FUNITED 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 TO PROTECT 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' OPPOSITION TO DEFENDANT-INTERVENORS' JOINT MOTION TO COMPLY WITH THE COURT'S SCHEDULING ORDER

The Defendant-Intervenors ("Defendants") argue that Plaintiffs should not be allowed to rely on, and that the Court should not consider, evidence of the serious environmental damage caused by domestic horse slaughter facilities, as well as the U.S. Department of Agriculture's ("USDA" or "Agency") assessment of that damage, in resolving Plaintiffs' claim that the federal defendants and the Agency violated the Administrative Procedure Act ("APA"), U.S.C. § 501 *et seq.* and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* when

authorizing horse slaughter operations.[1] *See Defendant-Intervenors' Joint Mot. to Comply with the Court's Scheduling Order dated August 29, 2013*, Sept. 18, 2013, ECF No. 155. Yet Defendants do not argue that the evidence cannot be admitted. Rather, Defendants argue that the evidence should be stricken because Plaintiffs did not cite authority in support of relying on this evidence. Plaintiffs did not provide authority for their reliance on this extra-record evidence, however, because traditional, widely known administrative review principles, and *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575-76 (10th Cir. 1994), the case that the Court has directed the parties to follow in their briefing, plainly permit the Court's consideration of such evidence.

As the Court is aware, this case involves the Agency's failure to comply with its obligations under NEPA, including its refusal even to consider the known environmental dangers of horse slaughter when deciding not to prepare an environmental assessment or an environmental impact statement prior to issuing its decision to authorize horse slaughter. These dangers were (1) established by Plaintiffs before this Court, *see* Pls.' Mot. TRO at 3-5, July 2, 2013, ECF No. 5, (2) held by this Court as relevant to the Agency's decision, *see* Order Granting Pls.' Mot. TRO at 5, Aug. 2, 2013, ECF No. 94 ("TRO Order"), and (3) held to be a matter of Agency knowledge over seven years ago, *see Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 19 (D.D.C. 2007) ("Neither Defendants nor Defendant-Intervenors refute Plaintiffs' argument that horse slaughter operations have 'significantly' impacted the environment within the meaning of NEPA. . . ."). Not surprisingly, Defendants are doing their best to exclude this

[1] Specifically, Plaintiffs challenge the Agency's granting Valley Meat and Responsible Transportation's applications for horse slaughter inspection without conducting substantive environmental review and establishing a new residue testing program for horses without even considering NEPA. Recently, USDA also granted inspection to a third applicant, Rains Natural Meats, without conducting any substantive environmental review.

indisputable evidence, ignored by the Agency, from the Court's view. Below, Plaintiffs provide authority that explains why this evidence – all of which is already in the record before the Court – may be considered.[2]

I. *Olenhouse* Permits the Court to Consider Extra-Record Evidence that the Federal Defendants Ignored or Considered but Failed to Include in the Administrative Record.

Under the APA, federal defendants' decisionmaking process was arbitrary and capricious, and may not stand, because they ignored relevant facts in reaching the challenged decisions and actions. The proposition Defendants put forward in their motion is that a federal agency should be allowed to make a decision while intentionally ignoring evidence that is directly relevant to the issue at hand. This is a blatant violation of the APA. *See Olenhouse*, 42 F.3d at 1573-74. Plaintiffs' submission of the evidence here is not an effort to introduce extra-record evidence of which the Agency was not aware – but evidence that the Agency specifically knew existed, *see Johanns*, 520 F. Supp. 2d at 19, that this Court has already agreed is pertinent, *see* TRO Order at 5, and that the Agency decided to omit from its decisionmaking process completely.

Basic principles of administrative law require federal agencies to examine the relevant data and articulate a rational connection between "the facts found and the decision made." *Olenhouse*, 42 F.3d at 1574 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)). These facts must be supported by substantial evidence in the administrative record. *See Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1280 (D. Colo. 2010)

[2] Plaintiffs also believed the Court agreed that it would permit the use of all evidence already before the Court prior to submission of their Opening Brief on the Merits. *See* Tr. of Telephonic Status Conference at 13:22-14:2, *Front Range Equine Rescue v. Vilsack*, No. 13-cv-639, D.N.M. Sept. 3, 2013, ECF No. 141 ("MR. WAGMAN: This is Bruce Wagman for plaintiffs. Your Honor, we do not intend to submit anything additional, other than what the Court has seen at this point. THE COURT: All right. That seems to take care of it. Anything further, counsel?").

(citing *State Farm*, 463 U.S. at 43 and *Olenhouse*, 42 F.3d at 1575–76). Moreover, if an agency has "entirely failed to consider an important aspect of the problem," its decision "would be arbitrary and capricious." *State Farm*, 463 U.S. at 43. Here, the federal defendants' failure to consider relevant evidence – and their failure to include that evidence in the record – undermines their decisionmaking process and is arbitrary and capricious. *See Olenhouse*, 42 F.3d at 1574 (citing *State Farm*, 463 U.S. at 43).

When an agency's decisionmaking process is challenged, the agency is prohibited from defending its actions based on evidence outside the administrative record. *Id.* at 1575. The Court may only uphold an agency's actions, "if at all, on the basis articulated by the agency itself." *Id.* (quoting *State Farm*, 463 U.S. at 50). This prevents the agency from improperly bolstering its decisionmaking process to the "disadvantage" of plaintiffs by relying on extra-record evidence. *Id.* at 1580. Thus, federal agencies may not use motions for summary judgment and motions to affirm precisely because such motions permit the agency to introduce evidence that it did not actually consider. *See id.* at 1579-80.

However, *Olenhouse* does not similarly prohibit plaintiffs from relying on extra-record evidence in cases like this one, where an agency failed to consider relevant evidence in making its decision. *See id*. at 1575. In these types of cases, the only way plaintiffs can prove that the agency's action was arbitrary and capricious is by introducing the very evidence that the agency ignored. *See id*.; *see also Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d at 1280 ("By its very nature, evidence which the agency fails to consider is frequently not in the record. Accordingly, in order to allow for meaningful, in-depth, probing review, such extra-record evidence is often properly included in the Administrative Record."). The Court may consider "materials which were not considered by the agency, but which are necessary for the [C]ourt to

conduct a substantial inquiry. . . ." *Colorado Wild v. Vilsack*, 713 F. Supp. 2d 1235, 1238 (D. Colo. 2010). Courts may also consider facts actually considered by an agency but omitted from the administrative record. *See id.*

Consistent with *Olenhouse* and basic tenets of administrative law, courts recognize "the relevance of extra-record evidence in NEPA cases where there are gaps or inadequacies in the NEPA process" – such as where an agency fails to consider relevant evidence. *Colorado Wild* 713 F. Supp. 2d at 1241 (citing *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007)); *see also Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1137 (10th Cir. 1991) (courts may consider extra-record evidence "where necessary for background information or for determining whether the agency considered all relevant factors including evidence contrary to the agency's position"); *Suffolk Cnty. v. Sec'y of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977) ("[I]n NEPA cases . . . a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives . . . which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored.").

II. Defendants Have No Basis to Exclude Relevant Extra-Record Evidence from the Court's Consideration.

Defendants seek to exclude from the Court's consideration two types of evidence, each of which is admissible under *Olenhouse* and has already been considered by this Court. First, Defendants want the Court to ignore compelling evidence concerning the impact of domestic horse slaughter facilities on the environment. This evidence, which is directly relevant to the potential for significant environmental effects flowing from the Agency's decision to authorize horse slaughter – and thus is also directly relevant to whether the Agency improperly decided not

to prepare an environmental assessment or environmental impact statement in making the decisions plaintiffs are challenging here – includes declarations from citizens and public officials regarding continuous and overwhelming environmental harm, including blood spills, a severe stench, declining property values, and ongoing waste discharge violations, as well as administrative orders documenting these violations.[3] Second, Defendants want the Court to ignore evidence prepared by the federal defendants, and submitted to this Court in support of their argument about the propriety of USDA's decisions and actions. The declaration of USDA employee and Assistant Administrator of the Food Safety Inspection Service, Daniel L. Engeljohn ("Engeljohn Declaration"), ECF No. 66-1, describes the Agency's rationale and decisionmaking process regarding the challenged actions. Because *Olenhouse* requires the Court to evaluate both the facts and factors the Agency actually considered in authorizing horse slaughter and the facts and factors that the Agency should have considered, the Court should consider each of these categories of evidence in evaluating the merits of Plaintiffs' claim.

[3] *See* Decl. Paula Bacon, Wagman Decl., Ex. 13, ECF No. 13 at ¶ 4 (horse slaughter in Mayor Paula Bacon's town "robbed [ ] citizens of the quiet and peaceful enjoyment of their property"); Decl. Robert Eldridge, Wagman Decl., Ex. 2, ECF No. 13 at ¶¶ 3-5 (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); Decl. Tonja Runnels, Wagman Decl., Ex. 3, ECF No. 13 (same); Decl. Juanita Smith, Wagman Decl., Ex. 4, ECF No. 13 at ¶¶ 3-4, 6-7 ("blood in my bathtub, sinks, and toilets," unable to have family over because of "severe stench on daily basis"); Decl. Yolanda Salazar, Wagman Decl., Ex. 5, ECF No. 13 at ¶¶3-4, 6 (Fort Worth, Texas resident unable to go outside for activities because of stench); Decl. Margarita Garcia, Wagman Decl., Ex. 6, ECF No. 13 at ¶¶ 3-4 ("constantly exposed to the severe stench of the plant;" cannot open windows because "odor is unbearable"); Decl. Mary Farley, Wagman Decl., Ex. 7, ECF No. 13 at ¶ 4 (DeKalb, Illinois resident stating that "smell was so bad, and it would linger in my head for the rest of the day"); Decl. Elizabeth Kershisnik, Wagman Decl., Ex. 8, ECF No. 13 at ¶¶ 4-5 (describing "ongoing water pollution violations"; "polluted, green foam oozing from the plant's wastewater treatment tank"); Decl. James Kitchen, Wagman Decl., Ex. 9, ECF No. 13 (same). *See also* Administrative Orders in *In Re the Matter of: Cavel Int'l, Inc., DeKalb Sanitary District*: Mar. 17, 2005, Wagman Decl., Ex. 10, ECF No. 13 (Cavel found to be in "'significant' non-compliance" with discharge permit for first six months of 2004); Jan. 30, 2006, Wagman Decl., Ex. 11, ECF No. 13 (Cavel in "'significant' noncompliance" with discharge requirements for first eleven months of 2005); Oct. 18, 2006, Wagman Decl., Ex. 12, ECF No. 13 (Cavel found to be in "'significant' non-compliance" with discharge permit for first nine months of 2006).

1. Declarations and Administrative Orders Regarding Former Horse Slaughter Facilities Are Relevant Evidence that the Agency Should Have Considered.

Under the guiding principles for this case, the Agency's failure to consider relevant evidence is not grounds to exclude it from the Court's consideration. *See Olenhouse*, 42 F.3d 1 at 1574. On the contrary, the Agency's failure to consider such relevant evidence indicts its decisionmaking process and renders its actions arbitrary and capricious. *See id.*

Evidence of environmental harm caused by the last three horse slaughter facilities that the Agency authorized and regulated is directly relevant to the propriety of the Agency's decisionmaking process here.[4] *See, e.g.*, *Reed v. Salazar*, 744 F. Supp. 2d 98, 118 (D.D.C. 2010) (prior operational problems with agency program are relevant to NEPA analysis of similar program). In ignoring this evidence and omitting it from the administrative record, the Agency clearly failed to consider environmental problems associated with granting horse slaughter inspections, and this failure rendered its decisions not to undertake substantive NEPA analysis – on the inspection grants as well as on FSIS Directive 6130.1 – arbitrary and capricious. Had the Agency properly considered this information, it should have concluded that authorizing horse slaughter does indeed present the possibility of a significant effect on the environment. *See* Valley Meat Decision Memo, AR2476; Responsible Transportation Decision Memo, AR3289. "To deny" the relevance of this evidence is "inconsistent with rational decisionmaking." *See Ctr. for Native Ecosystems*, 711 F. Supp. 2d at 1280 (internal quotation marks omitted). If plaintiffs cannot rely on this type of evidence in challenging agency action, then agencies can get

[4] Plaintiffs' reliance on this evidence is also consistent with the Court's August 29, 2013 Order, Scheduling Order, Aug. 29, 2013, ECF No. 137 ("Scheduling Order"), which requires that the parties "not submit additional evidence in support of and in opposition to the substantive result of the federal defendants' NEPA process." Plaintiffs do not rely on this evidence to challenge the substance of the Agency's decisions, but to challenge the decisionmaking *process* by which the Agency concluded its actions were appropriate. *See Colorado Wild*, 713 F. Supp. 2d at 1241 (defendants "fail to recognize the importance of extra-record evidence in the NEPA context where a party challenges not the merits of the agency's decision, but the sufficiency of the process followed in reaching it").

away with flouting NEPA simply by issuing perfunctory conclusions that an action will not significantly affect the environment and assembling an administrative record that excludes all evidence to the contrary. *See Franklin Sav. Ass'n*, 934 F.2d at 1137 (Plaintiffs are entitled to rely on "evidence contrary to the [A]gency's position" that the Agency failed to consider.).

The Court itself has already recognized the relevance of this evidence, and relied on it in its prior ruling. *See* TRO Order at 5. Specifically, the Court stated that "Plaintiffs have submitted evidence of environmental harm at commercial horse slaughter facilities that operated in the United States prior to the defunding of inspectors in fiscal year 2006," which "included blood spills, improper disposal of animal parts and carcasses, noxious odors, and the leeching of horse effluent into the local water supply and waterways." *Id.* Just as this evidence demonstrates a likelihood of environmental harm, *id.*, it is also relevant to the Agency's assertion that authorizing horse slaughter will not significantly affect the environment.

It is understandable why Defendants seek to bar the Court from considering this evidence as it exposes in harsh light the problems with the Agency's decisionmaking process here. Its very existence proves the Agency's actions were arbitrary and capricious.

2. Defendants Have No Basis to Exclude from the Court's Consideration Evidence that Explains the Agency's Decisionmaking.

Plaintiffs are also entitled to rely on the Engeljohn Declaration, which comprises the Agency's own rationale for its actions and explains its decisionmaking.[5] While the Agency may not rely on the Engeljohn Declaration to bolster or rationalize its decisionmaking process, *see*

[5] *See* Engeljohn Declaration at ¶ 13 (the Agency began designing its new residue testing program in late 2011), at ¶ 14 (the Agency's multi-residue method detects up to "52 analytes," including "those of potential public health concern from all livestock, including equines"), at ¶ 16 (admitting that "most equines presented for slaughter" are not raised for human consumption), at ¶ 17 (asserting that there "is no reason to believe that the number of positive results" from residue testing "is likely to be any higher now than it was from 1997 through 2006"), and at ¶ 25 (concluding that, based on a comparison to slaughter operations involving traditional food animals, "commercial horse slaughter at [Valley Meat and Responsible Transportation] cannot and will not result in the harms alleged and to the extent alleged").

Olenhouse, 42 F. 3d at 1575, Plaintiffs may offer statements in the Engeljohn Declaration as evidence of "an explanation for its decision[s] that runs counter to the evidence before the agency. . . ." *Id.* at 1574 (quoting *State Farm*, 463 U.S. at 43). Similarly, as with the evidence discussed in the prior section, the Court has authority to review this information in determining whether the Agency omitted relevant evidence from its decisionmaking process. *See Olenhouse*, 42 F. 3d at 1574. This is consistent with the Court's August 29, 2013 Scheduling Order stating that the parties should follow *Olenhouse* in their briefing.[6] Plaintiffs' submission of this evidence is directly in line with *Olenhouse*. *See id.*

III. Conclusion

Because the extra-record evidence challenged by Defendants is plainly relevant and Plaintiffs have provided ample authority in support of their reliance on such evidence, Plaintiffs respectfully request that the Court deny the portion of Defendants' Joint Motion to Comply with the Court's Scheduling Order that asks the Court to strike evidence in the opening briefs that relates to matters outside of the administrate record.

[6] It is particularly unclear why Defendants suddenly seek to prevent the Court from considering statements made in the Engeljohn Declaration, after they all (as well as the federal defendants) urged the Court to defer to the declaration's assertions and trumpeted Dr. Engeljohn's expertise. *See, e.g.*, Tr. of Oral Argument at 73:8-15, 75:1-3, *Front Range Equine Rescue v. Vilsack*, No. 13-cv-639, D.N.M. Aug. 2, 2013, ECF No. 100. That some of Dr. Engeljohn's sworn statements may undermine Defendants' defenses *now* does not bar the Court from considering his explanation of the Agency's decisionmaking process in determining whether the Agency properly considered all relevant evidence that was before it.

Respectfully submitted this 23rd day of September 2013.

/s/ Bruce A. Wagman
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CERTIFICATE OF SERVICE

I certify that on September 23, 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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