**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, 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. 1:13-cv-00639-MCA-RHS

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**INTERVENOR-PLAINTIFF STATE OF NEW MEXICO'S**
**AMENDED OPENING BRIEF ON THE MERITS**

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## I. JURISDICTIONAL STATEMENT

The Court has subject matter jurisdiction over this suit under 28 U.S.C. § 1331 because this action involves a federal agency as a defendant, and arises under the laws of the United States, including the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

## II. STATEMENT OF ISSUES

1. Did the federal Defendants act arbitrarily and capriciously or not in accordance with the law, in violation of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, when they granted inspection to horse slaughterhouses without preparing an environmental impact statement or environmental assessment, or properly invoking a categorical exclusion, as required by the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*.?

2. Did the federal Defendants act arbitrarily and capriciously or not in accordance with the law, in violation of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*., when they adopted a new residue testing program established by the Food Safety and Inspection Service Directive 6130.1, Ante-Mortem, Postmortem Inspection of Equines and Documentation of Inspection Tasks, without preparing an environmental impact statement or environmental assessment, or properly invoking a categorical exclusion, as required by the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*.?

## III. PRELIMINARY STATEMENT

This Court has already held that the federal defendants violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* when USDA (1) adopted Directive 6130.1, which established a new drug residue program for testing for dangerous substances in horses going to slaughter, without even performing a categorical exclusion analysis and (2) granted inspection for horse slaughter at two facilities. This was the second time a court ruled that the initiation

of horse slaughter operations requires NEPA review. *See Humane Society of the U.S. v. Johanns,* 520 F. Supp. 2d 8, 34 (D.D.C. 2007). While this Court's August 2 ruling was under the standards for a temporary restraining order, nothing in the record before this Court should change that conclusion. It is still the case that USDA spent a year or more devising Directive 6130.1 ("the Directive") and its residue testing program because of its concerns about the controversial nature of horse slaughter and the significant potential environmental and public harms horse slaughter presents. The administrative record confirms that the Agency based its decisions about environmental safety and NEPA compliance on improper political concerns. And the grants of inspection, which USDA had ample discretion to make and which it made only conditionally, are still unequivocally the cause of the harms alleged by Plaintiffs in this action. It remains the case, then, that this Court should reiterate its prior ruling, finding that the USDA violated NEPA in both adopting the Directive and issuing the grants of inspection without proper NEPA review, and enter a permanent injunction, enjoining USDA from performing any horse slaughter inspections or utilizing the Directive until it has satisfied its NEPA obligations.

## IV. STATEMENT OF THE CASE

On July 2, 2013, Plaintiffs commenced this action alleging defendants violated NEPA and the APA by authorizing federal inspections at horse slaughter facilities and implementing a nationwide drug-residue testing program without undertaking NEPA review of the potential impacts of those actions. The State of New Mexico moved to intervene on July 19, 2013[Dkt. #65], and the Court granted that motion on July 31, 2013 [Dkt. #90].

On August 2, 2013, after briefing and oral argument, this Court entered its Order granting Plaintiffs' motion for a temporary restraining order, which enjoined

federal defendants from dispatching inspectors or carrying out inspection services at domestic horse slaughter facilities, and enjoining RT and VM from "commercial horse slaughter operations until further order of this Court." Order Granting Pls.' Mot. TRO, Aug. 2, 2013, [Dkt. #94] ("TRO Order") at 7. The Court has ordered expedited review of the merits of this case. *See* Order Granting Mot. Expedite, Aug. 29, 2013, [Dkt. #137]; Order, Sept. 5, 2013 [Dkt. #142].

The Court has already determined that plaintiffs have established a substantial likelihood of success on the merits, TRO Order at 3-4, and the Court has rejected all of Defendants' excuses for failing to comply with NEPA. *See* Federal Defs.' Opp. Pls.' Mot. PI, July 19, 2013("TRO Opp."), [Dkt. #66] at12-26; Tr. of Oral Argument, *Front Range Equine Rescue v. Vilsack*, No. 13-cv-639 (D.N.M. Aug. 2, 2013), [Dkt. #100] at 29:4-12.

## V. STATEMENT OF FACTS

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. AR175.[1] A March 2013 survey confirmed that 70% of registered voters in New Mexico oppose horse slaughter.[2] Nevertheless, every year more than 140,000 American horses are sold to slaughter. AR993.[3]

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[1] 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.

[2] *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.

[3] 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.

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* AR65-69 [Plaintiffs' Rulemaking Petition, pp. 61-65]. 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. AR35-38, 50-52 [Plaintiffs' Rulemaking Petition, pp. 31-34, 46-48].

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, including applications from Intervenor-Defendants Valley Meat Co., LLC ("Valley Meat") in Roswell, New Mexico and Responsible Transportation in Sigourney, Iowa.

In April 2012, Plaintiffs Front Range Equine Rescue (FRER) and The Humane Society of the United States (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"). 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. AR94-123. USDA denied the Rulemaking Petition on June 28, 2013. USDA granted both applications for inspection for horse slaughter facilities around the same time. AR2466-76, 3281-89.

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. *See* AR391-92. 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. *See, e.g.*, AR391, 410-22, 429-31.

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.

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" 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." *Johanns*, 520 F. Supp. 2d at 34

(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.[4] That defund may become law within the very near future.

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. [5]

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[4] 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.

[5] *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 [Dkt. #13]; Letter from Dr. Ron Nelson, Denver District Manager, USDA 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 [Dkt. #13]; *Letter from George W. Akeley, Jr., Manager, Enforcement Section, NMED, to*

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 [Dkt. #13]. 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.[6] 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.

Plaintiffs and Intervenor-Plaintiff the State of the New Mexico ("New Mexico") together 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.*

Defendants violated NEPA by granting inspection to domestic horse slaughter facilities and by creating a new residue testing plan without conducting any meaningful 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

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*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 [Dkt. #13]; 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 [Dkt. #13].

[6] *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); *see also* AR 2743-53.

Plaintiffs regarding these impacts and the public health risks associated with the grant of inspection and creation of the new residue testing plan. Plaintiffs sought a temporary restraining order and preliminary injunction preserving the status quo pending the Court's ruling on the merits of Plaintiffs' complaint. [Dkt. #5]

In granting Plaintiffs' motion for a temporary restraining order, this Court held last month that the federal defendants violated NEPA when USDA (1) adopted Directive 6130.1, which established a new drug residue program for testing for dangerous substances in horses going to slaughter, without even performing a categorical exclusion analysis and (2) granted inspection for horse slaughter at two facilities. [Dkt. #94, later amended at #125] This was the second time a court ruled that the initiation of horse slaughter operations requires NEPA review. *See Humane Society of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 34 (D.D.C. 2007). The same reasoning that led the Court to rule in Plaintiffs' favor in issuing a temporary restraining order applies at this stage of the proceedings. It is still the case that USDA spent a year or more devising Directive 6130.1 ("the Directive") and its residue testing program because of its concerns about the controversial nature of horse slaughter and the significant potential environmental and public harms horse slaughter presents. The administrative record confirms that the Agency based its decisions about environmental safety and NEPA compliance on improper political concerns. And the grants of inspection, which USDA had ample discretion to make and which it made only conditionally, are still unequivocally the cause of the harms alleged by Plaintiffs in this action. The Court should renew its prior ruling, find that the USDA violated NEPA in both adopting the Directive and issuing the grants of inspection without proper NEPA review, and enter a permanent injunction enjoining USDA from performing any horse slaughter inspections or utilizing the Directive until it has satisfied its NEPA obligations.

## VI. STATUTORY AND REGULATORY FRAMEWORK

### 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 provide public access to meaningful information. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704, 707 (10th Cir. 2009); *see also* 42 U.S.C. § 4332(C).

NEPA established the Council on Environmental Quality ("CEQ") to formulate regulations 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 or a decision to produce a complete 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* 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 Fund For Animals v. Norton*, 281 F.Supp. 2d 209, 235 (D.D.C. 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 New Mexico ex rel. Richardson*, 565 F.3d at 703. 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); *Colorado Wild, Heartwood v. U.S. Forest Serv.*, 435 F.3d 1204, 1209 (10th Cir. 2006) ("An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.") (citing 40 C.F.R.

§1508.4).

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 Utah Envtl. Cong. v. Dale Bosworth*, 443 F.3d 732, 736 (10th Cir. 2006) ("Federal law limits categorical exclusions in one critical respect: a proposed action is precluded from categorical exclusion if 'extraordinary circumstances' exist such that 'a normally excluded action may have a significant environmental effect.'"); *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.

## VII. ARGUMENT

### A. Applicable Legal Standard.

Courts review NEPA claims under the APA. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004). *Olenhouse v. Commodity Credit Corp.*, 42 F. 3d 1560, 1575 (10th Cir. 1994). The reviewing court is required "to engage in a substantial inquiry and to conduct a thorough, probing, in-depth review." *United Keetoowah Band of Cherokee Indians of Oklahoma v. U.S. Dept. of Housing and Urban Development*, 567 F.3d 1235, 1239 (10th Cir. 2009) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971)). Its inquiry should focus on the administrative record, which must contain facts that support the agency's decision. *Olenhouse*, 42 F. 3d at 1575. The agency must examine all relevant data and clearly provide a reasoned explanation for its action. *Id.* at 1575-76. After-the-fact rationalizations will not cure an agency's arbitrary and capricious action.

NEPA requires USDA to conduct environmental review for major Federal actions that may significantly affect the quality of the human environment. 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.9; 7 C.F.R. §§ 1b.4(a) and 1b.4(b)(6). The purpose of NEPA review "is to ensure that in reaching its decision, the agency will have available and will carefully consider detailed information concerning significant environmental impacts." *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 452 (10th Cir. 1996) (quotation omitted). Both acts challenged here –

granting inspection to domestic horse slaughter facilities, and creating a new drug residue testing program – trigger NEPA. Federal defendants have deprived decisionmakers including New Mexico and the public of an open discussion of the potentially far-reaching environmental impacts of approving an unknown number of new horse slaughter facilities in this state and throughout the country.

### B. Defendants Violated NEPA and the APA by Failing to Prepare an EIS or EA.

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 US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1164 (10th Cir. 2012). Courts review an agency's decision not to issue an EIS under an "arbitrary and capricious" standard. *Davis*, 302 F.3d at 1111. 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). 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.

#### 1. 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." *Id*. §§ 1508.18(a), (b)(1), (3)-(4); *see, e.g.*, *Johanns*, 520 F. Supp. 2d at 28; *see also Ross v. Fed. Highway Admin.*, 162 F.3d 1046, 1052 (10th Cir. 1998) (construction of traffic throughway was a major federal action); *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1175 (D.N.M. 2000) ("The threshold for arriving at a "major federal action" requiring preparation of an EIS is generally low."); *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).

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. *See New Mexico ex rel. Richardson*, 565 F.3d at 689 ("Amending a resource management plan is a "major federal action" whose potential environmental impacts must be assessed under NEPA."); *Colorado River Water Conservation Dist. v. United States*, 593 F.2d 907, 909 (10th Cir. 1977) (water district's "transcontinental diversion of water is a major Federal action that . . . require[d] an environmental impact statement") *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).

### 2. Defendants' Actions May Significantly Affect the Environment.

The grant of inspection and the new horse meat residue testing plan 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. AR 18, 35-38, 94-147, 4034-48. 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. AR 31-33. Past horse slaughter plants' operations and the evidence in the Rulemaking Petition are proof that Defendants' actions may significantly harm the environment. *See, e.g.*, AR 31-33, 388-437; *see also Johanns*, 520 F. Supp. 2d at19.

The evidence of environmental impacts goes well beyond the threshold to trigger the agency's duties under NEPA. "An EIS is warranted where uncertainty [regarding proposed action] may be resolved by further collection of data, especially where such data may reduce the need for speculation." *Town of Superior v. U.S. Fish & Wildlife Serv.*, 913 F.2d 1087 (D. Colo. 2012) (citation and quotation omitted). And a CE may not be used unless "an agency [determines] that extraordinary circumstances do not exist *before* relying on a CE in a particular instance." *Wildearth Guardians v. U.S. Forest Serv.*, 668 F. Supp. 2d 1314, 1321-22 (D.N.M. 2009) (quotation omitted) (emphasis added) (citing *Utah Envtl. Cong. v. Russell*, 518 F.3d at 821 ("[T]he presence of an extraordinary circumstance

precludes the application of a categorical approach.")). To determine whether there are extraordinary circumstances precluding the application of a CE, the agency "must consider if the proposed action *may* have a potentially significant impact." *Wildearth* Guardians, 668 F. Supp. 2d at 1322 (emphasis added). To require the agency to conduct NEPA review, the plaintiff does not have to show that significant effects will in fact occur. *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002) (substantial dispute as to the effects of water reallocation and curtailment of river maintenance warranted an EIS). As outlined below, Defendants are well aware that their 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.

Thus, given the evidence of past environmental harms at horse slaughter facilities, 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. *See 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). Valley Meat's prior history of noncompliance with 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.

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; *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 6:09-CV-00037-RB-LFG, 2011 WL 7701433, at *20 (D.N.M. Aug. 3, 2011) ("The APA requires the reviewing court to 'consider whether the [agency] decision was based on a consideration of the relevant factors....'") (quoting *Marsh*, 490 U.S. 360, 378 (1989)). As described below, Defendants acted arbitrarily and capriciously by relying on a CE and by failing to consider the applicability of each of the CEQ significance factors to their actions.

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); *Catron Cnty. Bd. of Comm'rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1439 (10th Cir. 1996) (designating critical habitat for protection pursuant to the Endangered Species Act warrants at least an EA "[w]hen the environmental ramifications of such designation[ ] are unknown"). 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. AR17-18, 94-123. 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. AR17-18, 35-38, 94-147, 4034-48. Some are indisputably known to be unsafe, and there is no minimal residue that scientists can guarantee is safe. AR17-31, 241-50. 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,[7] but the waste byproducts from horse slaughter may also contain dangerous residues, capable of contaminating local ecosystems and water and soil supplies. AR 391-92.

Environmental effects of a proposed action that are highly uncertain or that involve unique or unknown risks require the preparation of an EIS. 40 C.F.R. § 1508.27(b)(5); *San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1243 (D. Colo. 2009) ("An agency must generally prepare an EIS if the environmental effects of a proposed action are highly uncertain."). 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

[7] *See, e.g.*, 21 U.S.C. § 342(a).

are not yet understood and are highly controversial, implicating another CEQ significance factor. 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. 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.[8] USDA's new residue testing plan requires testing only four of each 100 or more horses slaughtered, so that 96% of the byproducts of slaughtered horses will flow into the local groundwater and waterways, and 96% 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. AR2562-66. 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

[8] *See Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, 702 F.3d 1156, 1181 (10th Cir. 2012) (a project is "highly controversial" if there is "a substantial dispute as to the size, nature, or effect of the action").

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). Similar concerns may arise at other proposed horse slaughter facilities.

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. Because of these new, nationwide programmatic changes that will provide authority for Defendants' new national horse slaughter program, a CE may not be applied here. *See Sierra Club v. United States*, 255 F. Supp. 2d 1177, 1183 (D. Colo. 2002) (citing with approval *High Sierra Hikers Ass'n v. Powell*, 150 F.Supp.2d 1023, 1044 (N.D.Cal.2001) holding that a CE could not be used to renew long-term special-use permits for commercial trip operators in wilderness areas where the CE previously only applied to renewals of short-term permits). Defendants' actions in approving and authorizing horse slaughter across the country are not something that has occurred pursuant to a CE in the last six years, which was when the District Court for the District of Columbia told Defendants that they could not use a CE to oversee horse slaughter. *See Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8, 34 (D.D.C.

2007).

Additionally, Defendants cannot simply presume that horse slaughter and food-animal slaughter are identical in order to conclude that horse slaughter falls within the scope of Defendants' CE for FSIS activities. The particular activity that Defendants attempt to shield from environmental review and its possible environmental consequences must be closely examined. *See Sierra Club v. United States*, 255 F. Supp. 2d 1177, 1183 (D. Colo. 2002) (finding agency had "no rational basis" to rely on a particular categorical exclusion for approving a land easement where the challenged agency action would change "both the use of the [ ] land and the impacts to th[e] parcel.")

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 New Mexico ex rel. Richardson*, 565 F.3d at 718-19 (NEPA required Bureau of Land Management ("BLM") to produce an EIS analyzing the site-specific impacts of oil and gas lease prior to lease's issuance; because "BLM could not prevent the impacts resulting from surface use after a lease issued, it was required to analyze any foreseeable impacts of such use before committing the resources", and the impacts of the planned gas field were reasonably foreseeable before lease was issued).

Courts have repeatedly recognized that agency actions and the consequent environmental effects should be considered together where one is dependent on the other. *See Sierra Club v. United States*, 255 F. Supp. 2d 1177, 1184 (D. Colo. 2002) (citing *Thomas v. Peterson,* 753 F.2d 754, 758 (9th Cir.1985) ("the timber sales

cannot proceed without the road"); *Save the Yaak Committee v. Block*, 840 F.2d 714, 720 (9th Cir.1988) ("road reconstruction, timber harvest, and feeder roads are all 'connected actions' that must be analyzed by the Forest Service in deciding whether to prepare an EIS or only an EA"); *Alpine Lakes Protection Society v. United States Forest Serv.*, 838 F.Supp. 478, 480-83 (W.D.Wash.1993) (Forest Service must consider not only access road across National Forest, but also logging on adjacent private lands)). The principle in these cases is that one agency action, e.g., building an access road, "had no independent purpose or utility distinguishable from the overall project." *Sierra Club*, 255 F. Supp. 2d at 1184. The same is true here, where Defendants only created a nationwide residue testing program for horse slaughter in order to inspect and oversee horse slaughter operations throughout the country. Defendants' new nationwide equine residue testing plan is the foundational document on which Defendants' FSIS inspectors rely when conducting inspections at any plant. Both the utility of and the significant environmental harms stemming from Defendants' national equine residue testing program is only understood in connection with Defendants' grants of inspection to several horse slaughter operations. For this reason, the agency actions creating a new residue testing program *and* granting inspection must be considered in concert. 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 [Dkt. #13]; Nelson Letter, Wagman Decl., Ex. 15 [Dkt. #13]; Letter from George W. Akeley,

Wagman Decl., Ex. 15; E-mail from Auralie Ashley-Marx, Wagman Decl., Ex. 16 [Dkt. #13]. 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. [Dkt. #13]. 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 [Dkt. #13]. "Impacts to water quality are impacts to the human environment and, if significant, could necessitate the preparation of an EIS. Accordingly, impacts to water quality should be considered when there is potential that [an agency's grant of a permit] will significantly affect water quality." *Wyoming Outdoor Council Powder River Basin Res. Council v. U.S. Army Corps of Engineers,* 351 F. Supp. 2d 1232, 1244 (D. Wyo. 2005). 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. "In determining whether an action requires an EA or EIS or is

categorically excluded, federal agencies must not only review the direct impacts of the action, but also analyze indirect and cumulative impacts." *Sierra Club v. United States*, 255 F. Supp. 2d 1177, 1182 (D. Colo. 2002) (citing 40 C.F.R. §§ 1508.7, 1508.8); *Wyoming Outdoor Council Powder River Basin Res. Council*, 351 F. Supp. 2d at 1241 ("A NEPA analysis requires the consideration of cumulative impacts in an EA."); *Fuel Safe Washington v. F.E.R.C.*, 389 F.3d 1313, 1329-30 (10th Cir. 2004) ("An environmental impact statement must analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts."); 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." *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1228 (10th Cir. 2008) (quoting *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006)).

Defendants claim that they are only granting inspection, which causes no environmental harm, and are not responsible for the environmental effects caused by horse slaughter. Defendants' contention is plainly contrary to the controlling law. "The fact that a private company will undertake the [project] is irrelevant under NEPA regulations" when the agency has granted the permit, access, right-of-way, or license that is a condition precedent of the project. *Sierra* Club, 255 F. Supp. 2d at 1185 (citing 40 C.F.R. § 1508.7 ("regardless of what agency or person undertakes such other actions")). Defendants' final agency action authorizes horse slaughter, and Defendants cannot evade NEPA review under the rationale that Defendants themselves are not directly slaughtering the horses but instead are merely authorizing and monitoring the slaughter. It is clear that Defendants "must at least assess the cumulative impacts that are likely to result from the issuance of [their grant of inspection]" even where "[t]he Court recognizes that the [agency] has no responsibility for or control over" the activities that may occur as a result of the grant

or may fall under another person's authority when carried out. *Wyoming Outdoor Council Powder River Basin Res. Council*, 351 F. Supp. 2d at 1242; *see also Sierra Club*, 255 F. Supp. 2d at 1185 (it is irrelevant to the agency's NEPA duties *when* the private party may begin operations, "as long as action is still reasonably foreseeable.") (quotation omitted).

Defendants also assert that Valley Meat could resume slaughtering cattle under an existing grant of inspection and that effects from cattle slaughter are no different than horse slaughter; or in the alternative, horse slaughter facilities could process horse meat not for human consumption (i.e., as zoo feed), which would not require Defendants' inspection. But Defendants' hypothetical scenarios ignore the facts and reality of this case, which is that Valley Meat has requested inspection specifically to slaughter horses for human consumption. Indeed, Valley Meat sued Defendants to obtain its grant of inspection quickly and without any environmental review, so the idea that Valley Meat or any other horse slaughter plant has plans other than those expressly conditioned on Defendants' grant of inspection is simply not grounded in the facts of this case. Therefore, "[t]he [agency] is obligated to assess cumulative impacts relating to [horse slaughter plants] in which the use of [its grant of inspection] is essential to [operation] of the [horse slaughter plant] to determine whether the impacts of those [plants] on the human environment will be significant." *Wyoming Outdoor Council Powder River Basin Res. Council*, 351 F. Supp. 2d at 1242.

The regulations make clear that cumulative impact analysis requires a careful review of all reasonably foreseeable future activities. "A determination as to whether the impacts of a general permit will be cumulatively significant cannot be foregone based on the assurance that they will be reviewed on an individual permit basis later during [the project's execution]." *Id.* at 1243. 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). "By their very nature, the "cumulative impacts" of a general permit cannot be evaluated in the context of approval of a single project. Even if it were possible to assess cumulative impacts at a later time on an individual permit basis, the [agency's] assurance that cumulative effects will be evaluated "as needed" is so vague as to ring hollow with the Court." *Wyoming Outdoor Council Powder River Basin Res.* Council, 351 F. Supp. 2d at 1243.

Here, the compounding of foreseeable 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 Wilderness Workshop*, 531 F.3d at 1228 ("NEPA's implementing regulations also require federal agencies to consider the 'cumulative impact' of proposed actions."); *Sierra Club*, 255 F. Supp. 2d at 1182 ("NEPA regulations require agencies to consider the impacts of 'connected actions.'") (quoting 40 C.F.R. §

1508.25(a)(1)); *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 Middle Rio Grande Conservancy Dist.*, 294 F.3d at 1227 (EIS required for critical habitat designation that would "affect the quality of the human environment" by requiring pervasive changes in the distribution of Middle Rio Grande river water, and requiring the curtailment of river maintenance activities); *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 provides an opportunity to "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1178 (10th Cir. 2008) (citing 40 C.F.R. § 1502.1). USDA has not

made any relevant information regarding its environmental analysis for horse slaughter available to the public. 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. *See, e.g.*, *Utah Envtl. Cong. v. Troyer*, 479 F.3d 1269, 1274 (10th Cir. 2007) ("*Occasionally*, a proposed action will fall within a categorical exclusion") (emphasis added). 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.

## VIII. CONCLUSION REQUESTING RELIEF

For the reasons presented herein, Intervenor-Plaintiff the State of New Mexico requests that the Court issue a permanent injunction enjoining USDA from performing any horse slaughter inspections or utilizing the Directive until it has satisfied its NEPA obligations.

Dated: September 23, 2013

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). I certify to the best of my knowledge that the substance of this brief contains 9,423 words as calculated by Microsoft Word. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, size 14. I certify that the information on this form is true and correct to the best of my knowledge.

*Ari Biernoff*
Ari Biernoff

## CERTIFICATE OF SERVICE

I certify that I filed the foregoing documents on September 23, 2013 using the ECF System, which will send notification to all parties of record.

*Ari Biernoff*
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