completed quarterly period. Quarterly monitoring shall be performed during the following periods and submitted as follows: • January 1st through March 31st (first quarter) – **due by May 1st** • April 1st through June 30th (second quarter) – **due by August 1st** • July 1st through September 30th (third quarter) – **due by November 1st** • October 1st through December 31st (fourth quarter) – **due by February 1st** [Subsection A of 20.6.2.3107 NMAC]

Monitoring Actions with Implementation Deadlines

#	Terms and Conditions
15.	Within 60 days following the effective date of this Discharge Permit (**by DATE**), the permittee shall submit a written monitoring well location proposal for review and approval by NMED. The proposal shall designate the locations of all monitoring wells required to be installed by this Discharge Permit. The proposal shall include, at a minimum, the following information: a) A map showing the proposed location of the monitoring well(s) from the boundary of the source it is intended to monitor. b) A written description of the specific location proposed for the monitoring well(s) including the distance (in feet) and direction of the monitoring well(s) from the edge of the source it is intended to monitor. Examples include: 35 feet north-northwest of the northern berm of the synthetically lined impoundment; 45 feet due south of the surface disposal area; 30 feet southeast of the land application area 150 degrees from north. c) A statement describing the ground water flow direction beneath the facility, and documentation and/or data supporting the determination. All monitoring well locations shall be approved by NMED prior to installation. [Subsection A of 20.6.2.3107 NMAC]
16.	Within 120 days of the effective date of this Discharge Permit (**by DATE**), the permittee shall install the following new monitoring well. • One monitoring well (**MW-5**) located 20 to 50 feet hydrologically downgradient of PWRS (southern impoundment).

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	The well(s) shall be completed in accordance with the attachment titled *Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions*, Revision 1.1, March 2011. Construction and lithologic logs shall be submitted to NMED within 30 days of well completion. Unless otherwise noted in this Discharge Permit, the requirement to install a monitoring well downgradient of a source is not contingent upon construction of or discharge of wastewater to that source, or discharge of wastewater from the facility. [Subsection A of 20.6.2.3107 NMAC]
17.	Following installation of the monitoring well(s) required to be installed by this Discharge Permit, the permittee shall collect ground water samples from the well(s) and analyze the samples for dissolved TKN, NO_3-N, TDS and Cl. Ground water sample collection, preservation, transport and analysis shall be performed according to the following procedure: a) Measure the depth-to-most-shallow ground water from the top of the well casing to the nearest hundredth of a foot. b) Purge three well volumes of water from the well prior to sample collection. c) Obtain samples from the well for analysis. d) Properly prepare, preserve and transport samples. e) Analyze samples in accordance with the methods authorized in this Discharge Permit. Depth-to-most-shallow ground water measurements, analytical results, including the laboratory QA/QC summary report, and a facility layout map showing the location and number of each well shall be submitted to NMED within 45 days of the installation of the monitoring wells. [Subsection A of 20.6.2.3107 NMAC]
18.	Within 150 days following the effective date of this Discharge Permit (**by DATE**), the permittee shall survey all wells approved by NMED for Discharge Permit monitoring purposes to a U.S. Geological Survey (USGS) or other permanent benchmark. Survey data shall include northing, easting and elevation to the nearest hundredth of a foot or shall be in accordance with the "Minimum Standards for Surveying in New Mexico" (12.8.2 NMAC). A survey elevation shall be established at the top-of-casing, with a permanent marking indicating the point of survey. The survey shall bear the seal and signature of a licensed New Mexico professional surveyor (pursuant to the New Mexico Engineering and Surveying Practice Act and the rules promulgated under that authority). Depth-to-most-shallow ground water shall be measured to the nearest hundredth of a foot in all surveyed wells, and the data shall be used to develop a ground water elevation contour map showing the location of all monitoring wells and the direction and gradient of ground

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	water flow at the facility. The data and ground water elevation contour map shall be submitted to NMED within 30 days of survey completion. [Subsection A of 20.6.2.3107 NMAC, NMSA 1978, §§ 61-23-1 through 61-23-32]
19.	Once prior to the date that the term of this Discharge Permit ends, NMED shall have the option to perform downhole inspections of all monitoring wells identified in this Discharge Permit. NMED shall establish the inspection date and provide at least 60 days notice to the permittee by certified mail. The permittee shall have any existing dedicated pumps removed at least 48 hours prior to NMED inspection to allow adequate settling time of sediment agitated from pump removal. Should a facility not have existing dedicated pumps, but decide to install pumps in any of the monitoring wells, NMED shall be notified at least 90 days prior to pump installation so that a downhole well inspection(s) can be scheduled prior to pump placement. [Subsections A and D of 20.6.2.3107 NMAC]

Ground Water Monitoring Conditions

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20.	The permittee shall perform quarterly ground water sampling in the following monitoring wells and analyze the samples for dissolved TKN, NO_3-N, TDS and Cl: • **MW-West** - intended to be located hydrologically upgradient of all contaminant sources at facility; located west of Evaporation Pond near the western boundary of the property. • **MW-North** - located north of Evaporation Pond. • **MW-East** - located east of Evaporation Pond. • **MW-Southeast** - located northeast of the PWRS, just off the northeast corner of the impoundment. • **MW-5** - intended to be located hydrologically downgradient of PWRS. Ground water sample collection, preservation, transport and analysis shall be performed according to the following procedure: a) Measure the depth-to-most-shallow ground water from the top of the well casing to the nearest hundredth of a foot. b) Purge three well volumes of water from the well prior to sample collection. c) Obtain samples from the well for analysis. d) Properly prepare, preserve and transport samples. e) Analyze samples in accordance with the methods authorized in this Discharge Permit. Depth-to-most-shallow ground water measurements, analytical results, including the laboratory QA/QC summary report, and a facility layout map showing the location and

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	number of each well shall be submitted to NMED in the quarterly monitoring reports. [Subsection A of 20.6.2.3107 NMAC]
21.	The permittee shall develop a ground water elevation contour map on a quarterly basis using the top of casing elevation data from the monitoring well survey and quarterly depth-to-most-shallow ground water measurements obtained from the ground water monitoring wells required by this Discharge Permit. The ground water elevation contour map shall depict the ground water flow direction based on the ground water elevation contours. Ground water elevations between monitoring well locations shall be estimated using common interpolation methods. A contour interval appropriate to the data shall be used, but in no case shall the interval be greater than two feet. Ground water elevation contour maps shall depict the ground water flow direction, using arrows, based on the orientation of the ground water elevation contours, and the location and identification of each monitoring well and contaminant source. The ground water elevation contour map shall be submitted to NMED in the quarterly monitoring reports. [Subsection A of 20.6.2.3107 NMAC]

Facility Monitoring Conditions

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22.	The permittee shall measure the monthly volume of wastewater discharged to the impoundment system. The permittee shall obtain readings from the totalizing flow meter located on the discharge line between the slaughter facility and the impoundment system on a monthly basis and calculate the monthly and average daily volume discharged to the impoundment system. The monthly discharge volume shall be used to calculate the average daily discharge volume by the formula below. monthly discharge volume ÷ number of days between readings = average daily discharge volume The monthly meter readings, and calculated monthly and average daily discharge volumes shall be submitted to NMED in the quarterly monitoring reports. [Subsection A of 20.6.2.3107 NMAC, Subsections C and H of 20.6.2.3109 NMAC]
23.	Flow meters shall be capable of having their accuracy ascertained under actual working (field) conditions. A field calibration method shall be developed for each flow meter and that method shall be used to check the accuracy of each respective meter. Field calibrations shall be performed upon repair or replacement of a flow measurement device and, at a

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	minimum, once within 90 days of the effective date of this Discharge Permit (**by DATE**). The following meters shall be field calibrated: • **Meter-1** - located on the discharge line from the slaughter facility to PWRS. Flow meters shall be calibrated to within plus or minus 10 percent of actual flow, as measured under field conditions. Field calibrations shall be performed by an individual knowledgeable in flow measurement and in the installation/operation of the particular device in use. A flow meter calibration report shall be prepared for each flow measurement device at the frequency calibration is required. The flow meter calibration report shall include the following information: a) The location and meter identification. b) The method of flow meter field calibration employed. c) The measured accuracy of each flow meter prior to adjustment indicating the positive or negative offset as a percentage of actual flow as determined by an in-field calibration check. d) The measured accuracy of each flow meter following adjustment, if necessary, indicating the positive or negative offset as a percentage of actual flow of the meter. e) Any flow meter repairs made during the previous year or during field calibration. The permittee shall maintain records of flow meter calibration(s) at a location accessible for review by NMED during facility inspections. [Subsection A of 20.6.2.3107 NMAC, Subsections C and H of 20.6.2.3109 NMAC]
24.	The permittee shall visually inspect the following flow meters on a monthly basis for evidence of malfunction: • **Meter-1** - located on the discharge line from the slaughter facility to PWRS. If a visual inspection indicates a flow meter is not functioning as required by this Discharge Permit, the permittee shall repair or replace the meter within 30 days of discovery. For *repaired* meters, the permittee shall submit a report to NMED with the next monitoring report following the repair that includes a description of the malfunction; a statement verifying the repair; and a flow meter field calibration report completed in accordance with the requirements of this Discharge Permit. For *replacement* meters, the permittee shall submit a report to NMED with the next monitoring report following the replacement that includes a design schematic for the device and a flow meter field calibration report completed in accordance with the requirements of this Discharge Permit. [Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]
25.	The permittee shall submit documentation (i.e., manifests or receipts) for the removal and/or disposal of offal, blood and hides from the facility by an offsite renderer, tanner, and/or landfill. The documentation shall be submitted to NMED in the quarterly monitoring reports.

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	[Subsection A of 20.6.2.3107 NMAC and Subsection C of 20.6.62.3109 NMAC]
26.	The permittee shall collect a composite wastewater sample on a semi-annual basis (once every six months) from *each* impoundment. The composite sample(s) shall consist of a minimum of six equal sub-samples collected around the entire perimeter of the evaporative impoundment and thoroughly mixed. The composite sample(s) shall be analyzed for TKN, NO_3-N, TDS and Cl. Samples shall be properly prepared, preserved, transported and analyzed in accordance with the methods authorized in this Discharge Permit. Analytical results shall be submitted to NMED in the monitoring reports due by May 1st and November 1st of each year. [Subsection A of 20.6.2.3107 NMAC, Subsections C and H of 20.6.2.3109 NMAC]

C. CONTINGENCY PLAN

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27.	In the event that ground water monitoring indicates that a ground water quality standard identified in Section 20.6.2.3103 NMAC is exceeded; the total nitrogen concentration in ground water is greater than 10 mg/L; or a toxic pollutant (defined in Subsection WW of 20.6.2.7 NMAC) is present in a ground water sample and in any subsequent ground water sample collected from a monitoring well required by this Discharge Permit, the permittee shall enact the following contingency plan: Within 60 days of the subsequent sample analysis date, the permittee shall propose measures to ensure that the exceedance of the standard or the presence of a toxic pollutant will be mitigated by submitting a corrective action plan to NMED for approval. The corrective action plan shall include a description of the proposed actions to control the source and an associated completion schedule. The plan shall be enacted as approved by NMED. Once invoked (whether during the term of this Discharge Permit; or after the term of this Discharge Permit and prior to the completion of the Discharge Permit closure plan requirements), this condition shall apply until the permittee has fulfilled the requirements of this condition and ground water monitoring confirms for a minimum of two years of consecutive ground water sampling events that the standards of Section 20.6.2.3103 NMAC are not exceeded and toxic pollutants are not present in ground water. The permittee may be required to abate water pollution pursuant to Sections 20.6.2.4000 through 20.6.2.4115 NMAC, should the corrective action plan not result in compliance with the standards and requirements set forth in Section 20.6.2.4103 NMAC within 180 days of

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	confirmed ground water contamination. [Subsection A of 20.6.2.3107 NMAC, Subsection E of 20.6.2.3109 NMAC]
28.	In the event that information available to NMED indicates that a well(s) is not constructed in a manner consistent with the attachment titled *Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions*, Revision 1.1, March 2011; contains insufficient water to effectively monitor ground water quality; or is not completed in a manner that is protective of ground water quality, the permittee shall install a replacement well(s) within 120 days following notification from NMED. The permittee shall survey the replacement monitoring well(s) within 150 days following notification from NMED. Replacement well location(s) shall be approved by NMED prior to installation and completed in accordance with the attachment titled *Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions*, Revision 1.1, March 2011. The permittee shall submit construction and lithologic logs, survey data and a ground water elevation contour map to NMED within 60 days following well completion. Upon completion of the replacement monitoring well(s), the monitoring well(s) requiring replacement shall be properly plugged and abandoned. Well plugging, abandonment and documentation of the abandonment procedures shall be completed in accordance with the attachment titled *Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions*, Revision 1.1, March 2011, and all applicable local, state, and federal regulations. The well abandonment documentation shall be submitted to NMED within 60 days of completion of well plugging activities. [Subsection A of 20.6.2.3107 NMAC]
29.	In the event that ground water flow information obtained pursuant to this Discharge Permit indicates that a monitoring well(s) is not located hydrologically downgradient of the discharge location(s) it is intended to monitor, the permittee shall install a replacement well(s) within 120 days following notification from NMED. The permittee shall survey the replacement monitoring well(s) within 150 days following notification from NMED. Replacement well location(s) shall be approved by NMED prior to installation and completed in accordance with the attachment titled *Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions*, Revision 1.1, March 2011. The permittee shall submit construction and lithologic logs, survey data and a ground water elevation contour map within 30 days following well completion. [Subsection A of 20.6.2.3107 NMAC]
30.	In the event a survey, capacity calculations, or settled solids thickness measurements,

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	indicate an existing impoundment is not capable of meeting the capacity requirements required by this Discharge Permit, within 90 days of the effective date of the Discharge Permit the permittee shall submit a corrective action plan for NMED approval. The plan may include, but is not limited to, proposals for constructing an additional impoundment, reducing the discharge volume, removing accumulated solids, changing wastewater management practices, or installing an advanced treatment system. The corrective action plan shall include a schedule for implementation through completion of corrective actions. The corrective action plan schedule shall propose completion not to exceed one year from the submittal date of the initial corrective action plan. The permittee shall initiate implementation of the plan following approval by NMED. Should the corrective action plan include removal of accumulated solids, solids shall be removed from the impoundment in a manner that is protective of the impoundment liner. The plan shall include the method of removal, and locations and methods for storage and disposal (or land application, if authorized) of the solids. [Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]
31.	In the event that inspection findings reveal significant damage likely to affect the structural integrity of the lined impoundment(s) or its ability to contain contaminants, the permittee shall propose the repair or replacement of the impoundment liner(s) by submitting a corrective action plan to NMED for approval. The plan shall be submitted to NMED within 30 days after discovery by the permittee or following notification from NMED that significant liner damage is evident. The corrective action plan shall include a schedule for completion of corrective actions and the permittee shall initiate implementation of the plan following approval by NMED. [Subsection A of 20.6.2.3107 NMAC, Subsection C of 20.6.2.3109 NMAC]
32.	In the event that a minimum of two feet of freeboard cannot be preserved in the impoundment(s), the permittee shall take actions authorized by this Discharge Permit and all applicable local, state, and federal regulations to restore the required freeboard. In the event that two feet of freeboard cannot be restored within a period of 72 hours following discovery, the permittee shall propose actions to be immediately implemented to restore two feet of freeboard by submitting a short-term corrective action plan to NMED for approval. Examples of short-term corrective actions include: removing excess wastewater from the impoundment through pumping and hauling; or reducing the volume of wastewater discharged to the impoundment. The plan shall include a schedule for completion of corrective actions and shall be submitted within 15 days following the date when the two feet of freeboard limit was initially discovered. The permittee shall initiate implementation of the plan following approval by NMED. In the event that the short-term corrective actions failed to restore two feet of freeboard, the permittee shall propose permanent corrective actions in a long-term corrective action plan

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	submitted to NMED within 90 days following failure of the short-term corrective action plan. Examples include: the installation of an additional storage impoundment, or a significant/permanent reduction in the volume of wastewater discharged to the impoundment. The plan shall include a schedule for completion of corrective actions and implementation of the plan shall be initiated following approval by NMED. [Subsection A of 20.6.2.3107 NMAC]
33.	In the event that a release (commonly known as a "spill") occurs that is not authorized under this Discharge Permit, the permittee shall take measures to mitigate damage from the unauthorized discharge and initiate the notifications and corrective actions required in Section 20.6.2.1203 NMAC and summarized below. Within 24 hours following discovery of the unauthorized discharge, the permittee shall verbally notify NMED and provide the following information: a) The name, address, and telephone number of the person or persons in charge of the facility, as well as of the owner and/or operator of the facility. b) The name and address of the facility. c) The date, time, location, and duration of the unauthorized discharge. d) The source and cause of unauthorized discharge. e) A description of the unauthorized discharge, including its estimated chemical composition. f) The estimated volume of the unauthorized discharge. g) Any actions taken to mitigate immediate damage from the unauthorized discharge. Within one week following discovery of the unauthorized discharge, the permittee shall submit written notification to NMED with the information listed above and any pertinent updates. Within 15 days following discovery of the unauthorized discharge, the permittee shall submit a corrective action report/plan to NMED describing any corrective actions taken and/or to be taken relative to the unauthorized discharge that includes the following: a) A description of proposed actions to mitigate damage from the unauthorized discharge. b) A description of proposed actions to prevent future unauthorized discharges of this nature. c) A schedule for completion of proposed actions. In the event that the unauthorized discharge causes or may with reasonable probability cause water pollution in excess of the standards and requirements of Section 20.6.2.4103 NMAC, and the water pollution will not be abated within 180 days after notice is required to be given pursuant to Paragraph (1) of Subsection A of 20.6.2.1203 NMAC, the permittee may be required to abate water pollution pursuant to Sections 20.6.2.4000 through 20.6.2.4115 NMAC.

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	Nothing in this condition shall be construed as relieving the permittee of the obligation to comply with all requirements of Section 20.6.2.1203 NMAC. [20.6.2.1203 NMAC]
34.	In the event that NMED or the permittee identifies any failures of the discharge plan or this Discharge Permit not specifically noted herein, NMED may require the permittee to submit a corrective action plan and a schedule for completion of corrective actions to address the failure(s). Additionally, NMED may require a Discharge Permit modification to achieve compliance with 20.6.2 NMAC. [Subsection A of 20.6.2.3107 NMAC, Subsection E of 20.6.2.3109 NMAC]

D. CLOSURE PLAN

Permanent Facility Closure Conditions

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35.	In the event a facility, or a component of a facility, is proposed to be permanently closed, upon ceasing discharging, the permittee shall perform the following closure measures: Within 60 days of ceasing discharging to the impoundment(s), the line leading to the impoundment shall be plugged so that a discharge can no longer occur. Within 90 days of ceasing discharging to the impoundment(s), the permittee shall remove solids from the tank(s) and contain, transport, and dispose of them in accordance with all local, state, and federal regulations. Within six months ~~60 days~~ of ceasing discharging to the impoundment(s), wastewater shall be evaporated from the impoundment. Wastewater from any other wastewater system components shall be drained and either transferred to the impoundment(s) for disposal by evaporation or transferred offsite for disposal to be accomplished in accordance with all local, state, and federal regulations. Within one year ~~90 days~~ of ceasing discharging to the impoundment(s), the permittee shall remove solids from the ~~tank(s) and~~ impoundment(s) and contain, transport, and dispose of them in accordance with all local, state, and federal regulations. Within one year following completion of solids removal and disposal, the permittee shall complete the following closure measures: a) Remove all lines leading to and from the impoundment(s), or permanently plug and

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	abandon them in place. b) Remove or demolish any other wastewater system components and re-grade area with clean suitable fill to blend with surface topography, promote positive drainage and prevent ponding. c) Perforate or remove the impoundment liner(s). d) Fill the impoundment(s) with clean suitable fill. e) Re-grade the impoundment site to blend with surface topography, promote positive drainage and prevent ponding. The permittee shall continue ground water monitoring until the requirements of this condition have been met and ground water monitoring confirms for a minimum of two years of consecutive ground water sampling events that the standards of Section 20.6.2.3103 NMAC are not exceeded and toxic pollutants are not present in ground water. If monitoring results show that a ground water quality standard in Section 20.6.2.3103 NMAC is exceeded; the total nitrogen concentration in ground water is greater than 10 mg/L; or a toxic pollutant (defined in Subsection WW of 20.6.2.7 NMAC) is present in ground water, the permittee shall implement the contingency plan required by this Discharge Permit. Following notification from NMED that post-closure monitoring may cease, the permittee shall plug and abandon the monitoring well(s) in accordance with the attachment titled *Ground Water Discharge Permit Monitoring Well Construction and Abandonment Conditions*, Revision 1.1, March 2011. When all closure and post-closure requirements have been met, the permittee may submit a written request for termination of the Discharge Permit to NMED. [Subsection A of 20.6.2.3107 NMAC]

E. GENERAL TERMS AND CONDITIONS

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36.	RECORD KEEPING - The permittee shall maintain a written record of the following information: a) Information and data used to complete the application for this Discharge Permit. b) Records of any releases (commonly known as "spills") not authorized under this Discharge Permit and reports submitted pursuant to 20.6.2.1203 NMAC. c) Records of the operation, maintenance, and repair of all facilities/equipment used to treat, store or dispose of wastewater. d) Facility record drawings (plans and specifications) showing the actual construction of the facility and bear the seal and signature of a licensed New Mexico professional

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	engineer. e) Copies of monitoring reports completed and/or submitted to NMED pursuant to this Discharge Permit. f) The volume of wastewater or other wastes discharged pursuant to this Discharge Permit. g) Ground water quality and wastewater quality data collected pursuant to this Discharge Permit. h) Copies of construction records (well log) for all ground water monitoring wells required to be sampled pursuant to this Discharge Permit. i) Records of the maintenance, repair, replacement or calibration of any monitoring equipment or flow measurement devices required by this Discharge Permit. j) Data and information related to field measurements, sampling, and analysis conducted pursuant to this Discharge Permit. The following information shall be recorded and shall be made available to NMED upon request: i) The dates, location and times of sampling or field measurements; ii) The name and job title of the individuals who performed each sample collection or field measurement; iii) The sample analysis date of each sample; iv) The name and address of the laboratory, and the name of the signatory authority for the laboratory analysis; v) The analytical technique or method used to analyze each sample or collect each field measurement; vi) The results of each analysis or field measurement, including raw data; vii) The results of any split, spiked, duplicate or repeat sample; and viii) A copy of the laboratory analysis chain-of-custody as well as a description of the quality assurance and quality control procedures used. The written record shall be maintained by the permittee at a location accessible during a facility inspection by NMED for a period of at least five years from the date of application, report, collection or measurement and shall be made available to the department upon request. [Subsections A and D of 20.6.2.3107 NMAC]
37.	INSPECTION and ENTRY – The permittee shall allow inspection by NMED of the facility and its operations which are subject to this Discharge Permit and the WQCC regulations. NMED may upon presentation of proper credentials, enter at reasonable times upon or through any premises in which a water contaminant source is located or in which are located any records required to be maintained by regulations of the federal government or the WQCC. The permittee shall allow NMED to have access to and reproduce for their use any copy of the records, and to perform assessments, sampling or monitoring during an inspection for

#	**Terms and Conditions**
	the purpose of evaluating compliance with this Discharge Permit and the WQCC regulations. Nothing in this Discharge Permit shall be construed as limiting in any way the inspection and entry authority of NMED under the WQA, the WQCC Regulations, or any other local, state or federal regulations. [Subsection D of 20.6.2.3107 NMAC, NMSA 1978, §§ 74-6-9.B and 74-6-9.E]
38.	DUTY to PROVIDE INFORMATION - The permittee shall, upon NMED's request, allow NMED's inspection/duplication of records required by this Discharge Permit and/or furnish to NMED copies of such records. [Subsection D of 20.6.2.3107 NMAC]
39.	MODIFICATIONS and/or AMENDMENTS – In the event the permittee proposes a change to the facility or the facility's discharge that would result in a change in the volume discharged; the location of the discharge; or in the amount or character of water contaminants received, treated or discharged by the facility, the permittee shall notify NMED prior to implementing such changes. The permittee shall obtain approval (which may require modification of this Discharge Permit) by NMED prior to implementing such changes. [Subsection C of 20.6.2.3107 NMAC, Subsections E and G of 20.6.2.3109 NMAC]
40.	PLANS and SPECIFICATIONS – In the event the permittee is proposing to construct a wastewater system or change a process unit of an existing system such that the quantity or quality of the discharge will change substantially from that authorized by this Discharge Permit, the permittee shall submit construction plans and specifications to NMED for the proposed system or process unit prior to the commencement of construction. In the event the permittee implements changes to the wastewater system authorized by this Discharge Permit which result in only a minor effect on the character of the discharge, the permittee shall report such changes (including the submission of record drawings, where applicable) as of January 1 and June 30 of each year to NMED. [Subsections A and C of 20.6.2.1202 NMAC, NMSA 1978, §§ 61-23-1 through 61-23-32]
41.	CIVIL PENALTIES - Any violation of the requirements and conditions of this Discharge Permit, including any failure to allow NMED staff to enter and inspect records or facilities, or any refusal or failure to provide NMED with records or information, may subject the permittee to a civil enforcement action. Pursuant to WQA 74-6-10(A) and (B), such action may include a compliance order requiring compliance immediately or in a specified time, assessing a civil penalty, modifying or terminating the Discharge Permit, or any combination of the foregoing; or an action in district court seeking injunctive relief, civil

#	Terms and Conditions
	penalties, or both. Pursuant to WQA 74-6-10(C) and 74-6-10.1, civil penalties of up to $15,000 per day of noncompliance may be assessed for each violation of the WQA 74-6-5, the WQCC Regulations, or this Discharge Permit, and civil penalties of up to $10,000 per day of noncompliance may be assessed for each violation of any other provision of the WQA, or any regulation, standard, or order adopted pursuant to such other provision. In any action to enforce this Discharge Permit, the permittee waives any objection to the admissibility as evidence of any data generated pursuant to this Discharge Permit. [20.6.2.1220 NMAC, NMSA 1978, §§ 74-6-10 and 74-6-10.1]
42.	CRIMINAL PENALTIES – No person shall: 1) make any false material statement, representation, certification or omission of material fact in an application, record, report, plan or other document filed, submitted or required to be maintained under the WQA; 2) falsify, tamper with or render inaccurate any monitoring device, method or record required to be maintained under the WQA; or 3) fail to monitor, sample or report as required by a permit issued pursuant to a state or federal law or regulation. Any person who knowingly violates or knowingly causes or allows another person to violate the requirements of this condition is guilty of a fourth degree felony and shall be sentenced in accordance with the provisions of NMSA 1978, § 31-18-15. Any person who is convicted of a second or subsequent violation of the requirements of this condition is guilty of a third degree felony and shall be sentenced in accordance with the provisions of NMSA 1978, § 31-18-15. Any person who knowingly violates the requirements of this condition or knowingly causes another person to violate the requirements of this condition and thereby causes a substantial adverse environmental impact is guilty of a third degree felony and shall be sentenced in accordance with the provisions of NMSA 1978, § 31-18-15. Any person who knowingly violates the requirements of this condition and knows at the time of the violation that he is creating a substantial danger of death or serious bodily injury to any other person is guilty of a second degree felony and shall be sentenced in accordance with the provisions of NMSA 1978, § 31-18-15. [20.6.2.1220 NMAC, NMSA 1978, §§ 74-6-10.2.A through 74-6-10.2.F]
43.	COMPLIANCE with OTHER LAWS - Nothing in this Discharge Permit shall be construed in any way as relieving the permittee of the obligation to comply with all applicable federal, state, and local laws, regulations, permits or orders. [NMSA 1978, § 74-6-5.L]
44.	RIGHT to APPEAL - The permittee may file a petition for review before the WQCC on this Discharge Permit. Such petition shall be in writing to the WQCC within thirty days of the receipt of postal notice of this Discharge Permit and shall include a statement of the

#	**Terms and Conditions**
	issues to be raised and the relief sought. Unless a timely petition for review is made, the decision of NMED shall be final and not subject to judicial review. [20.6.2.3112 NMAC, NMSA 1978, § 74-6-5.O]
45.	TRANSFER of DISCHARGE PERMIT - Prior to the transfer of any ownership, control, or possession of this facility or any portion thereof, the permittee shall: 1) notify the proposed transferee in writing of the existence of this Discharge Permit; 2) include a copy of this Discharge Permit with the notice; and 3) deliver or send by certified mail to NMED a copy of the notification and proof that such notification has been received by the proposed transferee. Until both ownership and possession of the facility have been transferred to the transferee, the permittee shall continue to be responsible for any discharge from the facility. [20.6.2.3111 NMAC]
46.	PERMIT FEES - Payment of permit fees is due at the time of Discharge Permit approval. Permit fees shall be paid in a single payment or shall be paid in equal installments on a yearly basis over the term of the Discharge Permit. Single payments shall be remitted to NMED no later than 30 days after the Discharge Permit effective date. Initial installment payments shall be remitted to NMED no later than 30 days after the Discharge Permit effective date; subsequent installment payments shall be remitted to NMED no later than the anniversary of the Discharge Permit effective date. Permit fees are associated with issuance of this Discharge Permit. Nothing in this Discharge Permit shall be construed as relieving the permittee of the obligation to pay all permit fees assessed by NMED. A permittee that ceases discharging or does not commence discharging from the facility during the term of the Discharge Permit shall pay all permit fees assessed by NMED. An approved Discharge Permit shall be suspended or terminated if the facility fails to remit an installment payment by its due date. [Subsection F of 20.6.2.3114 NMAC, NMSA 1978, § 74-6-5.K]

V. PERMIT TERM & SIGNATURE

EFFECTIVE DATE: effective date
TERM ENDS: expiration date

[Subsection H of 20.6.2.3109 NMAC, NMSA 1978, § 74-6-5.I]

JERRY SCHOEPPNER
Chief, Ground Water Quality Bureau
New Mexico Environment Department

EXHIBIT 29

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May 31, 2013

VIA FEDERAL EXPRESS

The Honorable Thomas J. Vilsack
Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

Re: Response to the New Mexico Farm and Livestock Bureau's May 10, 2013 Letter

Dear Secretary Vilsack:

I write on behalf of Animal Protection of New Mexico, Front Range Equine Rescue, and the American Society for Prevention of Cruelty to Animals, and others, in response to the New Mexico Farm and Livestock Bureau's May 10, 2013 letter, in order to clarify and to correct a few of the numerous inaccuracies offered in support of horse slaughter.

First, contrary to what the Bureau claims, Valley Meat has not "complied with all regulations" and is not free of all obstacles except "political pressure." Rather, there are a series of regulatory failures, legal concerns, as well as other obstacles and instances of noncompliance that should prevent Valley Meat from slaughtering horses for human consumption:

- Valley Meat lacks a state groundwater discharge permit, without which it cannot operate as a slaughter facility.[1] N.M.A.C. § 20.6.2.3104. Though the New Mexico Environment Department website lists Valley Meat's discharge permit is "active," this listing is incorrect, according to attorneys with the Department. Valley Meat cannot legally operate a horse slaughter facility until it obtains a discharge permit, and that permit will be subject to review and revision if there is substantial public concern about the facility.

- Serious questions exist as to whether Valley Meat needs a federal stormwater discharge permit to operate a horse slaughter facility. Pursuant to Section 402 of the Clean Water Act

[1] For ten years after Ricardo De Los Santos took over Valley Meat, the company repeatedly failed to comply with the rules and conditions of its discharge permit, failing to submit monitoring reports, pumping manifests, groundwater sampling reports, wastewater sampling reports, and reports on the volume of wastewater discharge, and failed to protect the surrounding land by closing out its existing clay and manure lined lagoon. Further, in 2009, Valley Meat simply let its discharge permit expire and kept operating its cow slaughter facility in violation of New Mexico law.

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("CWA"), 33 U.S.C. § 1342, and EPA regulations, Valley Meat must obtain a Multi Sector General Permit for Stormwater Discharges Associated with Industrial Activity ("General Permit") or must at least submit an application for conditional exclusion from the General Permit before operating as a slaughter facility.[2]

- As noted in the FRER and HSUS letter of April 16, 2013, before Valley Meat can begin operations, USDA must comply with Section 7 of the Endangered Species Act ("ESA").[3] Any grant of inspection of operation before then would trigger legal action under the ESA.

- As explained in FRER's letter of April 22, 2013, Mr. De Los Santos committed two federal felonies in the past year, in direct connection with his attempt to begin slaughtering horses, when he submitted materially false applications for inspection to FSIS. Mr. De Los Santos is subject to prosecution for his felonious actions.

- As also documented in the April 22, 2013 letter, Valley Meat has a long history of environmental and humane handling violations, which call into question its fitness to operate as a horse slaughter facility.

- The initiation of horse slaughter in New Mexico – or anywhere – needs to be carefully reexamined in light of this month's report by the USDA Office of Inspector General's May 9, 2013 report, addressing FSIS Inspection and Enforcement Activities at Swine Slaughter Plants.[4] According to the report, FSIS's enforcement policies "do not deter swine slaughter plants from becoming repeat violators" of federal law. Consequently, "plants have repeatedly violated the same regulations with little or no consequence," which has resulted in "reduced assurance of FSIS inspectors effectively identifying pork that should not enter the food supply." Notably, pigs in slaughterhouses are far more manageable, as a practical matter, than horses, given the unique nature and temperament of most horses. It is doubtful that FSIS can ensure humane handling of equines – animals whose unique temperament

[2] In violation of the CWA, Valley Meat has violated and continues to violate the terms of the General Permit. Since Valley Meat began operating as a cattle slaughterhouse, Valley Meat has never submitted a Notice of Intent (NOI) to enroll in the General Permit, nor has Valley Meat submitted an application for conditional exclusion from the General Permit for "no exposure" of industrial activities and materials to storm water.

[3] Under the ESA, USDA must consult with the Secretary of the Interior through the U.S. Fish and Wildlife Service concerning the impact of Valley Meat's horse slaughter operations on threatened and endangered species and their critical habitat in the vicinity of Valley Meat's slaughter facility in Roswell, New Mexico. USDA's failure to engage in that consultative process to ensure that its actions are not likely to jeopardize ESA-listed species or result in the destruction or adverse modification of critical habitat pursuant to 16 U.S.C. § 1536(a)(2) is a violation of the ESA. FRER and HSUS are prepared to bring suit to ensure USDA's compliance with the ESA.

[4] USDA OIG Audit Report 24601-0001-41.

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makes humane slaughter essentially impossible – when it cannot ensure humane handling of swine, the number one most commonly killed mammal for food.

- It is even more doubtful that FSIS can ensure humane handling of equines at Valley Meat, in light of Valley Meat's status as a repeat humane handling offender of cows, which are more docile than equines.

- Finally, USDA has not ruled on FRER and HSUS's Petition To Create Rules and Regulations Governing the Sale, Transport and Processing of Horses and Horse Meat Intended for Human Consumption, which raises serious questions as to the fitness of horse meat from American horses.

Second, the "unwanted horse issue" discussion in the Bureau's letter presents a self-serving characterization of the problems. Certainly the destruction of allegedly unwanted animals is not the purpose of federal meat and slaughter inspection – but it is also not necessary, not humane, and not the main alternative route for these horses. As explained in the documents attached as Exhibit A:

- USDA determined that 92.3% of horses sent to slaughter are in good condition, so the vast majority of American horses sent to slaughter would be able to live productive lives if given the opportunity. These horses could be sold, donated, or otherwise rehomed; however, slaughter buyers regularly attend and outbid legitimate horse owners and rescues at auctions.

- Using USDA's own findings, when horse slaughter is prohibited, less than 1% of the entire horse population may require the help of rescues or euthanasia.

- There are numerous viable alternatives to horse slaughter, both in New Mexico and across the country. Valley Meat's owner has also indicated that he will be receiving horses from out of state, and the horses trucked to auctions around the country are often trucked for extended periods to get to the auctions. As demonstrated by the attached documents, there are significant support systems already in place for any horses (and horse owners) that need assistance, including:

  Selling, leasing, and donating horses;

  Rescues, retirement farms, sanctuaries, shelters, and adoption websites;

  Gelding clinics, subsidies, and grants;

  Hay/feed subsidies;

  Encouraging responsible breeding;

  Subsidized and humane euthanasia and disposal; and

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A volunteer network to try to optimize services when people don't qualify for other services.

- There is an available tax check-off in some states to support these kinds of programs, and a virtual guarantee that other groups will come forward to run similar programs, should the need arise.

Third, the claim that domestic horse slaughter is the "humane option" has repeatedly proven to be false.

- USDA inspectors cannot "guarantee a humane process." As explained recently by horse veterinarian and former FSIS inspector Lester Friedlander, horses' physical conformation and skittish nature, which differentiates them from traditional food animals, makes it difficult for slaughterhouse workers to effectively stun horses with a single shot.[5] Friedlander cited numerous examples of horses being shot "up to seven or eight times" before being rendered unconscious.

- USDA is aware of and has documented appalling cruelty at the last three domestic horse slaughter plants in Texas and Illinois, including gruesome descriptions and photographs of the mistreatment inherent in horse slaughter.[6]

- There is no evidence to support the claim that horses slaughtered domestically will travel fewer miles than those slaughtered abroad. Kill-buyers typically contract with slaughter facilities to provide a certain quota of horses and meet these quotas without regard to the original location of the horses. Valley Meat has publicly stated that it plans on obtaining horses from auctions in Texas that are at least 500 miles, thus subjecting the horses to a grueling journey. Nor is there any possible way for Valley Meat to stem the tide of horses

[5] Rene Romo, *Ex-inspector has concerns about horse slaughter plan*, ALBUQUERQUE JOURNAL, May 21, 2013, http://www.abqjournal.com/main/2013/05/21/news/exinspector-has-concerns-about-horse-slaughter-plan.html.

[6] *See, e.g.*, USDA, Food Safety & Inspection Service, Noncompliance Record No. 0019-2005-8243 (Apr. 13, 2005); Noncompliance Record Nos. 00 18-2005-8243 (Apr. 4, 2005) ("Nine horses were overcrowded in the alleyway causing undue excitement which was further exacerbated when two more employees from the kill floor began yelling and hitting these horses causing the one in the end of the line to slip and fall."); 0013-2006-8243 (Oct. 9, 2006) ("horse was down",. . . "in the upper middle compartment of a pot bellied trailer" and "[o]ther horses within the compartment were trampling the downed horse"); 0006-2007-8243 (Jan. 24, 2007) ("two downed horses being trampled upon by the other horses as well as the front horse being kicked with the hind feet from another horse"); Press Release, Animals' Angels (Nov. 2008), http://www.kaufmanzoning.net/nov24/ pressrelease.pdf; *see also* Mary Nash's Horse Meat Website, http://www.kaufmanzoning.net/foia.htm (providing for download USDA documents describing and depicting regulatory violations, mistreatment, and cruelty).

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going over our borders, so it is certainly not a solution to the problems caused by long transport.

- Slaughter often increases abuse and abandonment (as opposed to providing a humane alternative), such as when kill-buyers dump horses that are unfit for slaughter.

The claims of the Bureau are inflammatory and untrue. The true facts, as presented in this letter, demonstrate that authorizing Valley Meat to slaughter horses is contraindicated on every level. In light of the foregoing, we request that USDA deny Valley Meat's application for inspection.

Very truly yours,

Bruce A. Wagman

BAW:lfl
Enclosures
cc: Senator Tom Udall
Senator Martin Heinrich
Congressman Steve Pearce
Congressman Ben Ray Luján
Congresswoman Michelle Luján Grisham

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EXHIBIT 30

Decision Memo—National Environmental Policy Act Categorical Exclusion

Application of Rains Natural Meats for a Grant of Federal Meat Inspection Services

Decision

It is my decision to grant federal meat inspection services to Rains Natural Meats.

Description

Rains Natural Meats is a small (5,300 square-foot) meat and poultry slaughter and processing facility located at 23795 260th Street, Gallatin, Daviess County, Missouri. Its nearest neighbor is located approximately one-quarter mile to the south of the facility. The facility was built on a five-acre site in 1998. Its current owner, Mr. David Rains, received a grant of inspection on November 30, 1998, for processing (breaking, boning, fabricating, formulating, and slicing) meat and poultry products. The grant was updated on June 9, 2003, to include the slaughter and processing of cattle, calves, sheep, goats, swine, and ratites. The grant was updated again on April 22, 2004, to include the processing of young chickens, mature chickens, turkeys, geese, ducks, and guinea. On January 15, 2013, Rains Natural Meats filed an application with FSIS to modify its grant of inspection to receive inspection services for the commercial slaughter of horses, mules, and other equines.

Proposed Action

The proposed action is to grant federal meat inspection services for commercial horse slaughter operations at Rains Natural Meats. The Federal Meat Inspection Act ("FMIA") requires government inspectors to conduct an ante-mortem inspection of all amenable species, including cattle, sheep, swine, goats, horses, mules and other equines (21 U.S.C. § 603); a post-mortem inspection of the carcasses and parts of all amenable species (21 U.S.C. § 604); and an inspection of meat food products during processing operations (21 U.S.C. § 605) in establishments that sell or distribute in commerce meat that is intended for human consumption. Horses, mules, and other equines have been among the livestock species that are amenable to the FMIA since it was amended by the Wholesome Meat Act in 1967.[1] [2] The FMIA and its implementing regulations in 9 CFR Parts 302, 304, 307, 416, and 417 require establishments that wish to engage in the commercial slaughter of amenable species to produce meat intended for human consumption and sale or distribution in interstate commerce to apply to the Food Safety Inspection Service ("FSIS")

[1]FSIS regulations require that establishments that slaughter horses, mules, and other equines must be completely separate from any establishment that slaughters cattle, sheep, swine, or goats.
[2]FSIS temporarily suspended inspection of horse slaughter facilities from 2006 to 2012 because Congress prohibited FSIS from expending funds to pay for ante-mortem inspection of equines in each of those years, but the underlying statute requiring federal inspection of horse slaughter has never been amended or repealed. In 2012 Congress restored federal funding of ante-mortem inspection of horses at commercial horse slaughter plants. Therefore, issuing a grant of inspection for commercial horse slaughter is not precedent setting, but rather, a return to the status quo ante.

for a grant of federal inspection services, and they establish criteria for determining the eligibility of the applicant to receive inspection services.

FSIS is also required to conduct an examination and inspection of the method by which amenable species, including horses, are slaughtered and handled in connection with slaughter in order to ensure that the establishment is in compliance with the Humane Methods of Slaughter Act (21 U.S.C. § 603) ("HMSA"). The HMSA was enacted to prevent the needless suffering of livestock, to improve products and economies in slaughter operations, and to benefit producers, processors and consumers by expediting an orderly flow of livestock and livestock products in interstate and foreign commerce (7 U.S.C. § 1901). FSIS has implemented and enforces regulations under the HMSA (9 C.F.R. Part 313).[3]

The National Environmental Policy Act and FSIS's Categorical Exclusion

The National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*) ("NEPA") and the Counsel of Environmental Quality implementing regulations (40 C.F.R. Parts 1501-1508) require all federal agencies to prepare an assessment of the environmental impact of a proposed agency action (called an environmental assessment, or "EA") (40 C.F.R. §§ 1501.3 and 1501.4(b)). Based on the EA, NEPA further requires federal agencies to prepare an environmental impact statement ("EIS") for major federal actions significantly affecting the quality of the human environment (42 U.S.C. § 4332(2)(c) and 40 C.F.R. § 1504.1(c)). However, federal agencies may identify classes of actions that normally do not require the preparation of either an EA or an EIS because such actions do not have a significant effect on the human environment, either individually or cumulatively (40 C.F.R. § 1507.3(b)(2)). Classes of actions that have no significant environmental effect, either individually or cumulatively, are said to be categorically excluded from NEPA requirements (40 C.F.R. § 1508.4). Despite allowing federal agencies to identify classes of action that are categorically excluded from NEPA requirements, NEPA still requires an agency to determine whether or not there are any potential environmental impacts that may result from a proposed action of that agency and so inform the agency decision maker.

USDA's NEPA implementing regulations are found in 7 C.F.R. § 1b. These regulations list FSIS as an agency that conducts programs and activities that have been found to have no individual or cumulative effect on the human environment, such that FSIS is categorically excluded from the requirements of preparing procedures to implement NEPA, and its actions are categorically

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[3]The Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note) is an animal welfare statute governing the commercial transportation of equine for slaughter by persons regularly engaged in that activity within the United States. In 1998, the Secretary issued regulations (9 C.F.R. Part 88) that establish safety standards for conveyances being used to transport equines to slaughter; define the duties and responsibilities of owner/shippers prior to loading equines onto the conveyance, during the actual commercial transportation of said equines to the slaughter plant, and upon their arrival at a slaughter plant; and set forth paperwork and back tagging requirements for equines being commercially transported to slaughter. This program is administered by USDA's Animal and Plant Health Inspection Service, whose personnel historically have conducted their inspections of slaughter horses and the conveyances in which they are transported to slaughter upon the horses' arrival at a slaughter facility.

excluded from the preparation of an EA or an EIS unless the FSIS Administrator determines that an action may have a significant environmental effect (7 C.F.R. § 1b.4).

When a federal agency's action is merely ministerial as opposed to discretionary and the agency lacks discretion to affect the outcome of its action, there is no major federal action that triggers NEPA requirements. A grant of federal inspection under the FMIA is purely ministerial because, if a commercial horse slaughter plant meets all of the statutory and regulatory requirements for receiving a grant of federal inspection services, FSIS has no discretion or authority under the FMIA to deny the grant on other grounds or to consider and choose among alternative ways to achieve the agency's statutory objectives. Therefore, a grant of federal inspection services under the FMIA is not a major federal action that is subject to NEPA requirements.

A grant of federal inspection likewise does not and will not allow FSIS to exercise sufficient control over the commercial horse slaughter activities at Rains Natural Meats such that the grant will constitute a major federal action that triggers NEPA requirements. The sole purpose of federal meat inspection is to protect public health and welfare by ensuring that any meat produced for human consumption and sale or distribution in commerce is wholesome, not adulterated, properly packaged, and properly labeled as to species, quantity, and point of origin, and the FMIA does not authorize FSIS to regulate a commercial horse slaughter facility's slaughter activities beyond that which is necessary to achieve this purpose. Accordingly, the FMIA authorizes FSIS inspectors to conduct ante-mortem inspection of horses to ensure that they are not dead or dying, diseased, or non-ambulatory, and that they are not inhumanely handled or slaughtered. It likewise authorizes FSIS inspectors to conduct post-mortem inspection of the carcasses and meat food products resulting therefrom to ensure that the carcasses and meat are wholesome, not adulterated, and fit for use as human food. In addition, the FMIA authorizes FSIS to require commercial slaughter plants to maintain certain sanitary conditions with respect to the conduct of commercial slaughter, meat preparation, and meat packaging operations, the proper storage of carcasses and the meat products derived therefrom, and the storage and proper disposal of condemned or inedible materials. The FMIA further authorizes FSIS to require commercial slaughter plants to develop hazard analysis and critical control point plans that identify and prevent or control for potential food safety hazards at each step of the slaughter process. All FSIS inspectors assigned to conduct federal meat inspection at Rains Natural Meat's facility will be guided in the performance of their duties by the policies and procedures set forth in FSIS directives and notices, including but not limited to FSIS Directive 6900.2 Rev. 2, *Humane Handling and Slaughter of Livestock*; FSIS Directive 6100.1 *Ante-Mortem Livestock Inspection*; FSIS Directive 6100.2, *Post-mortem Livestock Inspection*; and FSIS Directive 6130.1, *Ante-mortem, Post-mortem Inspection of Equines and Documentation of Inspection Tasks*.[4] However, FSIS inspectors will

[4] FSIS directives and notices are internal documents, similar to operating procedures, that the agency uses to provide official instructions to agency personnel on how to carry out their duties with respect to agency policies. Directives "provide specific instructions or establish new procedures that Agency personnel need to follow to implement FSIS requirements . . . . Directives provide instructions to FSIS personnel, not the public or industry. Directives identify the specific Agency personnel that are to carry out the activities in the directive." See FSIS Directive 1230.1, *FSIS Issuance System;* see also page 4 of FSIS training module

not have any authority or control over the day-to-day operations of the slaughter plant save to the degree necessary to achieve only the agency's mission to protect public health by ensuring that horse meat intended for use as human food is safe to eat and properly labeled.

Even if FSIS did have sufficient authority and control over commercial slaughter activities at a horse slaughter establishment such that a grant of federal inspection to such an establishment could constitute a major federal action, federal ante-mortem and post-mortem inspection of horses at Rains Natural Meats would not be the legally relevant cause of the establishment's commercial horse slaughter activities or the impacts, if any, that such slaughter activities might have on the environment. As noted above, federal inspection under the FMIA is required for any meat that is produced for human consumption and for sale or distribution in interstate commerce, and Rains Natural Meats has operated for about 10 years under a grant of inspection for the commercial slaughter of amenable species other than horses that has not been revoked or otherwise terminated. Rains Natural Meats could resume the slaughter of other amenable species under its existing grant of inspection, so a decision not to grant Rains Natural Meats' current application for federal inspection of commercial horse slaughter would not result in the shuttering of the slaughter plant or reduce its alleged environmental impacts. Furthermore, a modification of the existing grant of inspection so that it applies exclusively to the commercial slaughter of horses would not be a substantial change to the agency's actions pursuant to the grant, but would preserve the status quo because FSIS inspectors would continue to follow the policies and procedures under the FMIA and implementing regulations, regardless of the amenable species being slaughtered. It also would not be a substantial change to Rains Natural Meats' commercial slaughter activities but would preserve the status quo because the environmental impacts resulting from the commercial slaughter of horses, if any, would not be significantly different from those resulting from the commercial slaughter of other amenable species. Finally, if the meat produced at a commercial horse slaughter plant is not intended for human consumption, or if it is intended for human consumption but for sale or distribution only in intrastate commerce rather than in interstate commerce, then the commercial horse slaughter and the effects thereof may proceed independently of a grant of federal ante-mortem and post-mortem inspection, and FSIS would have no ability to prevent them. In the present instance, Mr. Rains has indicated that he intends to prepare horse meat for human consumption and that his intended market is outside the State of

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"FSIS as a Public Health Regulatory Agency: Regulatory Framework", updated January 2012, at http://www.fsis.usda.gov/wps/wcm/connect/4db3c6aa-e911-45b0-ab51-db8d5483fe26/PHVt-Regulatory_Framework.pdf?MOD=AJPERES. As such, directives and notices do not have the force and effect of the agency's regulations that are found in 9 C.F.R. §§ 300-599. See FSIS "Policy Pal" dated April 27, 2011, at http://www.fsis.usda.gov/wps/wcm/connect/fsis-content/rss/policy-pals. Directives and notices also are not enforceable by third parties. Therefore, FSIS directives and notices and the issuance thereof, by their very nature, do not constitute major federal actions that significantly affect the human environment and trigger NEPA requirements. Even if directives and notices and the issuance thereof were major federal actions, they would be categorically excluded from NEPA requirements pursuant to 7 C.F.R. § 1b.3(a)(1), which excludes "policy development, planning and implementation which relate to routine activities" from NEPA requirements. Directives and notices are also categorically excluded from NEPA requirements pursuant to the categorical exclusion applicable to the agency as a whole that is found in 7 C.F.R. § 1b.4(b)(6).

Missouri, so he may operate only subject to a grant of federal inspection, but nothing in the FMIA precludes him from expanding his operation to include horse meat that will be produced for human consumption and sold and distributed solely within the State of Missouri.[5] Likewise, nothing in the FMIA precludes him from expanding his operation to include the preparation and sale of horse meat to pet food companies and zoos for non-human consumption. It thus is possible for Rains Natural Meats to operate as a horse slaughter establishment, and possibly have an effect on the environment, without a grant of federal inspection. Accordingly, a grant of federal inspection services is not and cannot be the legally relevant cause of either the commercial slaughter activity or its environmental impact, if any.

Based on the foregoing, a decision to grant federal inspection services to Rains Natural Meats does not constitute major federal action that will significantly affect the quality of the human environment and thus does not trigger any requirements under NEPA. Nevertheless, given the high level of public interest in this particular issue, FSIS has examined several aspects of granting federal inspection services to Rains Natural Meats to determine if the categorical exclusion applies to this action or if any unique conditions or extraordinary circumstances exist that would cause this action to have a significant environmental effect and trigger NEPA requirements. These aspects are the following:

–**Impacts on Public Health and Safety**. As explained above, federal inspection under the FMIA is intended solely to protect public health and safety by ensuring that meat and meat food products intended for use as human food are not adulterated or misbranded. However, the agency recognizes that certain segments of the public have raised concerns about the potential impacts of commercial horse slaughter on public health. One such concern is the potential public health risks that could arise from the presence in horse meat of trace amounts of certain classes of drugs that have not been approved for use in animals that will or could be slaughtered to produce food for human consumption. The Humane Society of the United States ("the Humane Society") and other horse protection groups contend that horses' status as companion animals that usually are not slaughtered in this country to produce human food means that most horses in the United States have been treated with antibiotics, anti-inflammatory drugs, growth hormones, and other substances that typically are not used on other food animals and for which the Federal Drug Administration has established no tolerances. These groups further contend that residues of these substances remain in horse tissues indefinitely, thus rendering any meat produced from U.S. horses unsafe for human consumption and constituting a threat to public health.

FSIS strongly disagrees with the Humane Society's assertions. The fact that a drug or other chemical was administered to an animal does not, by itself, mean that the meat and meat food products from the animal will be adulterated because the administration of a substance does not necessarily affect the meat or meat food products derived from that animal. Residues do not remain in animals forever but are eliminated from the body over time. Specifically, drugs that are

[5] It would be possible for Mr. Rains to prepare horse meat products for human consumption and sale or distribution only in the State of Missouri in accordance with the terms of Missouri's meat inspection program, which is "at least equal to" the federal program. The product could be distributed solely within the State to consumers located within the State (9 C.F.R. § 321.1).

administered to horses are excreted from their systems and eventually leave no detectable residues. If no detectable residue remains in a horse at the time of slaughter, the meat from that horse is not adulterated because there is no reason to believe that the meat will harm consumers or is otherwise unfit for use as human food. Even the administration of a drug or chemical that has not been approved for use in animals that are used as human food does not mean that meat from a horse treated with that substance is adulterated if the horse is subsequently slaughtered to produce meat for human consumption. The meat will be adulterated only if it contains residues of the drug or chemical in question at the time of slaughter. Therefore, FSIS finds no basis in either science or law for the proposition that treating horses with the drugs cited by the Humane Society renders their meat permanently tainted and thus adulterated as defined by the FMIA.[6]

Even assuming, *arguendo*, that the Humane Society's position has both legal and scientific merit, FSIS is confident that it can detect chemical residues in meat intended for human consumption and prevent the sale and distribution of meat containing such residues in commerce. Since 1967, FSIS's inspection program has included testing for chemical compounds such as veterinary drugs, pesticides, and environmental contaminants to ensure that meat and meat food products do not contain residues that would cause them to be adulterated and thus render them unsafe for use as human food. FSIS has set forth its drug residue testing policy with respect to horses in FSIS Directive 6130.1, *Ante-mortem, Post-mortem Inspection of Equines and Documentation of Inspection Tasks*). Pursuant to this directive, FSIS inspectors select a carcass for sampling based on their professional judgment and public health criteria, including observable signs and symptoms of animal diseases, producer history, or results from random scheduled sampling. After FSIS personnel collect a sample, the carcass is retained pending the results of laboratory testing. A violation occurs when a FSIS laboratory detects a residue that exceeds an established tolerance or action level. Horse meat that tests positive for drug residues will be marked U.S. condemned and will not be allowed to enter the stream of commerce. Instead, the meat will be disposed of by sending it to a rendering facility, thereby ensuring that it endangers neither public health and safety nor the local environment.[7]

Additionally, Mr. Rains has taken steps to address this issue by buying slaughter horses only from members of an equine quality assurance group. The horses purchased by this group will be maintained for at least 45 days prior to slaughter to ensure that no drugs are administered. The group member will sign an affidavit indicating that the horses are free of drugs. The establishment will also conduct blood tests on each horse before slaughter and have the samples analyzed for ivermectin and phenylbutazone levels.

The Food and Drug Administration ("FDA"), under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.), is the federal agency responsible for evaluating, approving, and establishing tolerances or action levels for drugs and other chemical substances used in all livestock, including but not limited to antibiotics, avermectins, milbemycins, beta-agonists, and sulfonamides. FDA also is the agency that is responsible for conducting any NEPA analysis that is required for the evaluation and approval of the use of the aforementioned drugs in equines and other animals that

6 See FSIS Petition Response to Bruce Wagman, dated June 28, 2013, at p. 2.
7 See Id. at pp. 2-5.

are used as human food, and FSIS has no jurisdiction in such matters. Accordingly, FDA's drug approval process includes a NEPA analysis of how the environment will be affected by an animal drug after it is approved.[8] Therefore, to the degree that a NEPA analysis is necessary for the drugs that may be used in animals used as human food, FDA has already conducted this analysis as part of its drug approval process.

As described below, an overlapping scheme of federal, state, and local environmental laws and ordinances will further ensure that the waste products generated by Rains Natural Meats' commercial horse slaughter activities are properly disposed of and will not enter the human food supply chain or the local environment. Therefore, a decision to grant federal inspection to Rains Natural Meats will safeguard public health and safety by ensuring that commercial horse slaughter at Rains Natural Meats has no more potential to have a significant impact on public health and safety than did the commercial slaughter of cattle, pigs, sheep, and goats that preceded it.

--**Wildlife Hazards**. FSIS has determined that commercial horse slaughter activities at Rains Natural Meats or federal inspection thereof will not create a wildlife hazard.

–**Impacts on Wild and Scenic Rivers and U.S. Waters and Wetlands**. The Eleven Point River is the only river in Missouri that is designated as wild and scenic.[9] The Eleven Point River is located more than 300 miles away from Rains Natural Meats' facility. Thus, FSIS has determined that commercial horse slaughter activities at Rains Natural Meats or federal inspection thereof will not affect a river segment that is listed in the Wild and Scenic River System or National Rivers Inventory.

FSIS also has determined that commercial horse slaughter activities at Rains Natural Meats or federal inspection thereof will not impact federal or state regulated or non-jurisdictional wetlands. The closest river to Rains Natural Meats is the Grand River and it is located over 1.5 miles south of the facility. The commercial slaughter of other amenable species occurred more or less continuously at Rains Natural Meats' facility for more than 10 years with no discernible effects on the Grand River. The establishment will continue to operate under its waste management agreement with the City of Gallatin, which requires all blood and organs to be removed and disposed of by a rendering facility in Des Moines, Iowa. Therefore, the establishment's waste cannot spill or seep into the groundwater contaminating nearby rivers or wetlands.

–**Impacts on Energy and Natural Resources**. FSIS has determined that commercial horse slaughter activities at Rains Natural Meats or federal inspection thereof will not have a significant impact on energy and other natural resource consumption.

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8 See, for example, FDA's approval of the oral administration of phenylbutazone to horses subject to a categorical exclusion (74 Fed. Reg. 1146 (Jan. 12, 2009)). See also FDA's 2007 approval of the topical application of a phenylbutazone paste to horses subject to a categorical exclusion (72 Fed. Reg. 60,550 (Oct. 25, 2007)). See generally, http://www.fda.gov/AnimalVeterinary/ResourcesforYou/AnimalHealthLiteracy/ucm219207.htm.

9 http://www.rivers.gov/rivers/missouri.php.

--Impacts on Public Parks, Recreation Areas, Wildlife/Waterfowl Refuges, Historical Sites, and Other Publicly Owned Lands. FSIS has determined that commercial horse slaughter activities at Rains Natural Meats or federal inspection thereof will not have any impacts on any publicly owned land from a public park, recreation area, wildlife or waterfowl refuge, or historical site of national, state, or local significance.

In its June 2011 report on the unintended consequences of the cessation of commercial horse slaughter in the United States, the General Accounting Office ("GAO") found that there has been an increase in horse abandonment on private or state park land since 2007. It likewise found an increase in horse abandonment on federal lands, including national parks and Indian reservations. The abandonment of horses on these lands results in over-grazing that degrades the land and puts environmental stress on other species that compete with horses for the same food sources. Horse abandonment on these and other federal lands that maintain populations of wild horses increases the chance that the abandoned horses will introduce equine diseases to the wild herds. The increasing numbers of unwanted horses also complicate the Bureau of Land Management's efforts to manage herds of wild horses and burros on federal lands by making it more difficult for the agency to adopt out the horses and burros that it removes from federal lands. Based on the foregoing, commercial horse slaughter at Rains Natural Meats and other horse slaughter plants has the potential to reduce the horse overpopulation in the United States while providing owners of unwanted horses with an economically viable and an environmentally sustainable alternative to horse abandonment as a method of disposing of their unwanted horses.

FSIS also has made the following findings required by other laws:

--Clean Air Act. Section 176(c)(1) of the Clean Air Act (42 U.S.C. § 7401) requires federal agencies to assure that their actions conform to applicable implementation plans for achieving and maintaining the National Ambient Air Quality Standards that the Environmental Protection Agency ("EPA") has set for certain criteria pollutants, such as sulfur dioxide, nitrogen dioxide, carbon monoxide, ozone, lead, and particulate matter. *See* 40 C.F.R. Part 50. FSIS has determined that commercial horse slaughter activities at Rains Natural Meats and/or federal inspection thereof will not increase the frequency or severity of any existing violations of standards for ambient air quality, result in any new violations of said standards, or prevent or delay the timely attainment of said standards in the area of concern.

--Clean Water Act. Following section 401(a) of the Clean Water Act (33 U.S.C. § 1341) ("CWA"), 9 CFR §304.2(c)(1) requires any applicant for federal meat inspection at an establishment where the operations thereof may result in any discharge into navigable waters as defined by the CWA to provide the Administrator, FSIS, with certification, obtained from the State in which the discharge will originate, that there is reasonable assurance that said operations will be conducted in a manner that will not violate the applicable water quality standards. On September 3, 2013, Mr. Rains provided the Administrator, FSIS, with an attestation that equine slaughter operations at Rains Natural Meats will not result in any discharge into any navigable waters as define by CWA. Mr. Rains also provided the Administrator, FSIS, with copies of letters from Darling International Inc., a rendering company, and the City of Gallatin agreeing to dispose of Rains Natural Meats' liquid and solid waste.

--Endangered Species Act. FSIS has determined that commercial horse slaughter activities at Rains Natural Meats or federal inspection thereof will not have any impact, either directly or indirectly, on any federally or state-listed or proposed endangered species of flora and fauna or impact critical habitat. The U.S. Fish and Wildlife Service lists one endangered and one threatened animal species (i.e., the Indiana bat and the Topeka shiner) that occur in Daviess County, Missouri.[10] Indiana bats summer along streams and rivers in north Missouri, and hibernate through the winter in caves and abandoned mines (never in houses) in the Ozarks, [11] whereas, Topeka shiners live pools of small streams with clear water and sand, gravel or rubble bottoms in central Missouri and northward into the prairie region.[12] Rains Natural Meats is not located near caves or streams; thus, there is no suitable habitat for these species in and around Rains Natural Meats' facility. Therefore, none of these species will be adversely affected by operations at Rains Natural Meats or Federal inspection thereof, nor will these operations affect other biotic communities or habitat not protected by the Endangered Species Act.

It should be noted that any grant of federal inspection for commercial horse slaughter at Rains Natural Meats will not be the issuance of a new grant, but instead will be a modification of an existing grant of inspection for the commercial slaughter of other amenable species under the FMIA (e.g., cattle, sheep, goats, and pigs) at the same facility. The commercial slaughter of other amenable species occurred more or less continuously at Rains Natural Meats' facility for more than 10 years with no discernible effects on listed endangered species or their designated critical habitat. Furthermore, there will be no significant difference between the methods that Rains Natural Meats will use to conduct commercial horse slaughter at its facility and the methods that it previously used to conduct the slaughter of other amenable species. Therefore, there is no reason to believe that the conversion of Rains Natural Meats' facility to a dedicated commercial horse slaughter plant will have any more impact on endangered species and their critical habitat than did the prior commercial slaughter of other amenable species.

--Migratory Bird Treaty Act. FSIS has determined that commercial horse slaughter activities at Rains Natural Meats or federal inspection thereof will not affect species protected under the Migratory Bird Treaty Act.

--National Historic Preservation Act. The National Register of Historic Places lists three sites located inside Daviess County, Missouri,[13] but these historic sites are located more than six miles away from where Rains Natural Meats' slaughter facility is located. Therefore, FSIS has determined that commercial horse slaughter activities at Rains Natural Meats or federal inspection thereof will not impact any historic or cultural property or resources protected by the National Historic Preservation Act.

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10 http://www.fws.gov/midwest/endangered/lists/missouri-cty.html.
11 http://www.fws.gov/midwest/Endangered/mammals/inba/index.html.
12 http://www.fws.gov/mountain-prairie/species/fish/shiner/TopekaShiner5YearReview01222010Final.pdf.
13 http://www.dnr.mo.gov/shpo/Daviess.htm.

In 2009, a coalition of northwest Indian tribes reported to the GAO that the increase in horse abandonments on tribal lands, combined with the sizable populations of wild horses that already existed on their lands, both increased the degradation of the land caused by over-grazing and complicated efforts to restore native and religiously-significant plant species on tribal lands. Commercial horse slaughter at Rains Natural Meats and other commercial horse slaughter plants thus has the potential to have a beneficial effect on the cultural resources of American Indian tribes whose tribal lands are being degraded by a combination of an overpopulation of wild horses and large scale abandonment of unwanted horses on their lands.

--**Federal Farmland Protection Policy Act**. FSIS has determined that federal inspection of the slaughter activities at Rains Natural Meats will not involve the acquisition or use of farmland protected by the Federal Farmland Protection Policy Act that would be converted to non-agricultural use.

–**Humane Methods of Slaughter Act**. As previously noted, Rains Natural Meats' commercial horse slaughter operations will be subject to the humane handling requirements found in section 603(b) of the FMIA (21 U.S.C. § 603(b)) and the regulations promulgated thereunder (9 C.F.R. Part 313). FSIS never suspended Rains Natural Meats for humane handling violations during its previous commercial slaughter of other amenable species.

--**State and Local Laws**.

Rains Natural Meats' waste disposal is governed by Missouri's Solid Waste Management Law ("SWML") (Mo. Rev. Stat. 260.005 *et seq*.). It is a violation of the SWML to store, process, or dispose of solid waste in an unapproved manner and to dispose of any solid waste in a place other than an approved solid waste processing facility (Mo. Rev. Stat. 260.210. 1). Pursuant to the SWML, Rains Natural Meats will collect all blood and organs after stunning and evisceration and store the materials in barrels. Darling International, Inc., a rendering company, will regularly collect the barrels and deliver them to its rendering facility in Des Moines, Iowa, where they will be rendered according to local, state, federal laws.

Rains Natural Meats' disposal of wastewater is governed by Missouri's Clean Water Law (Mo. Rev. Stat. 640.006 *et seq*.). In accordance with the Clean Water Law, Rains Natural Meats will discharge its wastewater into the City of Gallatin's wastewater collection system which consists of over 191 miles of sanitary sewer lines and 22 sanitary sewer pumping stations. [14] This system will transport water from Rains Natural Meats to the Gallatin Wastewater Treatment Plant for processing and eventual discharge of a high quality effluent back into Old Hickory Lake. The wastewater treatment plant has an organic treatment capacity of 12.5 million gallons per day. The plant is also capable of being operated in "Storm Mode" with a resulting hydraulic capacity in excess of 30 million gallons per day, while meeting all National Pollutant Discharge Elimination System effluent limitations set by the EPA.[15]

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14 http://www.gallatinutilities.com/wastewater.html.
15 http://www.gallatinutilities.com/wwtp.html.

Conclusion.

Based on the foregoing, FSIS finds no unique conditions or extraordinary circumstances of the proposed action to grant federal meat inspection services to Rains Natural Meats that would cause this action to have a significant environmental effect. Therefore, in accordance with 7 C.F.R. § 1b.4, the proposed action is categorically excluded from the preparation of an EA or an EIS.

9/13/13

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