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' REPLY IN SUPPORT OF MOTION TO MODIFY THE TEMPORARY RESTRAINING ORDER AND OBJECTION TO MAGISTRATE'S ORDER REQUIRING INJUNCTION BOND

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A few weeks ago the federal defendants and the intervenors (collectively "defendants") stridently argued (in briefs and open court) that they should never be enjoined in this action; and apparently they *still* maintain that position on the law. But in opposing this motion, the very same parties absurdly take the position that a broad injunction – broader than Plaintiffs ever requested – is the only lawful result under NEPA. In stumbling over this insupportable doublespeak in favor of being enjoined, defendants completely ignore the issues presented in Plaintiffs' motion, and opt instead to present irrelevant rhetoric, unfounded attacks on the Plaintiffs, and a rehash of their arguments at the TRO hearing.

There is no dispute that Magistrate Judge Scott entered a massive injunction bond in this case – perhaps the largest ever in a public interest NEPA case. Defendants were able to secure this crippling bond by exploiting an oversight in the Court's order – which not only enjoined the only party sued and the only party accused of violating federal law, but also the private non-federal company intervenors. The purpose of this bond is not to cover damages to the only defendant sued here – as the federal defendants have made clear that they have no damages from the injunction order. Nor is it really to compensate these would-be horse slaughter plants. One of the plants, Responsible Transportation (RT) – has withdrawn its application to slaughter horses, and decided to switch to cattle. The other, Valley Meat (VM), is tied up in state water permitting issues, has not operated any business on its property in more than a year, and does not even appear to have approval to ship horse meat to the European Union – the only major market for horse meat.[1]

Defendants' contradictory arguments (against and in favor of being enjoined) lay bare the fact that the only reason the defendants want to hold onto this crushing bond is to pressure Plaintiffs to drop their case, despite having demonstrated to this Court their likelihood of success. Accordingly, Plaintiffs filed this motion, seeking a technical modification of the TRO, to clarify that only the federal defendants are enjoined. The testy responses filed with the Court are telling, and confirm that the defendants are exploiting the Court's order and abusing the bonding provisions to squelch public interest litigation – something every Circuit has repeatedly warned against.

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[1] See Letter from Paola Testori Coggi, Deputy Director General, European Commission Health and Consumers Directorate-General, to Dr. Joanna Swabe, EU Director, Humane Society International, and Keith Dane, Director of Equine Protection, The Humane Society of the United States (Apr. 4, 2013) (on file with HSUS).

The fact is that a technical oversight in the Court's order has allowed the defendants to exploit the bonding provisions of FRCP 65 in a transparent effort to price Plaintiffs out of the case. Even accounting for the substantial financial resources of one of the Plaintiffs here, the roughly $500,000 a month bond ordered by the Magistrate will not be sustainable, will divert funds from the important animal rescue and sheltering mission of the Plaintiffs, and will ultimately deter this and other public interest cases challenging federal agency abuses – exactly the result the federal defendants are hoping for.[2]

The most equitable result here is to simply amend the Court's injunction order to make clear that the only enjoined party is the only party accused of violating the law – the federal agency defendants; and that only their interests should be considered in determining any bond. In the alternative, the Court should revisit the public interest exception to the bonding requirements in order to prevent defendants from using the bond as a financial weapon to preclude public interest litigation.

I. THE COURT SHOULD LIMIT THE INJUNCTION TO THE FEDERAL DEFENDANTS' INSPECTION SERVICES.

Defendants initially argued to this Court in the TRO proceedings that emergency injunctive relief is an "extraordinary remedy" to be sparingly applied, in line with the prevailing rule that injunctive relief should be no broader than necessary to prevent the threatened harm. *See, e.g.*, Def.-Intervenor RT's Resp. Pls.' Mot. TRO (ECF No. 46) at 10 ("[T]here is no justification for the imposition of the expansive and draconian relief Plaintiffs seek."); *Hospice of New Mexico, LLC v. Sebelius*, 691 F. Supp. 2d 1275, 1294-95 (D.N.M. 2010) (injunction "should be carefully addressed to the circumstances of the case"). Now the defendants claim the very opposite – that the Court's injunction must, as a matter of law, encompass non-federal parties who were not even sued. This bizarre and opportunistic request – defendants pleading with the Court to enjoin them in a manner they begged the Court not to do earlier this month – is gamesmanship that should not be countenanced by the Court.

[2] It is unclear why, except to deter this and other public interest cases, the federal defendants even responded to this motion. It seeks no relief against them and does not affect them financially, nor does it affect the pending injunction against them. The only available answer – that they are using the bond issue as an opportunity to suppress this and other public interest challenges to federal government conduct – is clear, and troubling.

The defendants do not dispute that Plaintiffs did not bring suit against RT or VM, or that Plaintiffs have no federal claims against RT or VM. Nor can the defendants dispute that RT and VM have no duties under NEPA and the APA. And the defendants do not and cannot dispute that an injunction against the federal defendants is all that is necessary to prevent the irreparable environmental harm that the Court found would likely occur if they federal defendants were not enjoined. *See* Defs.' Resp. Brief (ECF No. 120) at 5 ("There is no dispute that in the absence of federal inspectors these facilities cannot conduct horse slaughter operations to sell or distribute in commerce meat that is intended for human consumption."). Thus, there is no need to extend the injunction to encompass these horse slaughter facilities' operations given the *undisputed fact* that without federal inspection, horse slaughter facilities could not slaughter for human consumption.

Nevertheless, and despite the conventional wisdom that defendants do not *want* to be enjoined by a federal court, these defendants, solely for purposes of this motion, ask to be enjoined. Although a NEPA injunction *can* run against non-federal entities where needed, such an injunction is the exception, not the norm. *See Dickman v. City of Santa Fe*, 724 F. Supp. 1341, 1343-44 (D.N.M. 1989) (enjoining city for NEPA violations where city was the lead agency with "complete control" over the project and plaintiffs sought no relief from any other agency). Such an injunction should be issued only when necessary to prevent irreparable harm against the *Plaintiffs* arising from the established violation. *See Hospice of New Mexico, LLC v. Sebelius*, 691 F. Supp. 2d 1275, 1294-95 (D.N.M. 2010). Defendants fail to (and cannot) explain *why*, in addition to USDA, injunctive relief is necessary against RT and VM here – because the reality is that it is not. The unassailable proposition that private parties *may* be enjoined when the federal government violates NEPA, where necessary, is a far cry from establishing that VM and RT *must* be enjoined in this particular action here, where there is no need for that action.

The reason for this sudden change of heart by the defendants is clear – a broad injunction against non-federal parties is necessary to sustain the massive injunction bond, which they hope will price Plaintiffs out of this public interest case. This is proven when, in the very same document where RT asks that it be enjoined, RT simultaneously asserts that it was improperly enjoined. Def.-Intervenor RT's Resp. Brief (ECF No. 117) at 2 n.2 (both requesting affirmation of the injunction

against it and "vigilantly maintain[ing] its position that the TRO was improvidently granted"). The federal defendants' brief also makes clear their efforts to use the injunction bond as a weapon. They admit that the injunction does not harm them, *see, e.g.,* Defs.' Resp. Brief (ECF No. 120) at 6, and they even claim that they oppose horse slaughter. Yet they filed a lengthy opposition brief because they see the $495,000 bond as an opportunity to cut this case short and deter future public interest litigants from challenging gross federal legal violations. The defendants' opportunistic use of an injunction bond to prevail in litigation in which they have failed on the merits is exactly why courts have developed the public interest exception: to prevent plaintiffs in litigation over civil rights, consumer protection, environmental protection, and animal protection from being deterred from bringing suits to restrain illegal government conduct. Here, the nearly $500,000 injunction bond does exactly this. And certainly the ramifications of affirmation of this potential will have a chilling effect not just on this case, but on other public interest groups and actions as well.

The federal defendants are using the bonding provisions of FRCP 65 just like they used their categorical exclusion memoranda: to prevent public accusations that USDA is "dragging its feet on the equine slaughter issue," to protect itself from "the possibility of punitive congressional action if FSIS fails to institute an equine slaughter program," and to avoid complying with NEPA at all costs. *See* Decision Memorandum for the Under Secretary, from Alfred V. Almanza to Elizabeth A. Hagen, Administrative Record ("AR") at AR-2-8 (Jul. 30, 2013). This is the same mentality that led one of the federal defendants to conclude that "the fact that drug use is widespread in equines is essentially irrelevant." AR-2-9.[3]

Notably, despite their hollow claims about the critical need for a potentially case-ending bond here, the federal defendants did not even ask for a bond in the preliminary injunction proceedings the last time a federal court found them in violation of NEPA in relation to horse slaughter. *See* Defs.' Opp. Pls.' Mot. TRO, *Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8 (D.D.C. 2007) (ECF No. 10). Nor did the Department of Justice ask for a bond in another recent NEPA case in which HSUS twice moved for injunctions. *See* Defs.' Opp. Pls.' Mot. PI, *Humane Soc'y of the U.S. v.*

[3] The federal defendants' opportunistic use of the bonding provision will no doubt be coupled with additional attempts to slow this case down, and price Plaintiffs out of litigating this matter entirely.

Bryson, No. 12-CV-642 (D.D.C. Apr. 20, 2012) (ECF No. 367); Defs.' Opp. Pls.' Mot. TRO, *Humane Soc'y of the U.S. v. Bryson*, No. 12-CV-427 (D.D.C. Mar. 21, 2012) (ECF No. 16).

Indeed, in more than three decades of NEPA litigation, no bond has ever been required of HSUS, or its partner organization, the Fund for Animals, in any of the organizations' other cases against the federal government that have resulted in an injunction. *See, e.g., Animal Protection Institute America v. Hodel*, 860 F.2d 920 (9th Cir. 1988); *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008); Order Granting Pls.' Mot. PI, *Fund for Animals v. Jones*, 151 F. Supp. 2d 1 (D.D.C. 2001) (ECF No. 14); *Fund For Animals v. Clark*, 27 F.Supp.2d 8 (D.D.C. 1998); *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142 (D.D.C. 1993). Thus, it could not be more clear that federal defendants' sudden protestations in favor of a bond is nothing more than a naked effort to subvert the bond provisions of FRCP 65 and insulate the federal government from judicial review.

II. DEFENDANTS' ARGUMENTS HIGHLIGHT THE NEED FOR THE PUBLIC INTEREST EXCEPTION.

The danger of disregarding the public interest exception is clearly on display in this case, as the defendants try to use the bond to obtain a result they could not obtain at the TRO hearing. This gross misuse of the bond provision here illustrates the critical need for the public interest exception, both in this case and as a matter of policy.

As noted, despite the sizable assets of HSUS, at $500,000 per month, and possibly more if RT and VM get what they ask for, this case will rapidly become unsustainable. The significant bond obligations will obstruct HSUS's important animal rescue and sheltering mission. HSUS might be able to sustain these amounts for a month or two, but not through the life of the case. None of the other Plaintiffs could post this bond for even one month. Thus, contrary to defendants' claims, this *is* a case where the $500,000 bond will "impede [Plaintiffs'] access to judicial review," preclude a final decision on the merits, and get the federal defendants off the hook for ignoring their NEPA obligations. *See San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service*, 657 F. Supp. 2d 1233, 1248 (D. Colo. 2009); *see also Colorado Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1230-31 (D. Colo. 2007); *Colorado Wild v. U.S. Forest Serv.*, 299 F. Supp. 2d 1184, 1191 (D. Colo. 2004). This is their obvious intent.

There is also a much larger policy issue at stake. The bond ruling here sets a terrible precedent and represents an unmistakable message from the United States Government that it is more than willing to deploy the threat of a bond to deter litigation and deprive public interest litigants of their day in court. *See Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D. Or. 2012) ("It is well established that in public interest environmental cases the plaintiff need not post bonds because of the potential chilling effect on litigation to protect the environment and the public interest."); *Natural Resources Defense Council, Inc. v. Morton,* 337 F. Supp. 167, 168 (D.D.C. 1971) (ordering a nominal bond to avoid precluding judicial review by public interest litigants and stating that "courts have held that security is not necessary where requiring security would have the effect of denying the plaintiffs their right to judicial review of administrative action").

III. CONCLUSION.

For the foregoing reasons, should the Court decline to narrow the injunction order to run only against the party sued, it should revisit the Magistrate Judge's order under FRCP 72(a).

Respectfully submitted this 22nd day of August 2013.

/s/ Bruce A. Wagman
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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 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.

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