UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FRONT RANGE EQUINE RESCUE, *et al.*, Plaintiffs, v. TOM VILSACK, Secretary of the U.S. Department of Agriculture, *et al.*, Federal Defendants, VALLEY MEAT COMPANY, LLC, *et al.*, Defendant-Intervenors.	Civ. No. 1:13-cv-00639-MCA-RHS

FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFF-INTERVENOR'S JULY 19, 2013, "PROPOSED INTERVENOR COMPLAINT" [ECF NO. 70]

Federal Defendants hereby respond to Plaintiff-Intervenor's July 19, 2013 "Proposed Intervenor Complaint for Declaratory and Injunctive Relief," ECF No. 70 (hereinafter "Intervenor Complaint"), as follows:

1. Plaintiff-Intervenor's "Intervenor Complaint" challenges actions by the United States Department of Agriculture ("USDA") Food Safety Inspection Service ("FSIS") in granting inspections for horse slaughter facilities in the United States pursuant to the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601 *et seq*. ECF No. 70 ¶¶ 3-5. "Claim One" of the "Complaint" alleges that USDA violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(C), and "acted arbitrarily and capriciously" in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), by "granting inspection to a horse slaughter facility without first conducting an environmental review and producing an EIS [environmental impact

statement]." ECF No. 70 ¶ 20. "Claim Two" of the "Complaint" alleges that USDA violated NEPA and the APA by "establishing, issuing and authorizing a drug residue testing plan for horse slaughter to be used at horse slaughter facilities without first conducting an environmental review and producing an EIS." *Id.* ¶ 23. "Claim Three" of the "Complaint," which does not appear to be an actual separate claim, alleges that USDA violated the APA by "providing a grant of inspection to domestic horse slaughter plants." *Id.* ¶ 26.

2. Because NEPA does not provide for a private right of action against Federal Defendants, Plaintiff-Intervenor's claims are cognizable, if at all, only pursuant to the judicial review provisions of the APA. *See, e.g., Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 690 (10th Cir. 2010) ("NEPA itself does not provide for a private right of action; therefore, this court reviews an agency's approval of a project, including the agency's compliance with NEPA, under the APA."); *County of Los Alamos v. U.S. Dep't of Energy*, 2006 WL 1308305 (D.N.M. 2006) ("Where a statute, such as NEPA, does not provide for a private right of action, the [APA] provides for judicial review for challenges to final agency actions.").

3. In *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994), the Tenth Circuit held that challenges to federal agency actions under the APA are not subject to the use of normal civil trial procedures:

> A district court is not exclusively a trial court. In addition to its *nisi prius* functions, it must sometimes act as an appellate court. Reviews of agency action in the district court must be processed *as appeals*. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure.

42 F.3d at 1580 (emphasis in original). In another case challenging federal agency decisions under NEPA, this Court accordingly recognized that "[p]ursuant to *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994), claims under the APA are treated as appeals and

governed by reference to the Federal Rules of Appellate Procedure." *Wildearth Guardians v. U.S. Forest Serv.*, 668 F. Supp. 2d 1314, 1323 (D.N.M. 2009). Plaintiff-Intervenor acknowledges that its claims are governed by *Olenhouse*. *See* ECF No. 133 at 2 ("Plaintiffs request that, consistent with *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994), the parties agree to limit their briefing to the federal defendants' decision making as documented in the administrative record.").

4. In *Olenhouse*, the Tenth Circuit stated that part of "the illicit procedure [the district court] employed to determine the issues for review" was that the district court had "processed the [plaintiffs'] appeal as a separate and independent action, *initiated by a complaint* and subjected to discovery and a 'pretrial' motions practice." 42 F.3d at 1579 (emphasis added). Thus, the law in the Tenth Circuit, as set forth explicitly in *Olenhouse*, is that a "Complaint" is an improper vehicle for initiating claims challenging a federal agency action in federal district court. Therefore, Plaintiff-Intervenor's "Intervenor Complaint" should be treated as a "Petition for Review of Agency Action," and to which no "Answer" is required under the Federal Rules of Civil Procedure, which are inapplicable. *See, e.g.*, *Forest Guardians v. U.S. Fish and Wildlife Serv.*, 611 F.3d 692, 702 n.12 (10th Cir. 2010) ("Even though this action was originally filed in the form of a complaint, the parties later agreed to proceed as if it properly had been filed as a petition for review of agency action.") (citing *Olenhouse*, 42 F.3d at 1579-80); *Wildearth Guardians*, 668 F. Supp. 2d at 1323 ("Although [the plaintiff] captioned its initial filing as a 'Complaint' rather than a 'Petition for Review of Agency Action,' the parties subsequently agreed to proceed under *Olenhouse* in briefing the merits."); *Wyoming Timber Industry Ass'n v. U.S. Forest Serv.*, 80 F. Supp. 2d 1245, 1247 (D. Wyo. 2000) (stating that, under *Olenhouse*,

"Petitioners' complaint will be treated, in its entirety, as a petition for judicial review pursuant to [the APA]").

5. In accordance with *Olenhouse*, the Parties have agreed – and this Court has ordered -- that this case should proceed to briefing on the merits, consistent with the Federal Rules of Appellate Procedure. *See* ECF Nos. 132, 133, 137. *See also, e.g., Wildearth Guardians*, 668 F. Supp. 2d at 1323 (noting that the case was resolved on the merits based on briefing that "is consistent with the Federal Rules of Appellate Procedure" and the Court's scheduling order). Pursuant to *Olenhouse*, this matter should proceed in accordance with this Court's August 29, 2013 scheduling order, ECF No. 137, and no separate Answer is required.[1]

Respectfully submitted this 27th day of September, 2013.

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[1] In the event an Answer were deemed necessary, Federal Defendants deny all violations of federal law alleged in Plaintiff-Intervenor's "Intervenor Complaint" and deny the allegations underlying Plaintiff-Intervenor's claims that NEPA and the APA have been violated. Through this Response, Federal Defendants do not waive any claims or defenses, including that Plaintiff-Intervenor has failed to demonstrate standing, that Plaintiff-Intervenor has failed to state a claim on which relief can be granted, and that Plaintiff-Intervenor has failed to identify any specific "final agency actions" it is challenging, as required by the APA.

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 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/Alison D. Garner.
ALISON D. GARNER
U.S. Department of Justice