UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

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.

Civil No. 1:13-CV-00639-MCA-RHS

PLAINTIFFS' MOTION TO MODIFY THE TEMPORARY RESTRAINING ORDER AND OBJECTION TO MAGISTRATE'S ORDER REQUIRING INJUNCTION BOND AND MEMORANDUM IN SUPPORT THEREOF[1]

REQUEST FOR EXPEDITED REVIEW

[1] Pursuant to Local Rule 7.1(a), Plaintiffs have conferred with opposing counsel to obtain their position on this Motion. All of the defendants and defendant-intervenors have stated that they oppose this motion. The State of New Mexico supports this motion.

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I. INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 54(b) and 65, Plaintiffs hereby move the Court to modify its August 2, 2013 Order in which the Court granted in part Plaintiffs' motion for a temporary restraining order and preliminary injunction. Order Granting Pls.' Mot. TRO, Aug. 2, 2013, ECF No. 94 (TRO Order). In that Order, in addition to enjoining the federal defendants from dispatching inspectors or carrying out inspection services at the horse slaughter facilities of intervenor-defendants Valley Meat (VM) and Responsible Transportation (RT) until further order of this Court, the Court also directly enjoined VM and RT "from commercial horse slaughter operations until further order of this Court." *Id.* at 7. Because Plaintiffs neither brought any cause of action against VM or RT, nor sought any remedy against them, the Court's Order enjoining them is potentially invalid, and likely to lead to unintended consequences. The only defendants Plaintiffs sued – and whose actions may properly be restrained based on violations of the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA) –are the federal defendants. Accordingly, and because, as discussed below, the imposition of a potentially invalid injunction directly against VM and RT has dramatic financial implications for Plaintiffs as a result of the substantial bond set by the magistrate in this case, Plaintiffs respectfully request that the Court modify its August 2, 2013 Order to clarify that the only legally enjoined parties are the federal defendants.

Pursuant to Federal Rule of Civil Procedure 72(a), Plaintiffs also object to Magistrate Judge Scott's August 8, 2013 Order Requiring Injunction Bond, which set an injunction bond totaling $495,000 for a period spanning fewer than 30 days. Order Requiring Inj. Bond, Aug. 8, 2013, ECF No. 102 (Bond Order). A bond of this magnitude is to Plaintiffs' knowledge unprecedented in a public interest NEPA case, and is also based on highly speculative damage

calculations and an erroneous conclusion that the slaughter plants in question cannot mitigate their claimed damages by processing other species, including cattle.[2]

Because every day during which RT and VM are directly enjoined creates additional potential significant financial liability for the Plaintiffs as a result of the Bond Order, Plaintiffs respectfully request that this Court expedite briefing and decision on this Motion.

In support of this Motion, Plaintiffs provide the following points and authorities:

II. ARGUMENT

A. Background

1. Plaintiffs' Complaint

Plaintiffs brought this action against three federal officials, operating in their official capacity, alleging that they violated NEPA, 42 U.S.C. § 4321 *et seq.*, by authorizing federal inspections at horse slaughter facilities and implementing a nationwide drug-residue testing program without undertaking the required environmental analyses of the potential impacts of those actions. *See* Am. Compl., July 19, 2013, ECF No. 54, (Amended Complaint) at ¶¶ 1, 6, 9. Because there is no private right of action under NEPA to sue non-federal parties like VM, Plaintiffs sued the agency defendants under the APA, 5 U.S.C. 706(2)(A), which provides that a reviewing court shall set aside an "agency action" that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

In their claims for relief, Plaintiffs asserted only violations of NEPA and the APA as a result of the federal defendants' unlawful actions, and asked the Court to award relief only against the federal defendants. *See* Amended Complaint, ¶¶ 168-176 and requests for relief

[2] Yesterday RT announced that it is abandoning its quest to process horsemeat and will instead switch to processing cattle. Sharyn Jackson, *Iowa Firm Abandons Plans to Slaughter Horses*, DES MOINES REG., August 14, 2013, http://www.desmoinesregister.com/viewart/20130814/NEWS10/308140053/Iowa-firm-abandons-plan-to-slaughter-horses?Frontpage.

(seeking, *inter alia*, declarations that the agency's actions were arbitrary, capricious, and not in accordance with law, an order setting aside the agency's grants of inspections to horse slaughter facilities, and an injunction barring the implementation of a drug residue testing plan without adequate NEPA review). Plaintiffs did not sue any non-federal parties, including VM or RT, nor bring a cause of action implicating VM or RT's actions, nor at any time seek any relief from VM or RT.

After Plaintiffs filed their initial Complaint in this case, several parties moved to intervene, including VM and RT. *See* VM's Mot. Interv., July 8, 2013, ECF No. 24; RT's Mot. Interv., July 19, 2013, ECF No. 47. Plaintiffs did not oppose those motions to intervene, but did not amend their complaint to add any claims against the intervenors nor seek any relief against the intervenors. Nor could Plaintiffs have done so because their only claims here are under the APA and NEPA, which can only be brought against the federal defendants.

2. **This Court's Temporary Restraining Order**

On August 2, 2013, following briefing and oral argument, this Court entered its Order granting Plaintiffs' motion for a temporary restraining order. *See* TRO Order. In that Order, in addition to enjoining the federal defendants from conducting inspections at the VM and RT facilities, the Court also enjoined VM and RT directly "from commercial horse slaughter operations until further order of this Court." *Id.* at 7. The Court delegated to Magistrate Judge Scott issues related to whether an injunction bond should be set.

3. **The Magistrate Judge's Order Requiring Injunction Bond**

On August 8, 2013, following a hearing in which Plaintiffs argued, among other things, that the Court should set only a nominal bond due to the important public interest nature of this case, *see Davis v. Mineta*, 302 F. 3d 1104, 1126 (10th Cir. 2002) ("Ordinarily, where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be

considered."), as well as the fact that the State of New Mexico is a party, Magistrate Judge Scott issued an Order requiring Plaintiffs to post an injunction bond of $495,000 *per month* to cover the speculative damages alleged by VM and RT. *See* Bond Order. In his Order, Magistrate Judge Scott found that VM and RT had "standing to seek injunction bonds" as they were "parties being restrained by the Court," *id.* at 1, and therefore relied on the calculations put forth by VM and RT to determine the amount of the bond. The Magistrate Judge also found that "there is nothing further that either [VM or RT] can do to mitigate" their alleged losses. *Id.* at 2.

B. <u>This Court Should Modify Its Order to Clarify that the Federal Defendants Are the Only Enjoined Parties.</u>

Because Plaintiffs only sued the federal defendants under the APA and only sought in their Complaint to obtain relief from the federal defendants – compliance with NEPA – and because only the federal defendants have obligations under NEPA, the Court had no jurisdiction to enjoin non-federal third parties VM and RT. *See, e.g., Wilderness Soc'y. v. U.S. Forest Serv.*, 630 F.3d 1173, 1178 (9th Cir. 2011) (noting that "the federal government is the *only* proper defendant in a NEPA compliance action."); *Forest Guardians v. Bureau of Land Mgmt.*, 188 F.R.D. 389, 395 (D.N.M. 1999) ("[O]nly the federal government need comply with NEPA."); *see also Hayes v. North State Law Enforcement Officers Association*, 10 F.3d 207, 217 (4th Cir. 1993) ("Although injunctive relief should be designed to grant the full relief needed to remedy the injury to the prevailing party, it should not go beyond the extent of the established violation.").

Indeed, the APA provides that a reviewing court shall set aside only an "agency action" that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. 706(2)(A). The APA does not provide jurisdiction to enjoin non-federal parties. *See Mwabira-Simera v. Howard Univ.*, 692 F. Supp. 2d 65, 70 (D.D.C. 2010) (noting that "the APA

applies only to agencies of the federal government" and dismissing APA claims against a private educational institution and its former employees) (citing 5 U.S.C. § 701(b)(1)). Plaintiffs did not bring any legal claims concerning the conduct of VM or RT, and did not seek any remedies against them. Nor is it necessary for the Court to enjoin the conduct of the slaughter facilities in order to provide complete relief. The injunction against the federal defendants is all that is needed to ensure that they do not carry out inspections – which would in turn authorize slaughter for human consumption – pending this Court's review. *See Hospice of New Mexico, LLC v. Sebelius*, 691 F. Supp. 2d 1275, 1294-95 (D.N.M. 2010) (injunctive relief "should be carefully addressed to the circumstances of the case" and not any broader than necessary "to afford relief to the prevailing party") (quoting *Virginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001)).[3]

The Court's decision to issue an injunction directly against VM and RT has serious practical implications for the Plaintiffs because it triggered the Magistrate Judge's decision to require the posting of an injunction bond by Plaintiffs based on VM and RT's claimed future damages.[4] This is significant, as under Rule 65 the plaintiff bears financial responsibility for any injunction issued by the Court that is later found to be improperly issued. Given the lack of any claims directly against VM or RT, there is a high likelihood that the injunction against these

[3] Indeed, the FMIA only requires federal inspections for animals processed for human consumption. If VM or RT wanted to process horses for animal food – as RT spokespersons have publicly stated they do, *see, e.g.*, Mark Carlson, *Horse Slaughter Opponents Sue USDA, Sigourney Operation Approved*, KCRG, Jul. 2, 2013, http://www.kcrg.com/home/top-9/Horse-Slaughter-Opponents-Sue-USDA-As-Sigourney-Operation-is-Approved-214036261.html ("The business is still pondering what to do with the meat, but one option is to sell it as zoo feed, Walker, 27, said.") – that conduct would not be affected by the availability of federal inspections. *See* 21 U.S.C. § 606(a) (FSIS shall examine and inspect all meat food products); 21 U.S.C. § 601(j) ("The term 'meat food product' means any product capable of use as human food. . . .").

[4] As described below, these alleged damages were entirely speculative and should not have formed the basis for the Magistrate Judge's order in any event.

parties will be reversed or dissolved at a later date, and that plaintiffs will have to pay potentially millions of dollars in damages as a result of their being improperly restrained.

Because there is no pending cause of action against the non-federal defendants, and thus no jurisdictional basis for imposing injunctive relief against non-federal third parties who were not sued, and because of the potentially drastic financial implications associated with the issuance of potentially invalid injunctive relief under Rule 65, Plaintiffs respectfully request that the Court modify its temporary restraining order to clarify that the only properly enjoined parties are the federal defendants.

C. The Court Should Set Aside Magistrate Judge Scott's Order Requiring an Injunction Bond.

Even if VM and RT were properly subject to an injunction, the Court should set aside Magistrate Judge Scott's Bond Order as clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a) ("The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law."); D.N.M. LR-Civ. 7.3-5; 72.1. The Bond Order is clearly erroneous and contrary to law because it failed to consider the well-established public interest exception, is based on highly speculative damage calculations, and did not address substantial evidence that both VM and RT can mitigate any alleged damages.

Courts typically require only minimal or nominal bonds where plaintiffs are seeking to vindicate the public interest. *Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002) ("[W]here a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered."). "Federal courts have consistently waived the bond requirement in public interest environmental litigation, or required only a nominal bond." *Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D. Or. 2012). The public interest exception has the salutary effect

of promoting enforcement of environmental and public interest statutes and avoiding "the potential chilling effect" on public interest litigation. *Id.*

Courts in every federal circuit have applied the public interest exception to avoid chilling future public interest litigation with massive bond requirements. *Davis*, 302 F.3d at 1126; *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995); *Pharm. Soc. of State of New York, Inc. v. New York State Dep't of Soc. Servs.*, 50 F.3d 1168, 1175 (2d Cir. 1995); *Temple Univ. v. White*, 941 F.2d 201, 220 (3d Cir. 1991); *Crowley v. Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, & Packers*, 679 F.2d 978, 1000 (1st Cir. 1982) *rev'd on other grounds*, 467 U.S. 526 (1984); *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981); *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972); *W. Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232, 236 (4th Cir. 1971); *Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1335-36 (M.D. Fla. 2009); *Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Agric.*, 566 F. Supp. 2d 995, 1008 (D.S.D. 2008); *California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985); *Envtl. Def. Fund, Inc. v. Corps of Eng'rs of U. S. Army*, 331 F. Supp. 925, 927 (D.D.C. 1971).

This case provides a textbook example of the necessity of the public interest exception. Plaintiff public interest organizations and concerned individuals filed suit to require a federal agency to fulfill its statutory duty to conduct an environmental review prior to instituting a national drug residue testing program and authorizing horse slaughter for human consumption, with their attendant potentially significant environmental consequences. The Bond Order, based on the speculative projected lost profits of businesses that have no history at all (and no record of profitability), requires Plaintiffs to post nearly $500,000 just to make it to the preliminary

injunction hearing. The requirement that plaintiffs post a $500,000 each month, until the Court issues a permanent injunction, is unsustainable, stifles the public interest, and discourages future litigation aimed at protecting the environment and requiring that federal agencies comply with the law.[5]

Plaintiffs raised these arguments in their Motion for Temporary Restraining Order and Preliminary Injunction and supporting papers, and their counsel, along with counsel for the State of New Mexico, made these arguments in the August 8, 2013 hearing before Magistrate Judge Scott. Yet Magistrate Judge Scott did not even mention the public interest exception, nor the importance of private enforcement of NEPA and the chilling effect on NEPA and other types of public interest litigation, in his Order. Consequently, the Bond Order is erroneous and contrary to law. The Court should set aside the Bond Order, consider the public interest exception, and require that Plaintiffs post a nominal bond in accordance with Circuit precedent.

Even if the Court were to uphold the Magistrate Judge's decision not to consider the public interest exception to the bond requirement, the Court should dramatically reduce the amount of the bond ordered.[6] Magistrate Judge Scott set an unusually high bond amount based on the entirely speculative projected business losses of two entities that have never even been in the business of slaughtering horses and selling the meat before, and thus have no record of profits. *See Elgin Family Co., L.L.C. v. Paralogia Ultra Lounge, L.L.C.*, No. 9-CV-1228 WJ, 2010 WL 1610509, at *2 (W.D. Okla. Apr. 20, 2010) (citing *AB Electrolux v. Bermil Indus.*

[5] In order to ensure the Court has the opportunity to review this motion and issue an order addressing it, Plaintiffs intend to file the bond as directed by Magistrate Judge Scott.

[6] The nearly $500,000 bond set by Magistrate Judge Scott appears to be an extraordinary outlier even among cases where the public interest exception was not applied. Based on a review of cases on both Lexis and PACER, there does not appear to be a single case in New Mexico where a bond (injunction or appeal) of this amount has been required. The next highest amount Plaintiffs were able to locate was $100,000; most non-nominal bonds appear to be set between $10,000 and $60,000.

Corp., 481 F. Supp. 2d 325, 336 (S.D.N.Y. 2007)) (refusing to set bond where enjoined party merely provides anecdotal evidence of speculative economic damages); *cf. Sunnyland Farms, Inc. v. Cent. New Mexico Elec. Co-op., Inc.*, 2013-NMSC-017, 301 P.3d 387, 396 (N.M. Apr. 18, 2013) (courts may accept predictions of lost profits damages from unestablished businesses only if they prove "with reasonable certainty the fact of lost profits").

As explained by Plaintiffs' counsel at the bond hearing, VM's $423,000 in asserted damages per month is based on wishful thinking expressed in a self-serving affidavit. VM simply asserts in an affidavit that it will slaughter 121 horses per day and reap revenues of $350 per horse, De Los Santos Aff., ECF No. 56, Att. 2, ¶ 4, and provided for the first time at the hearing before Magistrate Judge Scott an estimated lost net profit of $180-200 per horse. Magistrate Judge Scott relied on these fanciful projections, without considering or acknowledging that VM has repeatedly stated its intention to slaughter approximately 50 to 100 horses per day. *See* Jeri Clausing, *Horse Meat Debate Heats Up As New Mexico Slaughterhouse Considers U.S. Development*, HUFFINGTON POST, Apr. 23, 2013, http://www.huffingtonpost.com/ 2013/04/23/valley-meat-company-horse-debate_n_3136720.html?view=print&comm_ref=false (noting VM owner's assertion that his plant has the capacity to slaughter 50 to 100 horses per day); Samantha Stainburn, *Horse Slaughterhouses to Reopen in US*, GLOBAL POST, Jun. 29, 2013, http://www.globalpost.com/dispatch/news/regions/americas/united-states/130629/horse-meat-factories-reopen-us (VM will slaughter "up to" 100 horses per day); Barnini Chakraborty, *US Companies Seek Final Approval to Start Slaughtering Horses for Food*, FOX NEWS, Mar. 20, 2013, http://www.foxnews.com/politics/2013/03/20/us-horse-farms-almost-ready-to-start-slaughtering/ (VM "expects to process 100 horses a day").

Further adding to the speculative nature of VM's alleged lost profits is the fact that VM lacks a groundwater discharge permit required by New Mexico law, without which it cannot operate according to its plans. *See* Def. U.S.D.A. Mot. Dismiss, July 8, 2013, ECF No. 22, Att. 2 (USDA's categorical exclusion decision document acknowledges that VM lacks a groundwater discharge permit required by New Mexico's Water Quality Act); Jeri Clausing, *NM Company Faces Setbacks in Horse Slaughter Plans*, DENVER POST, Jul. 22, 2013, http://www.denverpost.com/headlines/ci_23707815/ redford-richardson-fight-against-horse-slaughter ("The New Mexico Environment Department told Valley Meat Co. of Roswell, which has a lapsed discharge permit, that it won't renew the permit without a public hearing.").

Similarly, Magistrate Judge Scott ignored the record evidence that Attorney General Gary King has stated that horse meat is an adulterated food under the New Mexico Food Act, indicating a strong likelihood that any horse meat produced by VM will be immediately embargoed, resulting not only in no profit, but in a significant loss for VM. *See* Memorandum from Zachary Shandler, Assistant Attorney General, Attorney General's Office of New Mexico, to New Mexico State Senator Hon. Richard Martinez regarding Attorney General Opinion Request – New Mexico Food Act (Jun. 10, 2013), Administrative Record ("AR") at AR-2-494-497 (Jul. 30, 2013). Instead of considering all of these critical factors, however, Magistrate Judge Scott appears to have simply assumed the complete accuracy of VM's fantasy projections, without question.

Nor does the Magistrate Judge's decision address the fact that any damages suffered by VM and RT as a result of a delay in starting up operations are self-inflicted, and not caused by this Court's injunction pending further judicial review. *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 against them, courts give those harms little weight in the balancing test.") (citation omitted). Given the facts stated in the previous paragraph, as well as the general national hostility towards horse slaughter in America, VM and RT were both well aware of the unfavorable and completely unpredictable business environment they were entering when they chose to engage in the business of horse slaughter. As the record shows, Congress has defunded horse slaughter inspections repeatedly since 2006 and may do so again in the future. Moreover, in light of the court's ruling in *Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 35-36 (D.D.C. 2007), VM and RT were on notice that any grant of inspections may require the USDA to undertake NEPA review.[7] Accordingly, the financial losses claimed here are not caused by this Court's TRO Order requiring the federal defendants to act in accordance with NEPA, but were "self-inflicted" by VM and RT's own poor investment decisions. *Davis*, 302 F.3d at 1116; *see also Interlink Intern. Fin. Serv's, Inc. v. Block*, 145 F. Supp. 2d 312, 315 (S.D. N.Y. 2001) (asserted damages must be attributable to the injunction, and not to other independent causes).

Finally, as evidenced by an announcement made yesterday by RT's president that he intends to give up the quest to slaughter horses for human consumption and instead transition to a beef slaughter facility, the Magistrate Judge was incorrect in concluding without analysis (and contrary to the argument of counsel at the bond hearing) that "there is nothing further that either [VM or RT] can do to mitigate" their losses. Docket No. 102 at 1-2. Indeed, RT's president,

[7] At the hearing before Magistrate Judge Scott, Plaintiffs provided numerous additional examples of the highly uncertain nature of entering into the horse slaughter business, including the New Mexico Attorney General's formal opinion announcing that horse meat would be considered adulterated under the New Mexico Food Act, legal petitions filed with federal and state agencies, and numerous other potential obstacles to commencing horse slaughter operations for human consumption in the United States.

Keaton Walker, explained that the reason for the switch to cattle was to "get back to work" and mitigate losses. AP NewsBreak, *Iowa Plant Drops Horse-Slaughter Plan*, KTAR (Aug. 13, 2013, 2:53pm), http://ktar.com/23/1551455/APNewsBreak-Iowa-plant-drops-horseslaughter-plan ("Walker said the company decided to reapply for a federal permit, as a beef-only operation, the day after U.S. District Judge Christina Armijo issued the temporary restraining order. Walker said his company, with 18 employees in southeast Iowa, should be able to switch within a month."). VM could also transition to processing cattle to mitigate damages, just as it did before it sought to enter the horse slaughter market. *See* Grant Schulte & Jeri Clausing, *APNewsBreak: Iowa Plant Drops Horse Slaughter Plan*, ABC News (Aug. 13, 2013), http://abcnews.go.com/US/wireStory/apnewsbreak-iowa-plant-drops-horse-slaughter-plan-19950222 (noting that VM has been "pushing . . . to convert its cattle plant into a horse slaughterhouse"). Accordingly, Magistrate Judge Scott was simply incorrect that there is nothing the entities can do to mitigate their losses, and at a minimum the Bond needs to be revised to take available mitigation into account. *See, e.g., Div. No. 1, Detroit, Broth. of Locomotive Eng's v. Consol. Rail Corp.*, 844 F.2d 1218, 1229 (6th Cir.1988) ("Before requiring a bond[,] . . . we believe it is incumbent on the parties and the court to investigate alternative, less costly methods of avoiding the threatened losses. Considering avenues to mitigate the potential loss is a logical extension of the process of balancing [the parties' interests].")

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court modify its Order enjoining the activities of VM and RT and clarify that the only enjoined parties are the federal defendants. Such an order will align with the claims stated in the Amended Complaint, provide the only relief available to Plaintiffs, and avoid the dangerous risk that Plaintiffs will be liable for millions of dollars for an injunction order that could be dissolved on jurisdictional grounds at a

later date. Plaintiffs also respectfully request the Court revise or set aside Magistrate Judge Scott's Bond Order requiring Plaintiffs to post a nearly $500,000 bond per month in this public interest action to enforce federal environmental laws.

Respectfully submitted this 14th day of August 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on August 14th, 2013, I filed through the United States District Court ECF System the foregoing document to be served by CM/ECF electronic filing on all counsel of record.

/s/ Bruce A. Wagman
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