UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FRONT RANGE EQUINE RESCUE, THE HUMANE SOCIETY OF THE UNITED STATES, MARIN HUMANE SOCIETY, HORSES FOR LIFE FOUNDATION, RETURN TO FREEDOM, FOUNDATION 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' EXPEDITED MOTION FOR ORDER REQUIRING BOND

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This Court has already ruled that a party who is neither enjoined nor restrained is not entitled to an injunction bond under Federal Rule of Civil Procedure 65(c). Tr. Bond Hearing at 82:7-13, *Front Range Equine Rescue v. Vilsack*, No. 13-cv-639 (D.N.M. Aug. 8, 2013), ECF No. 101 ("[T]he issue of bonding only applies to . . . the only two parties who have been enjoined . . ."). Because the Court has not enjoined or restrained Rains Natural Meats ("RNM"), RNM lacks standing to seek a bond. *See* Order at 2, Sept. 20, 2013, ECF No 168 ("September 20 Order").

Further, an injunction bond is only appropriate where alleged losses are caused by the issuance of the bond, which is not the case here. The federal defendants' approval of RNM's application for inspection was based on false information about environmental issues related to RNM's operation. Because RNM has failed to obtain a Missouri Clean Water Law General Permit and cannot dispose of its wastewater by transporting or otherwise delivering it to the City of Gallatin Wastewater Treatment Facility as it has claimed, it cannot currently operate regardless of any injunction issued in this case. And as even RNM admits, the federal defendants have not issued RNM's grant of inspection. Def.-Intervenors' Brief in Support of Agency Action at 3 n.1, Sept. 27, 2013, ECF No. 183. Without a grant of inspection, RNM cannot slaughter horses for human consumption. Therefore, the injunction here has caused no losses.

If the Court were to accept RNM's arguments, the well-established public interest exception to a Rule 65(c) bond requires only a minimal or nominal bond. *Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002) ("[W]here a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered."). Therefore, if the Court requires a bond, the bond should be nominal, and no bond should be assessed against Plaintiffs who have demonstrated an inability to pay. Finally, any bond awarded may only secure alleged losses RNM incurred after the issuance of the injunction on September 20, 2013.

I. BACKGROUND

On July 2, 2013, Plaintiffs commenced this action alleging that the U.S. Department of Agriculture ("USDA") 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.* by authorizing federal inspections at horse slaughter facilities and implementing a new drug residue testing program without undertaking NEPA review of the potential impacts of those actions. *See* Compl., July 2, 2013, ECF No. 1; *see also* Am. Compl., July 19, 2013, ECF No. 54. Plaintiffs sought an injunction barring the federal defendants from providing horse slaughter inspections until they complied with NEPA.

On August 2, after briefing and oral argument, this Court entered an Order granting Plaintiffs' motion for a temporary restraining order, enjoining the federal defendants from dispatching inspectors to or carrying out inspection services at Valley Meat Company ("VM") and Responsible Transportation ("RT"), and enjoining VM and RT from conducting commercial horse slaughter operations. Order Granting Pls.' Mot. TRO at 7, Aug. 2, 2013, ECF No. 94 ("TRO Order"). The Court has ordered expedited briefing on the merits of this case and extended the TRO Order until October 31, 2013. Order Granting Mot. Expedite, Aug. 29, 2013, ECF No. 137; Order, Sept. 5, 2013, ECF No. 142.

On September 20, this Court enjoined the federal defendants from dispatching inspectors to or carrying out inspection services at RNM until October 4, 2013. *See* September 20 Order. The Court later extended this injunction until October 31, 2013. Order, Sept. 26, 2013, ECF No. 179 ("September 26 Order"). Unlike VM and RT, *RNM is not enjoined* from conducting commercial horse slaughter operations. *See* September 20 Order.

II. ARGUMENT

The burden is on the party seeking an injunction bond to establish why a bond is appropriate and to justify the amount requested. *Int'l Equity Investments, Inc. v. Opportunity Equity Partners, Ltd.*, 441 F. Supp. 2d 552, (S.D.N.Y. 2006); *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 883 (9th Cir. 2003) (the party seeking an injunction bond

has the "obligation of presenting evidence that a bond is needed"); *accord Doctors' Assocs. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996). For several reasons, RNM fails to meet its burden.

A. Rains Natural Meats Is Not Entitled to an Injunction Bond Because the Court Has Not Enjoined or Restrained It.

RNM is not entitled to a bond under Rule 65(c) because, as this Court previously held, an injunction bond is only proper to secure the alleged losses of a party that has been enjoined or restrained. *See* Order Requiring Injunction Bond at 1, Aug. 8, 2013, ECF No. 102 ("Bond Order") ("The Court concludes that only Responsible Transportation and Valley Meat have standing to seek injunction bonds as they are the only parties being restrained by the Court."). While the Court's September 20 and 26 Orders restrain the federal defendants from providing inspection services to RNM, the Court has not enjoined or restrained RNM itself. *See* ECF No. 168; ECF No. 179. Therefore, because RNM has not been "restrained by the Court," RNM does not "have standing to seek [an] injunction bond[ ]. . . ." *See* Bond Order at 1.

Under Rule 65, a party is only entitled to an injunction bond if it has been enjoined (by a preliminary injunction) or restrained (by a temporary restraining order). Fed. R. Civ. P. 65(c). *See also* Order on Motion for Bond at 1, *Collagenex Pharmaceuticals, Inc. v. Thompson*, No. 03-1405 (D.D.C. Aug. 26, 2003), ECF No. 42 ("The preliminary injunction issued by the Court enjoins and restrains only the federal defendants. Mutual therefore has no standing to demand security in this matter under the text of [Rule 65(c)]."); *Equip. & Sys. For Indus., Inc. v. Zevetchin*, 864 F. Supp. 253, 257-58 (D. Mass. 1994) (refusing to "consider damages that employees' new employer would allegedly suffer, since new employer was not enjoined party"); *Sys. Operations, Inc. v. Scientific Games Dev., Corp.*, 555 F.2d 1131, 1145 (3d Cir. 1977) ("*Powelton* holds that a party who has not been enjoined has no right to demand that another party post a security bond."); *Com. of Puerto Rico v. Price Comm'n*, 342 F. Supp. 1311, 1312-13 (D.P.R. 1972) ("It is crystal clear to this Court that a party against which a temporary restraining order does not run . . . has no standing to demand security."); *G.B.C., Inc. v. United States*, 302 F. Supp. 1283, 1285 (E.D. Tenn. 1969) (because temporary restraining order only was issued

against Interstate Commerce Commission, "[w]hatever harm [certain] carriers may sustain as a result of this order is irrelevant to the security amount, required by Rule 65(c)"); *Powelton Civic Home Owners Ass'n v. Dep't of Hous. & Urban Dev.*, 284 F. Supp. 809, 814-15 (E.D. Pa. 1968) ("The Redevelopment Authority may or may not suffer financial loss if the federal funds here have been wrongfully enjoined; that financial loss may or may not have been due to its own conduct. These issues we do not resolve. It is clear that the Redevelopment Authority has not been enjoined by this Court; thus it cannot have been wrongfully enjoined; and therefore it is not entitled to demand security under F. R. Civ. P. No. 65(c).").

RNM has argued in this very action that a party must be enjoined or restrained to obtain an injunction bond. *See* Def.-Intervenors' Resp. Pls.' Emergency Mot. Modify Am. TRO at 2, Sept. 20, 2013, ECF No. 161 (Only VM and RT "were enjoined and therefore only these two companies were to be considered for purposes of the injunction bond."). Just as VM and RT had standing to seek an injunction bond because they were "directly enjoined from operating," *id.* at 1, RNM lacks standing to seek an injunction bond because it is not "directly enjoined from operating." *See id.*; September 20 Order. No further inquiry is necessary.

B. Because RNM Cannot Currently Operate as a Horse Slaughterhouse, RNM Is Not Entitled to Any Bond.

According to the Department of Natural Resources of the State of Missouri, the issuing authority of water permits required for slaughter operations, as of the time of this filing RNM cannot legally begin horse slaughter operations. RNM has falsely claimed – to both this Court and USDA – that RNM was "prepared, ready and uninhibited to begin its operations well before August 2013." RNM Bond Motion at 3. In fact, RNM has *never* been able to legally operate its horse slaughter operations according to its stated plans and still has not fulfilled all requirements under the Missouri Clean Water Law necessary to operate according to plan. *See* Preliminary Order in Prohibition, *State of Missouri ex rel Sink et al. v. Pauley*, No. 13AC-CC-00464 (Cole Cty., Mo. Cir. Ct. Aug. 5, 2013) (attached hereto as Exh. A). Specifically, RNM lacks a General Permit, without which it cannot discharge horse blood and other liquid waste into its lagoons.

See 10 CSR 20-6.015(2)(A); RNM Affidavit at ¶ 2. Nor can RNM legally dispose of its wastewater at the City of Gallatin Wastewater Treatment Facility, because the Missouri Department of Natural Resources has prohibited the City of Gallatin from accepting wastewater from equine slaughter. *Compare* Federal Defendants' Response Brief on the Merits at 46 n.6, Sept. 27, 2013, ECF No. 185 (claiming RNM can dispose of wastewater in Gallatin) *with* Sept. 20, 2013 Email from Steve Feeler, MO DNR to City of Gallatin ("DNR Email") (attached hereto as Exh. B) (as of September 20, 2013, "the City of Gallatin is not authorized to accept wastewater from an equine processing facility").

Similar to VM, RNM likely will assert that its failure to obtain the permit necessary to discharge liquid waste is no impediment to operating. *See* VM's Resp. Pls.' Mot. Modify TRO at 2-3, Aug. 21, 2013, ECF No. 121 (asserting that, even without a discharge permit, VM could contract to haul its liquid waste to a licensed facility).[1] But the plan RNM has proposed to USDA, and which USDA relied upon in finding that RNM had satisfied the requirements for a grant of inspection, Decision Memo – National Environmental Policy Act Categorical Exclusion at 10, Sept. 13, 2013, ECF 154-1 ("RNM Decision Memo"), is based on RNM's misrepresentation that the facility can unload its wastewater in the City of Gallatin Wastewater Treatment Facility. The Missouri DNR has corrected RNM's misrepresentation. *See* DNR Email. At the very least, the grant of inspection to RNM – and any claimed business losses by RNM – is based on this untruth. Even if RNM could operate in spite of these state regulatory barriers, its asserted lost profits do not take into account the expenses RNM will incur to dispose of its wastewater somewhere outside the City of Gallatin. *See* RNM Affidavit at ¶ 4. The Court must consider these expenses in setting any bond amount.

[1] Valley Meat has been making this misrepresentation to this Court and obtained its $435,000 injunction bond based on the false statement that it could operate without a state water permit, by hauling its wastewater off site. In fact, this is not the case: under New Mexico environmental law and regulations, Valley Meat has *never* been able to operate a horse slaughter facility, up to and including the present day – because New Mexico state law requires a discharge permit, even if Valley Meat were to truck its wastewater offsite. *See* N.M. Admin. Code § 20.6.2.3104. Thus, Valley Meat obtained its injunction bond under false premises presented to this Court.

RNM's request for an injunction bond – and its eligibility for the grant of inspection – is also nullified by another, far more disconcerting, falsehood contained in the documentation regarding RNM's approval for inspection by the federal defendants. In deciding to "grant federal meat inspection services" to RNM, the federal defendants relied on the following facts:

> In accordance with the [Missouri] Clean Water Law, Rains Natural Meats will discharge its wastewater into the City of Gallatin's wastewater collection system which consists of over 191 miles of sanitary sewer lines and 22 sanitary sewer pumping stations.[2] This system will transport water from Rains Natural Meats to the Gallatin Wastewater Treatment Plant for processing and eventual discharge of a high quality effluent back into Old Hickory Lake. The wastewater treatment plant has an organic treatment capacity of 12.5 million gallons per day. The plant is also capable of being operated in "Storm Mode" with a resulting hydraulic capacity in excess of 30 million gallons per day, while meeting all National Pollutant Discharge Elimination System effluent limitations set by the EPA.[3]

RNM Decision Memo at 10. This entire statement –which relates directly to the potential environmental harms caused by the discharge of wastewater from RNM's operations – is false. In fact, the "Gallatin" referenced in the Decision Memo is located in the State of *Tennessee – not Missouri.* Gallatin, Missouri has no such system or capacity. The citations in support of the above quotation are to the wastewater system in Gallatin, Tennessee.[4] Gallatin, Tennessee has a population of roughly 31,000 and covers approximately 22 square miles. Gallatin, Missouri's population is under 2000 and its square mileage is less than 3 miles. And Gallatin, Tennessee is roughly 600 miles from Gallatin, Missouri, as is the referenced "Old Hickory Lake." In other words, in approving RNM for inspection, the federal defendants relied on completely irrelevant and misleading information, and the RNM Decision Memo that the federal defendants submitted to this Court contains absolutely no analysis of the potential for RNM to overwhelm the Gallatin wastewater treatment plant – if indeed it was ever granted permission to operate.

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[2] http://www.gallatinutilities.com/wastewater.html (citation in RNM Decision Memo).

[3] http://www.gallatinutilities.com/wwtp.html (citation in RNM Decision Memo).

[4] *See* http://www.gallatinutilities.com/contact_us.html.

C. Even if RNM Has Standing to Seek a Bond, the Court Should Apply the Public Interest Exception and Require Only a Nominal Bond.

1. The Public Interest Exception Applies to this Environmental Claim.

Even if the Court considers RNM's motion for a Rule 65(c) bond, the Court should require only a nominal bond because Plaintiffs' claim seeks to vindicate the public interest.[5] *See Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002) ("[W]here a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered."); *see also Forest Guardians et al. v. U.S. Forest Service et al.*, Civ. No. 04-0011 (D.N.M. 2004) (declining to set bond in public interest environmental matter). "Federal courts have consistently waived the bond requirement in public interest environmental litigation, or required only a nominal bond." *Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D. Or. 2012). Under the public interest exception to Rule 65(c), courts require minimal or nominal bonds in order to promote access to judicial review. The public interest exception has the salutary effect of promoting enforcement of environmental and public interest statutes and avoiding "the potential chilling effect" of a significant bond on public interest litigation. *Id.*

This case provides a textbook example of the necessity of the public interest exception. Plaintiff public interest organizations and concerned individuals filed suit to require a federal agency to fulfill its statutory duty to conduct environmental review prior to the potential environmental harm that could result from instituting a national drug residue testing program and authorizing commercial horse slaughter operations. Requiring the $300,000 bond requested by

[5] Additionally, "the likelihood of success on the merits, as found by the district court, tips in favor of a minimal bond or no bond at all." *People of State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1326, *amended*, 775 F.2d 998 (9th Cir. 1985); *accord TGI Friday's Inc. v. Great Northwest Restaurants, Inc*., 652 F.Supp.2d 763, 774 (N.D. Tex. 2009) ("[B]ecause TGIF has established a strong likelihood of success on the merits, the court finds that a relatively low bond is sufficient, and it gives less weight to speculative harms the injunction may indirectly cause defendants to suffer."); *Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996) ("In this case the court waives the bond requirement based on the strength of plaintiff's case and the minimal damages which defendants would suffer as a result of the preliminary injunction."). In its Order, this Court clearly found a strong likelihood of success for Plaintiffs, *see* TRO Order, which justifies a minimal bond or no bond at all.

RNM would have a chilling effect on future public interest litigation. In contrast, requiring a minimal or nominal bond would promote access to judicial review.

2. *Plaintiffs Who Are Unable to Pay a Bond Should Be Exempt from Any Bond Requirement.*

Even if the Court declines to apply the public interest exception to all plaintiffs, it should at the very least exempt from any bond requirement those plaintiffs who have established they are unable to pay for an injunction bond. If the Court requires an injunction bond for RNM, and any plaintiffs who may be able to pay the bond do not post such bond, the plaintiffs who are unable to pay should still be entitled to the injunctive relief granted by the Court in this case.

Courts throughout the country have applied the public interest exception to Rule 65(c) to require only a nominal bond, or no bond, from plaintiffs who are unable to pay a bond in public interest cases, including actions to enforce NEPA. *See, e.g.*, *Colorado Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1230-31 (D. Colo. 2007) (no bond for plaintiff that is unable to pay); *Earth Island Inst. v. U.S. Forest Serv.*, 2:05-CV-1608-MCE-GGH, 2006 WL 3359192, at *3 (E.D. Cal. Nov. 20, 2006) (nominal injunction bond for plaintiff in NEPA case based on inability to pay); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 128-29 (D. Mass. 2003) (no bond where plaintiffs submitted affidavits indicating "financial inability to post a security bond"); *McCormack v. Twp. of Clinton*, 872 F. Supp. 1320, 1328 (D.N.J. 1994) ("imposition of anything more than a nominal bond could constitute a severe hardship to plaintiff"); *Temple Univ. v. White*, 941 F.2d 201, 220 (3d Cir. 1991) (no bond where plaintiff would have been unable to pay); *California ex rel. Van de Kamp v. Tahoe Rg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) (no injunction bond for plaintiff in NEPA case based on inability to pay); *Crowley v. Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, & Packers*, 679 F.2d 978, 1000 (1st Cir. 1982) (no bond where plaintiffs are unable to pay), *rev'd on other grounds*, 467 U.S. 526 (1984); *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981) (no bond where plaintiffs are unable to pay); *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 322-23 (9th

Cir. 1975) (reducing NEPA injunction bond based, in part, on plaintiff's limited resources); *Bass v. Richardson*, 338 F. Supp. 478, 490 (S.D.N.Y. 1971) (no bond where plaintiffs are unable to pay).

Even outside public interest litigation, courts do not require a bond, or require only a minimal bond, from a party who obtains an injunction and is unable to pay. *See Hayden v. Freightcar Am., Inc.*, CIV.A. 3:2007-201, 2008 WL 375762, at *68 (W.D. Pa. Jan. 11, 2008) (requiring a $50 bond for each of three named plaintiff-employees against defendant-employer where plaintiffs were unable to pay defendant's alleged expenses); *Sluiter v. Blue Cross and Blue Shield of Michigan*, 979 F. Supp. 1131, 1145 (E.D. Mich. 1997) (no bond where plaintiff-insured was unable to pay defendant-health plan administrator's costs and damages); *Doe by Doe v. Perales*, 782 F. Supp. 201, 206 (W.D.N.Y. 1991) (no bond where plaintiffs were unable to pay); *Governing Council of Pinoleville Indian Community v. Mendocino County*, 684 F. Supp. 1042, 1047 (N.D. Cal. 1988) (no bond where plaintiff-tribes were unable to pay defendant-asphalt operators' costs and damages); *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 567 F.2d 692, 701 (7th Cir. 1977) (no error to waive bond where plaintiff-insured lacked ability to pay defendant-insurance agency).

Here, the Court granted the injunctive relief requested by Cassie Gross, Krystle Smith, and the other plaintiffs, but Ms. Gross and Ms. Smith, in addition to several other plaintiffs, are unable to post any injunction bond. Declaration of Cassie Gross, Sept. 12, 2013 (attached hereto as Exh. C); Declaration of Krystle Smith, Sept. 12, 2013 (attached hereto as Exh. D). Based on the above authority, the Court should exempt Ms. Gross and Ms. Smith from any bond order. If the other plaintiffs fail to post a bond ordered by the Court for this period, the injunction should still be enforceable by Ms. Gross and Ms. Smith.

D. Rains Natural Meats' Request for a Three-Month Injunction Bond Is Improper Because Injunction Bonds May Cover Only the Period of the Injunction.

Even if RNM had standing to seek a bond and was entitled to a non-nominal bond, no party is entitled to a bond without a showing that its injuries are "proximately caused by the injunction." *See Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1056 (2d Cir. 1990); *see also Lever Bros. Co. v. Int'l Chem. Workers Union, Local 217*, 554 F.2d 115, 120 (4th Cir. 1976) (recoverable losses are only "those that arise from the operation of the injunction itself and not from damages occasioned by the suit independently of the injunction"). Consequently, any bond required by the Court must be limited to the period of the subject injunction. *See* Fed. R. Civ. P. 65(c) (bond issued based on injunction). Simply put, a Rule 65(c) bond does not cover "pre-injunction damages". *Atomic Oil Co. of Okl. v. Bardahl Oil Co.*, 419 F.2d 1097, 1103 (10th Cir. 1969).

Here, RNM has no legitimate basis for any bond, much less a bond that covers purported losses that occurred two months before the date on which the September 20 injunction order was issued against the federal defendants. *See* Defendant-Intervenors VM, RNM, and Chevaline's Expedited Motion for Order Requiring Bond at 4, Sept. 26, 2013, ECF No. 180 ("RNM Bond Motion"). It is simply not true that RNM "has been or will be enjoined" throughout August, September, and October 2013. *See id.* (claiming entitlement to a $300,000 bond based on $100,000 in alleged losses over three months). Had the Court enjoined RNM on September 20, which it did not, any bond awarded could secure, at most, only those losses allegedly caused by the injunction and incurred during the period of the injunction. *See Atomic Oil*, 419 F.2d at 1103. Therefore, at the very most, any bond required by the Court may only cover September 23, 2013 through October 31, 2013 – that is, at most, 29 weekdays.[6]

[6] *See* September 20 Order; September 26, Order. Even using RNMs' speculative projected losses, the maximum amount, if RNM qualified for a bond, would be $145,000 (29 days x 20 horses per day x $250 per horse). *See* Affidavit of David Rains ("RNM Affidavit") at ¶ 4, Sept. 20, 2013, ECF No. 161-1. But the Court "need not order security in respect of economic damages that are speculative at best." *See Interlink Int'l Fin. Servs, Inc. v. Block*, 145 F. Supp. 2d 312, 315 (S.D.N.Y. 2001) (internal quotation marks omitted); *see also FSL Acquisition Corp. v. Freeland Sys., LLC*, 686 F. Supp. 2d 921, 933 (D.

Similarly, RNM's allegations that USDA improperly delayed granting its application for inspection are irrelevant to the Rule 65(c) bond requirement. *See, e.g.*, Defendant-Intervenors VM, RNM, and Chevaline's Response to Plaintiffs' Emergency Motion to Modify the Amended TRO at 2-3, Sept. 20, 2013, ECF No. 161 ("[RNM has] been ready to go for months, only waiting on the government to issue their Grant. What might be considered remarkable or curious, however, is that USDA did not issue the Grant to [RNM] when it issued the others."); RNM Bond Motion at 3 ("[RNM] has participated dutifully in that regard in this litigation and waited patiently for Federal-Defendants and the Court to offer it equal treatment. . . ."). In fact, USDA claims it did not grant RNM's application for inspection until September 3, 2013 because "prior to that date, Rains was not qualified for a grant of inspection" due to its failure to certify that it "met the requirements of Section 401 of the Clean Water Act for any discharges into navigable waters [or to] attest that no such discharges will occur." *See* Federal Defendants' Response to Plaintiffs' Emergency Motion to Modify the Amended TRO at 3-4, Sept. 20, 2013, ECF No. 165; *see also* Aug. 30, 2013 Email from Eric Thompson, FSIS to Melissa Hammar, FSIS, Administrative Record ("AR") at AR0004803 (attached hereto as Exh. E) (explaining that USDA would "be ready to issue the grant" to RNM after "Mr. Rains['s] lawyer figured out that he can self attest").[7] This is further evidence that any effect on RNM from the injunction could not possibly have occurred prior to September 20.

Minn. 2010) (appropriate for court to waive bond "given the highly speculative nature" of the non-movant's projected damages).

[7] It is also unclear how RNM can assert entitlement to a Rule 65(c) bond for extensive losses incurred throughout August, September, and October 2013 when it decided, for some time during that period, to produce meat from other animals. *See* Aug. 5, 2013 Letter from David Rains to Missouri DNR (attached hereto as Exh. F) ("The facility will be a multi-species processing facility – *exclusive of equine*." (Emphasis added.)). Apparently frustrated with its failure to obtain the permit necessary to discharge wastewater produced by horse slaughter into its existing lagoon system, RNM decided to produce different types of meat, for which it could obtain a permit to discharge into its lagoon system. *See id.* RNM is not entitled to a bond for this period of time.

III. CONCLUSION

For the reasons set forth herein, the Court should deny Defendant-Intervenors VM, RNM, and Chevaline's Expedited Motion for Order Requiring Bond. If the Court considers requiring an injunction bond for RNM, Plaintiffs respectfully request that in determining the bond amount, the Court consider the public interest exception, the inability of certain plaintiffs to post a bond, the losses alleged during the period of the injunction, and the fact that RNM cannot legally operate its facility under Missouri law at this time.

Respectfully submitted this 7th day of October 2013.

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CERTIFICATE OF SERVICE

I certify that on October 7th, 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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