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.	Civil No. 1:13-cv-00639-MCA-RHS

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS'

JULY 2, 2013 MOTION FOR PRELIMINARY INJUNCTION [ECF NO. 16-1]

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INTRODUCTION

Preliminary injunctions are "extraordinary" remedies, and Plaintiffs bear the burden of establishing all four requirements for such extraordinary relief with "clear and unequivocal" evidence. *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991). Despite this clear and heavy burden, Plaintiffs offer no competent evidence in support of their conclusory allegations of irreparable injury, the balance of harms, and the public interest. Even if Plaintiffs' *fear* of contamination actually stops them from using lakes and rivers in the area of the Valley Meat facility in Roswell, New Mexico, that fear has no basis in science or fact, and is not a cognizable injury. Plaintiffs have not and cannot show that the grant of federal inspection as mandated by the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601-625, will cause any significant environmental injury, let alone irreparable environmental injury. Plaintiffs' fear and speculation are not enough to establish grounds for the drastic remedy of an emergency preliminary injunction that would plainly harm Valley Meat and other legitimate businesses that meet the requirements of the FMIA.

Plaintiffs also cannot succeed on the merits of their National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h ("NEPA") claims. While Plaintiffs may legitimately oppose and seek to end the slaughter of horses in the United States for human consumption, their remedy lies in the political arena, not a court of law. The FMIA *mandates* the U.S. Department of Agriculture ("USDA"), acting through the Food Safety and Inspection Service ("FSIS"), to grant inspections of livestock slaughter at facilities such as Valley Meat that meet the requirements of the FMIA. The FMIA does not afford FSIS discretion to deny or condition a grant of inspection for a qualifying facility on environmental grounds, nor does the FMIA give FSIS authority or control over any environmental impacts that may flow from operations at a qualifying facility. Because

FSIS lacks such discretion, environmental review pursuant to NEPA cannot meaningfully inform or change its decision to grant or deny an inspection. Under these circumstances, NEPA does not apply to FSIS's decisions, and Plaintiffs cannot prevail on their NEPA claims.

That NEPA (which is purely procedural and does not impose substantive environmental protections) does not apply to FSIS's grants of inspections does not mean that horse slaughter facilities may cause environmental harm without concern or consequence. Slaughter operations of all kinds throughout the United States are heavily regulated by a panoply of federal, State, and local laws protecting the environment. In part because of these environmental protections and in part because horse slaughter operations do not pose the unique concerns to the environment from drug residue as Plaintiffs erroneously claim, FSIS determined that -- even if NEPA was applicable -- its grant of inspection for Valley Meat would fall under a "categorical exclusion" or "CE" pursuant to NEPA for actions that USDA has found have no significant impacts on the environment. Therefore, even if the Court were to find that NEPA applied to FSIS's decision, Plaintiffs' NEPA claims would still fail because FSIS conducted an environmental review consistent with its CE, thereby negating the need for further analysis under NEPA.

Plaintiffs have not demonstrated that this Court should impose the extraordinary and drastic remedy of an emergency injunction halting inspections at the Valley Meat facility or any other horse slaughter facility in the United States. Plaintiffs' motion for a temporary restraining order and preliminary injunction ("Pls. PI Br."), ECF No. 16-1, should be denied.

FACTUAL BACKGROUND

Valley Meat Company, LLC ("Valley Meat") is a small cattle slaughter and processing facility in Roswell, New Mexico. *See* Decision Memo for the Application of Valley Meat for a Grant of Federal Meat Inspection Services, ECF No. 22-4 at pdf 4. Its current owner, Ricardo de

los Santos, has conducted federally-inspected commercial slaughter of cattle, veal calves, goats, sheep, lambs, and swine at the facility since approximately 1991. *Id*. By application dated December 13, 2011, Valley Meat applied to FSIS for a grant of inspection adding equines to the species covered by its grant of inspection. USDA regulations require that establishments that slaughter equine species be completely separate from establishments that slaughter cattle, sheep, swine, or goats. 9 C.F.R. § 305.2(b). Therefore, on March 2, 2012, Valley Meat filed an application with FSIS to modify its application to receive inspection services solely for the commercial slaughter of horses, mules, and other equines for human consumption. ECF No. 22-4 at pdf 4. On June 28, 2013, FSIS approved Valley Meat's application consistent with a categorical exclusion promulgated pursuant to NEPA. ECF No. 22-4 at pdf 4.

Pursuant to 9 C.F.R. § 304.3(b), the grant of inspection for Valley Meat is a conditional grant of inspection for the slaughter of horses for a period not to exceed ninety days during which Valley Meat must validate its Hazard Analysis and Critical Control Point ("HACCP") Plan. ECF No. 22-4 at pdf 1.[1] Upon successful validation of the HACCP Plan, the grant of inspection will be made permanent. *Id*.

FSIS also issued a document memorializing its consultation[2] with the United States Fish and Wildlife Service ("FWS"). Exhibit B. FWS advised FSIS that there is no suitable habitat for any listed or sensitive species in the area in or near Valley Meat's facility. *Id*. at 6. FWS

[1] A HACCP plan is part of "a management system in which food safety is addressed through the analysis and control of biological, chemical and physical hazards." 9 C.F.R. § 304.3(b).
[2] Section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), requires all federal agencies, in consultation with FWS, to ensure that their actions are not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of any designated critical habitat. ESA's implementing regulations state that Section 7 applies to "all actions in which there is discretionary federal involvement or control." 50 C.F.R. § 402.03.

concurred with FSIS's determination that there will be no effect on listed species or designated critical habitat. *Id*.

Responsible Transportation, LLC, is a facility located in Sigourney, Iowa. *See* Decision Memo for the Application of Responsible Transportation for a Grant of Federal Meat Inspection Services, ECF No. 22-5 at pdf 3. The facility was previously used by West Liberty Foods for processing beef products, but is currently closed. *Id*. On December 13, 2012, Responsible Transportation filed an application with FSIS to grant federal meat inspection services for commercial horse slaughter operations for human consumption. *Id*. FSIS approved Responsible Transportation's application consistent with a categorical exclusion issued pursuant to NEPA. *Id*.

Pursuant to 9 C.F.R. § 304.3(b), the grant of inspection for Responsible Transportation is a conditional grant of inspection for the slaughter of horses for a period not to exceed ninety days during which the company must validate its HACCP Plan. ECF No. 22-5 at pdf 1. Upon successful validation of the HACCP Plan, the grant of inspection will be made permanent. *Id*.

Rains Natural Meats in Gallatin, Missouri, submitted an application on January 15, 2013, and its application for inspection is in the final stages of review, but has not been approved or denied. *See* Declaration of Daniel Engeljohn, Ph.D., Exhibit A ¶ 7.

FSIS has also received applications to grant federal meat inspection services from three other companies in Missouri, Oklahoma and Tennessee. *Id*. These companies have not actively pursued completion of the grant process after their initial submissions to FSIS. *Id*. FSIS has not taken final agency action on any of these applications. *Id*.

On June 28, 2013, FSIS issued Directive 6130.1. ECF No. 22-3. The directive provides instructions to FSIS inspectors "on how to perform ante-mortem inspection of equines before slaughter and post mortem inspection of equine carcasses and parts after slaughter." *Id*. at 1.

The Directive also instructs FSIS inspectors on "making ante-mortem and post-mortem dispositions of equines, how to perform residue testing, verify humane handling, verify marking of inspected equine products, and document results . . . ." *Id.* The Directive requires FSIS inspectors to conduct intensified random drug residue testing of healthy-appearing equines. *Id.* at 6-7. While inspectors will test equines more frequently than many other types of livestock slaughtered for human consumption, the method for testing equine tissue is not different from the method for testing other types of livestock. *See* Engeljohn Decl., Exhibit A ¶¶ 8-10; 14-16. This multi-residue method of testing tissues detects up to 52 analytes. *Id.* The drug residues tested include those of potential public health concern for all livestock, including equines.[3] *Id.*

LEGAL BACKGROUND

I. THE NATIONAL ENVIRONMENTAL POLICY ACT

NEPA requires federal agencies proposing "major Federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement ("EIS"). 42 U.S.C. § 4332(2)(C). The purpose of NEPA is to ensure that agencies take a "hard look" at potential environmental consequences before approving any major federal action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). It is well-settled, however, that NEPA is an "essentially procedural" statute and does not require an agency to follow the most environmentally sound course of action. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978); *Robertson*, 490 U.S. at 350. "NEPA does not work by mandating that agencies achieve particular substantive environmental results." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989).

Regulations promulgated by the Council on Environmental Quality ("CEQ"), 40 C.F.R.

[3] Examples include Avermectins, Arsenic, Sulfanamides and Antibiotics. Engeljohn Decl., Exhibit A ¶ 17; Attachment 1.

§§ 1500-08, provide guidance on the implementation of NEPA, and are entitled to substantial deference. *Robertson*, 490 U.S. at 355-56. CEQ's regulations allow an agency to comply with NEPA in one of three ways. First, the agency may always prepare an EIS. 40 C.F.R. § 1501.3. An EIS is a detailed statement subject to extensive regulations regarding format, content, and methodology. 40 C.F.R. Part 1502. Second, the agency may prepare an environmental assessment ("EA"), *see id.* §§ 1501.4(b), 1508.9, and based on the EA either determine that an EIS is necessary or issue a finding of no significant impact ("FONSI"). *See id.* §§ 1501.4(e), 1508.13. In contrast to the detailed EIS, an EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether" the action will have a "significant" effect on the environment, the threshold for preparation of an EIS. 40 C.F.R. § 1508.9. If the agency determines that the effects will not be significant, it issues a FONSI. *Id.* § 1508.13. Third, the agency need not prepare an EA or an EIS, if the agency determines that the proposed action falls within an established "categorical exclusion" or "CE." *See id.* §§ 1501.4(a)(2), 1501.4(b); *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 926-27 (9th Cir. 2000) (describing NEPA requirements).

CEs are defined as "categor[ies] of 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 [NEPA] procedures adopted by a Federal agency." 40 C.F.R. § 1508.4. In other words, if an agency determines that a particular category of action will not have a significant effect on the environment, the agency may establish a CE and need not prepare an EA or EIS when conducting a future action falling in the category. The only exception is that an agency must make allowances for "extraordinary circumstances in which [the] normally excluded action may have a significant environmental effect." *Id.* Consequently, before relying on a CE in a

particular instance, an agency must determine that extraordinary circumstances do not exist. *See California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002); *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1023 (10th Cir. 2002).

CEs are an integral part of the framework for demonstrating compliance with NEPA and are, in fact, required by CEQ's regulations. *See* 40 C.F.R. § 1507.3(b)(2)(ii) (stating that agency NEPA procedures "*shall* include . . . [s]pecific criteria for and identification of those typical classes of action . . . [w]hich normally do not require either an [EIS] or an [EA] (categorical exclusions)") (citing *id.* § 1508.4) emphasis added). The use of CEs allows agencies to focus their environmental review efforts on major actions that will have significant effects on the environment and which are the primary focus of NEPA. 48 Fed. Reg. 34,263, 34,263-66 (July 28, 1983); *see also* 40 C.F.R. § 1500.4(p) (noting that establishment and use of CEs can reduce excessive paperwork by eliminating unnecessary preparation of EAs). CEQ thus has encouraged agencies to identify CEs using "broadly defined criteria which characterize types of actions that, based on the agency's experience," normally do not have "significant environmental effects." 48 Fed. Reg. at 34,265.

II. FEDERAL MEAT INSPECTION ACT

Congress enacted the FMIA, Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1260, "after Upton Sinclair's muckraking novel *The Jungle* sparked an uproar over conditions in the meatpacking industry. . . ." *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 968 (2012). As amended and codified, "FMIA regulates a broad range of activities at slaughterhouses to ensure both the safety of meat and the humane handling of animals." *Harris*, 132 S. Ct. at 968. In its current version, FMIA applies to certain "amenable species," including "cattle, sheep, swine, goats, horses, mules, and other equines." 21 U.S.C. § 601(w) (incorporating Wholesome Meat Act, Pub. L.

No. 90-201, § 12(a), 81 Stat. 592 (1967)). FMIA requires that FSIS "shall" inspect any animal within an "amenable species" prior to its "be[ing] allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which [it is] to be slaughtered and the meat and meat food products thereof are to be used in commerce. . . ." *Id.* § 603(a). FMIA also requires that FSIS "shall" inspect the carcasses and parts thereof from any animal within an "amenable species" if the carcasses and parts thereof are to be "prepared at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment in [the United States] as articles of commerce which are capable of use as human food. . . ." *Id.* § 604. FMIA prohibits the sale or transport "in commerce" of any article involving "any cattle, sheep, swine, goats, horses, mules, or other equines, or any carcasses, parts of carcasses, meat or meat food products of any such animals" if the article has not been "inspected and passed" by FSIS in accordance with FMIA. *Id.* § 610(c).

Inspections under FMIA must be conducted by "inspectors appointed for that purpose." 21 U.S.C. §§ 603(a), 604. The Administrator of FSIS, delegate of the Secretary of Agriculture, is responsible for "caus[ing]" those inspections to take place. *Id.* §§ 601(a), 603(a), 604; 7 C.F.R. § 2.53(a)(2)(ii). "[E]ach person conducting operations at an establishment subject to [FMIA]" must "make application" to the Administrator before "inspection is granted." 9 C.F.R. § 304.1(a). "The Administrator is authorized to grant inspection upon his determination that the applicant and the establishment are eligible therefor and to refuse to grant inspection at any establishment if he determines that it does not meet the requirements. . . ." *Id.* § 304.2(b). A successful applicant receives a conditional grant of inspection for a period not to exceed ninety days, during which period the establishment must validate a plan for managing food safety. 9 C.F.R. § 304.3(b). In addition, during the conditional period, "the establishment must validate

its HACCP plan." *Id*. An establishment validates its HACCP plan by conducting certain activities "designed to determine that the HACCP plan is functioning as intended." 9 C.F.R. § 417.4(a)(1).

For Fiscal Year 2006 and subsequent fiscal years, Congress prohibited USDA from using appropriated funds to pay the "salaries or expenses of personnel" to conduct inspections of horses under the FMIA prior to their slaughter. *See* Pub. L. No. 109-97, § 794, 119 Stat. 2120, 2164 (2005); Pub. L. No. 110-161, div. A, § 741(1), 121 Stat. 1844, 1881 (2007); Pub. L. No. 111-8, div. A, § 739(1), 123 Stat. 524, 559 (2009); Pub. L. No. 111-80, tit. VII, § 744(1), 123 Stat. 2090, 2129 (2009). This prohibition was not enacted for Fiscal Years 2012 or 2013. *See* Pub. L. No. 112-55, div. A., tit. VII, 125 Stat. 552, 580 (2011); Pub. L. No. 113-6, 127 Stat. 198 (2013). A bill to restore the prohibition for Fiscal Year 2014 has been introduced, but not passed, in both houses of Congress. H.R. 2410, 113th Cong. § 749(1) (2013); S. 1244, 113th Cong. § 736(1) (2013).

STANDARDS OF REVIEW

I. PRELIMINARY INJUNCTION STANDARD

A preliminary injunction is an "extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (internal citation and quotation omitted) (emphasis in original).[4] *See also GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984) ("A preliminary injunction is an extraordinary remedy; it is the exception rather than the rule.") (citation omitted). As a result, the Tenth Circuit has long required a movant to show a "clear and unequivocal" right to injunctive relief. *SCFC ILC*, 936 F.2d at 1098. *See also Greater*

[4] In *Mazurek*, the Supreme Court noted that the movant's "requirement for substantial proof is much higher" for a motion for a preliminary injunction than it is for a motion for summary judgment. *Mazurek*, 520 U.S. at 972.

Yellowstone Coal. v. Flowers, 321 F.3d 1250, 1256 (10th Cir. 2003) (stating that, given the extraordinary nature of a preliminary injunction, "the right to relief must be clear and unequivocal") (citation omitted).

The party seeking preliminary relief must demonstrate: "(1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 19-20 (2008)). [5] If a plaintiff fails to meet its burden on any of these four requirements, its request must be denied. *See, e.g.*, *Winter*, 555 U.S. at 20 (denying injunctive relief on the public interest and balance of harms requirements alone, even assuming irreparable injury to endangered species and a violation NEPA); *Chem. Weapons Working Grp., Inc. v. Dep't of the Army*, 111 F.3d 1485, 1489 (10th Cir. 1997) (failure on the balance of harms "obviat[ed]" the need to address the other requirements); *Sprint Spectrum, L.P. v. State Corp. Comm'n*, 149 F.3d 1058, 1060 (10th Cir. 1998) ("The district court ruled that the wireless providers failed to satisfy the first two preliminary injunction requirements. However, we need not address the second because the first -- substantial likelihood of prevailing on the merits -- clearly supports the denial of the preliminary injunction.").

II. JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

Because NEPA does not provide for a private right of action, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, provides for judicial review for challenges to final agency actions under NEPA. *See. e.g.*, *Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir. 1998).

[5] The Tenth Circuit's relaxed "serious questions" standard upon which Plaintiffs rely, *see* Pls. PI Br. at 11-12, did not survive *Winter*, 555 U.S. at 22, which requires nothing less than a likelihood of success on the merits. *Id.* at 22 (stating that any lesser standards are "inconsistent with our characterization of injunctive relief"). *RoDa Drilling Co.*, 552 F.3d at 1208-09.

Pursuant to *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994), in the Tenth Circuit, "[r]eviews of agency action in the district courts [under the APA] must be processed *as appeals*." *Id*. (emphasis in original).

"[T]he scope of review under the [APA] is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under the "arbitrary and capricious" standard, "administrative action is upheld if the agency has 'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 982 (9th Cir. 1985) (quoting *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983)); *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 429 (10th Cir. 1996). The court's role is solely to determine whether "the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

This standard is "exceedingly deferential." *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996). "While we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974) (citations omitted); *see also Friends of the Earth v. Hintz*, 800 F.2d 822, 831 (9th Cir. 1986) ("The court may not set aside agency action as arbitrary and capricious unless there is no rational basis for the action.") (footnote and citation omitted). "The [agency's] action . . . need be only a reasonable, not the best or most reasonable, decision." *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989).

In deciding disputes that involve primarily issues of fact that "'require[] a high level of technical expertise,' [the court] must defer to 'the informed discretion of the responsible federal agencies.'" *Marsh*, 490 U.S. at 377 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)); *see also Balt. Gas*, 462 U.S. at 103 ("When examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential."). "Deference to the agency is especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise." *Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 824 (10th Cir. 2008) (citing *Marsh*, 490 U.S. at 378). Thus, when dealing with the complex technical issues relating to application of the FMIA, a federal agency such as FSIS "must have discretion to rely on the reasonable opinions of its own qualified experts." *Marsh*, 490 U.S. at 378.

ARGUMENT

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

A. FSIS Lacks Sufficient Discretion In Granting Inspections At Horse Slaughter Facilities Under The FMIA To Trigger A NEPA Obligation

"The touchstone of whether NEPA applies is discretion." *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001). Because the FMIA mandates that FSIS grant inspections of the slaughter of amendable species if a facility meets the conditions of eligibility under the FMIA, FSIS lacks sufficient discretion over its actions to weigh environmental considerations. Therefore, the environmental review provisions of NEPA do not apply, and Plaintiffs cannot prevail on the merits of their claims.

For NEPA to apply, a federal agency must be able to select an environmentally preferable alternative (even if that alternative is the "no-action" alternative of denying a proposal) or to impose conditions to mitigate environmental concerns. *Citizens*, 267 F.3d at 1151. Where a federal agency has no such discretion, it would be pointless to conduct an analysis of alternatives

-- the "heart" of an EA or an EIS. *See* 40 C.F.R. § 1502.14. Accordingly, the Tenth Circuit has held that "NEPA compliance is unnecessary where the agency action at issue involves little or no discretion on the part of the agency." *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1262 (10th Cir. 2001) (citing cases).

FSIS explained in its decision granting inspection at the Valley Meat facility that granting such an inspection is not subject to the requirements of NEPA:

> When a federal agency's action is merely ministerial as opposed to discretionary and the agency lacks discretion to affect the outcome of its action, there is no . . . trigger[for] NEPA requirements. A grant of federal inspection under the FMIA is purely ministerial because, if a commercial horse slaughter plant meets all of the statutory and regulatory requirements for receiving a grant of federal inspection services, FSIS has no discretion or authority under the FMIA to deny the grant on other grounds or to consider and choose among alternative ways to achieve the agency's statutory objectives. Therefore, a grant of federal inspection services under the FMIA is not . . . subject to NEPA requirements.

ECF No. 22-4 at pdf 6.[6] As a result of this limited authority, "FSIS inspectors will not have any authority or control over the day-to-day operations of the [Valley Meat] slaughter plant save to the degree necessary to achieve the agency's mission to protect public health by ensuring that horse meat intended for use as human food is safe to eat and properly labeled." *Id.*

FSIS has reasonably determined that its authority and discretion under the FMIA are limited.[7] Through the FMIA, Congress has directed that, "[f]or the purpose of preventing the

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[6] FSIS proffered this same explanation in its decision approving a grant of inspection for the Responsible Transportation facility. ECF No. 22-5 at pdf 4-5.

[7] A federal agency's interpretation of its authorities and its determination of whether NEPA applies to its actions are entitled to judicial deference. *See, e.g.*, *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984) (holding that judicial review of an administrative agency's construction of the statutes that it administers is limited and deferential); *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1070 (9th Cir. 2002) ("An agency's threshold decision that certain activities are not subject to NEPA is reviewed for reasonableness.") (citation omitted). "As the Supreme Court observed in *Marsh*, 'the difference between the "arbitrary and capricious" and "reasonableness" standards is not of great pragmatic consequence.'" *Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992) (quoting *Marsh*, 490 U.S. at 377-78 n.23).

use in commerce of meat and meat food products which are adulterated," FSIS "*shall* cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in commerce," and that "when so slaughtered the carcasses of said amenable species *shall* be subject to a careful examination and inspection. . . ." 21 U.S.C. § 603(a) (emphasis added). Likewise, "[f]or the purpose of preventing the inhumane slaughtering of livestock," FSIS "*shall* cause to be made, by inspectors appointed for that purpose, an examination and inspection of the method by which amenable species are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under this chapter." 21 U.S.C. § 603(b) (emphasis added). The FMIA further requires FSIS to make post-mortem inspections and to mark "carcasses and parts thereof" of animals not adulterated as "Inspected and passed" and those that are adulterated to be marked "Inspected and condemned." 21 U.S.C. § 604.

In short, the FMIA *requires* that FSIS grant inspections to facilities that meet applicable humane handling and food safety requirements. The FMIA does not give FSIS discretion to deny a grant of inspection on environmental grounds, to choose among alternatives in order to minimize environmental impacts, or to condition a grant of inspection on the mitigation of environmental impacts.[8] Under the FMIA, FSIS is under a mandatory duty to grant inspections to facilities that meet the requirements of the FMIA. FSIS lacks discretion to deny or condition a

[8] In *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 671-72 (2007), the Supreme Court held that under the ESA, which like NEPA applies to only discretionary agency actions, the fact that a federal agency may exercise some "judgment" in determining whether an applicant meets statutory criteria does not grant the federal agency discretion "to add another entirely separate prerequisite to that list" and thus does not authorize the agency to consider the protection of threatened or endangered species when evaluating the application.

grant of inspection based on a consideration of environmental impacts, and NEPA does not apply.

In accordance with the FMIA, USDA and FSIS have promulgated detailed regulations governing the slaughter of all amenable species, including equines, which must be subject to inspection under the FMIA. *See* 9 C.F.R. § 300.1 through § 500.7. Consistent with the limited authority and jurisdiction granted to FSIS under the FMIA, these regulations focus on ensuring that animals are slaughtered humanely and that the meat products are unadulterated. *See, e.g.*, 9 C.F.R. §305.3 ("Inspection shall not be inaugurated if an establishment is not in sanitary condition. . . ."). Pursuant to the regulations, FSIS may take only one of two actions on an application for a grant of inspection: 1) grant the application if the facility meets the requirements of the FMIA and its implementing regulations, or 2) deny the application if the facility does not meet the requirements. *See* 9 C.F.R. § 304.2(b) ("The Administrator [of FSIS] is authorized to grant inspection *upon his determination* that the applicant and the establishment are eligible therefor and to refuse to grant inspection at any establishment *if he determines* that it does not meet the requirements of this part or the regulations in Parts 305, 307, and Part 416, §§ 416.1 through 416.6 of this chapter or that the applicant has not received approval of labeling and containers to be used at the establishment as required by the regulations in Parts 316 and 317.") (emphasis added). FSIS is not authorized to deny the application (or to condition the granting of the application) based on a consideration and weighing of potential environmental impacts from the operation of the facility.

FSIS's authority and discretion are narrowly circumscribed by the FMIA, and it is well settled that NEPA does not enlarge that discretion.[9] Because the FMIA limits the discretion of

[9] *See, e.g., S. Coast Air Quality Mgmt. Dist. v. F.E.R.C.*, 621 F.3d 1085, 1092 (9th Cir. 2010) ("NEPA may not be used to broaden [a federal agency's] congressionally-limited role.");

FSIS and mandates approval of grants of inspection for facilities meeting the FMIA eligibility requirements, environmental considerations pursuant to a NEPA analysis could not have changed FSIS's decision. As the Supreme Court held in *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004), "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect," and the agency need not consider such effects "when determining whether its action is a 'major Federal action'" for purposes of NEPA. *See also id.* at 769 ("It would not . . . satisfy NEPA's 'rule of reason' to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform.").

Plaintiffs will argue that the court in *Humane Society of the United States v. Johanns*, 520 F. Supp. 2d 8 (D.D.C. 2007), has already held that FSIS's inspections of horse slaughter facilities are subject to NEPA review. But *Johanns* is easily distinguishable. At issue in *Johanns* was the Interim Final Rule that FSIS promulgated to allow horse slaughter facilities to obtain and pay for FSIS inspections on a "fee-for-service" basis during the pendency of Congress's funding moratorium for such inspections. *Id.* at 13. The Interim Final Rule, however, was not adopted under mandatory requirements of the FMIA but was, according to the court, "an entirely new regulatory framework for [FSIS's] ante-mortem inspections," *id.* at 28, promulgated under the authority of the Agricultural Marketing Act ("AMA"), 7 U.S.C. § 1621. *Johanns*, 520 F. Supp. 2d at 13. Thus, while the *Johanns* court noted FSIS's lack of discretion under the FMIA, the court held that "promulgation of the Interim Final Rule was within [FSIS's] discretion" because FSIS was not "required" to promulgate the Rule under the AMA. *Id.* at 27. Thus, the court

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Natural Res. Def. Council, Inc. v. U.S. EPA, 822 F.2d 104, 129 (D.C. Cir. 1987) ("NEPA, as a procedural device, does not work a broadening of the agency's substantive powers."); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1983) ("[NEPA] does not expand the jurisdiction of an agency beyond that set forth in its organic statute.").

concluded, *Public Citizen* was distinguishable since the Interim Final Rule was "the 'legally relevant cause' of the environmental effects of the horse slaughter facilities after the FY 2006 Amendment [halting federal funding for inspections under the FMIA] went into effect." *Id.* Thus, in contrast to FSIS's nondiscretionary duty to grant inspections at qualifying facilities here as dictated by Congress through the FMIA, the *Johanns* court held that NEPA applied to FSIS's discretionary decision under the AMA to allow horse slaughter facilities to operate. *Id.*

Because the FMIA does not afford FSIS such discretion here, an EIS would not have been able to meaningfully inform or affect FSIS's grants of inspections for the Valley Meat and Responsible Transportation facilities, and FSIS reasonably and correctly concluded that NEPA did not apply. *See, e.g., Sac & Fox Nation*, 240 F.3d at 1262-63 (holding that a federal agency reasonably concluded that NEPA did not apply to its decision because a NEPA analysis would have been "pointless" since the analysis could not have had an impact on the decision as a result of the agency's lack of discretion). Plaintiffs' inability to succeed on the merits of their NEPA claims is fatal to their request for a preliminary injunction.

B. Even If NEPA Applied, FSIS Properly Found That Its Actions Were Categorically Excluded From Further NEPA Review

Even if NEPA did apply for FSIS's grants of inspection for the Valley Meat and Responsible Transportation facilities, Plaintiffs still would have no likelihood of success on the merits of their NEPA claims. FSIS satisfied any NEPA obligations by assessing the relevant potential environmental impacts in accordance with USDA's published NEPA regulations. Pursuant to these regulations:

> The USDA agencies and agency units listed in paragraph (b) of this section conduct programs and activities that have been found to have no individual or cumulative effect on the human environment. The USDA agencies and agency units listed in paragraph (b) of this section are excluded from the requirements of preparing procedures to implement NEPA. Actions of USDA agencies and

> agency units listed in paragraph (b) of this section 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 CFR § 1b.4(a). FSIS is one of the USDA agencies expressly identified for coverage under this categorical exclusion. *See id.* § 1b.4(b)(6) (listing "Food Safety and Inspection Service").

Although FSIS in the first instance determined that NEPA did not apply to its grant of inspection for Valley Meat, FSIS invoked this categorical exclusion under the NEPA process and conducted a thorough assessment to ensure that it applied. *See* ECF No. 22-4 at pdf 5-8; ECF No. 22-5 at pdf 4-7. "Once an agency establishes categorical exclusions, its decision to classify a proposed action as falling within a particular categorical exclusion will be set aside only if a court determines that the decision was arbitrary and capricious." *Citizens' Comm.* 297 F.3d at 1023 (citations omitted). "When reviewing an agency's interpretation and application of its categorical exclusions under the arbitrary and capricious standard, courts are deferential." *Id.* (footnote and citations omitted).

In the CE assessments for Valley Meat and Responsible Transportation, FSIS examined the potential impacts from operation of these facilities on environmental and other resources to ensure that there were no unique or extraordinary circumstances that would render the CE inapplicable. *See* ECF No. 22-4 at pdf 8-13; ECF No. 22-5 at pdf 6-10. For instance, FSIS's CE for Valley Meat specifically assessed Plaintiffs' central claim that Valley Meat operations will cause significant public health risks and environmental impacts because horses are treated with pharmaceuticals and other chemicals that are not intended for use in animals that are destined for human consumption. *See* Pls. PI Br., ECF No. 16-1 at 16-20. As explained in the CE for Valley Meat, FSIS will screen meat produced at the facility to ensure that it does not contain any such drug residues before it enters the chain of commerce. ECF No. 22-4 at pdf 8. Any meat that is

found to contain such residues will be marked "condemned" and sent to a rendering facility, "thereby ensuring that it endangers neither public health and safety nor the local environment." *Id.* Because of this screening process, in addition to the imposition of federal, State, and local laws regulating Valley Meat's operations, FSIS reasonably concluded that "commercial horse slaughter at Valley Meat has no more potential to have a significant impact on public health and safety than did the commercial slaughter of cattle, pigs, sheep, and goats that preceded it." *Id.* From an environmental impact standpoint, there is nothing unique or extraordinary about the proposed operations at Valley Meat.[10] Indeed, if evidence suggests a higher incidence of drug residue in equine carcasses than was previously observed prior to the congressional ban on equine slaughter inspection, FSIS has well-defined procedures for progressively and rapidly increasing the frequency of sampling healthy appearing equines, even up to 100 percent.

Plaintiffs' argument that horse slaughter operations occurring under a grant of inspection by FSIS may significantly affect the environment, Pls. PI Br. at 14-23, is seriously flawed, both legally and factually. In making this argument, Plaintiffs rely heavily on their petition to have FSIS initiate a rulemaking that would declare that any horse offered for slaughter for human consumption must be declared as "U.S. CONDEMNED" unless it is accompanied by full medical records since birth and unless it is individually tested for residue of all potentially dangerous substances. *See* Pls. PI Br. at 1 (citing Exhibit 1 to the Decl. of Bruce Wagman, ECF Nos. 8-12). On June 28, 2013, FSIS issued a detailed response denying Plaintiffs' petition because FSIS found "no merit in the assertion that all meat and meat food products from a horse without a proven lifetime history of all substances administered to it are adulterated under the FMIA." Exhibit C at 1.

[10] FSIS likewise concluded that there is nothing unique or extraordinary about the proposed operations at Responsible Transportation. ECF No. 22-5.

Plaintiffs' conclusory assertion, for instance, that "virtually every American horse" has been administered "most" of the drugs that "federal agencies have gone so far as to expressly ban" for use in horses destined for slaughter and human consumption, and thus will be present in these horses at the time of slaughter, Pls. PI Br. at 16, is demonstrably false. As FSIS explained, the fact that substances marked "Do not use in horses intended for human consumption" may have been administered to a horse during its lifetime does not mean that those substances remain in the animal at the time of slaughter. "Residues do not remain in animals forever; they are eliminated from the body over time," because they are "excreted from the animal's system . . . eventually leaving no detectable residue." Exhibit C at 2. During FSIS's extensive testing of thousands of horses in slaughter facilities from 1997 to 2006, "the number of positive results for each class of drug was exceedingly low, rarely exceeding more than 1 per year for all drug classes [including phenylbutazone] except antibiotics." Engeljohn Decl., Exhibit A ¶ 17. Moreover, "FSIS fully protects consumers from harm by enforcing a zero tolerance (*i.e.*, no detectable levels permitted) policy for substances in horsemeat" for which FDA and EPA have not established tolerance levels, and "FSIS condemns the entire carcass of an animal that tests positive for that substance and prohibits its use for human food." Exhibit C at 2. Thus, the central premise of Plaintiffs'NEPA argument – that virtually every horse that enters a slaughter facility will be tainted with dangerous drugs and other dangerous chemicals that may enter the environment – is squarely at odds with the science, evidence, and expert opinion and practice.

Plaintiffs' assertion that "USDA's new residue testing plan requires testing only 4 of each 100 or more horses slaughtered, so that ninety-six per cent of the byproducts of slaughtered horses will flow into the local groundwater and waterways . . ." Pls. PI Br. at 19, is similarly flawed and grossly misapprehends the process at the slaughter facilities. Under the agency's

directive, FSIS inspectors will sample "approximately a minimum of four to ten percent of the number of healthy-appearing equines slaughtered each slaughter shift," and "may increase the frequency of residue testing, up to 100%, based on the establishment's compliance history." Engeljohn Decl., Exhibit A ¶ 16. In addition to this random sampling of animals that appear healthy, the inspectors will "sample and test *every* equine when ante-mortem or post-mortem findings suggest an increased likelihood of recent drug treatment." *Id.* (emphasis added). Importantly, regardless of whether an animal has been tested, its inedible "byproducts," including blood, fecally contaminated meat, and diseased tissue will not flow into water systems. For example, at the Valley Meat facility, the inedible portions of all animals slaughtered will be denatured to prevent possible human use and placed in specially-marked containers identified for inedible product and sent to an off-site rendering facility for appropriate destruction. *Id.* ¶ 24. Contrary to Plaintiffs' assertions, Pls. PI Br. at 4-5, blood and other inedible byproducts will not be placed in the septic or lagoon system at the facilities and will not enter the environment. Engeljohn Decl., Exhibit A ¶ 24.[11]

In addition to the serious underlying factual flaws and exaggerations such as those discussed above, Plaintiffs' attempted application of the NEPA is laden with legal errors. For example, Plaintiffs argue at length that NEPA review is required because of the "cumulative impacts" of FSIS's grants of inspections for horse slaughter facilities. But it is well-settled that the cumulative effects analysis required by 40 C.F.R. §1508.7 need not be performed when a

[11] Plaintiffs' exaggerated complaints about Valley Meat's alleged lack of compliance with New Mexico's composting rules when it was a cattle facility and assertions that those practices may result in impacts to the environment, Pls. PI Br. at 6-7, 20-21, are misplaced. Valley Meat took corrective actions, New Mexico terminated its enforcement action, and Valley Meat does not presently have a composting permit but has contracted with a rendering facility for disposal of the solid waste materials, including the blood and any fecally contaminated or diseased tissue trimmed off the carcass during the slaughter operation, as described above. Engeljohn Decl. , Exhibit A ¶ 24.

federal agency invokes a CE. *See, e.g., Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 741 (10th Cir. 2006) ("By definition, . . . a categorical exclusion does not create a significant environmental effect; consequently, the cumulative effects analysis required by an [EA] need not be performed" with a CE.); *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1096-97 (9th Cir. 2013) ("By its plain language . . . this regulation [for assessment of cumulative impacts] applies only to environmental impact statements," not the invocation of CEs.) (citing 40 C.F.R. § 1508.25). Indeed, requiring a federal agency to conduct a cumulative impacts analysis every time it applied a CE would be redundant and "inconsistent with the efficiencies that the abbreviated categorical exclusion process provides." *Id.* at 1097; *see also* 75 Fed. Reg. 75630 (CEQ statement explaining that the documentation for applying a CE should be "as concise as possible to avoid unnecessary delays and administrative burdens for projects and programs").

In contrast to Plaintiffs' obviously flawed arguments about the potential effects of horse slaughter activities on the environment, FSIS reasonably and rationally invoked USDA's CE for its grants of inspection at the Valley Meat and Responsible Transportation facilities, relying on the technical opinions of its qualified experts to determine that unique and extraordinary circumstances did not exist that would indicate the potential for significant environmental impacts, as discussed above. These determinations are entitled to substantial deference. "[A]n agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378. Because FSIS properly invoked its categorical exclusion, it was not required to conduct a more detailed NEPA analysis than it did. Thus, even if NEPA applies to these grants of inspection, Plaintiffs cannot prevail on the merits of their claims.

C. Plaintiffs' Claims That FSIS Has Adopted A "National Program Of Horse Slaughter" Or A "New Residue Testing Plan" Subject To NEPA Requirements Are Without Merit

In a recent filing, Plaintiffs attempt to reframe one of their NEPA claims as "whether environmental review should be undertaken before a national program of horse slaughter starts or continues." ECF No. 41 at 6. There is no such claim in Plaintiffs' Complaint, which only raises claims that Federal Defendants violated NEPA by allegedly "granting inspection to a horse slaughter facility" and by establishing "a drug residue testing plan for horse slaughter" without first conducting environmental reviews. ECF No. 1 ¶¶ 162, 165. Because Plaintiffs' Complaint has not put Federal Defendants on notice of an alleged claim that Federal Defendants violated NEPA by failing to conduct an environmental review of some "national program of horse slaughter," such a claim cannot be the basis for a preliminary injunction.

Even if this claim were properly before the Court, it is without merit. Plaintiffs do not identify any decision in which FSIS adopted a "national program of horse slaughter;" nor can they, because no such decision exists. FSIS is doing nothing more than implementing its nondiscretionary statutory obligations under the FMIA for *all* amenable species, by granting inspections for qualifying facilities on a case-by-case basis. As noted above, NEPA claims may be reviewed only pursuant to the APA. *Utah*, 137 F.3d at 1203. In turn, the APA limits judicial review to "agency actions," and those actions must be "final." 5 U.S.C. §§ 702, 704. Plaintiffs cannot identify a "final agency action" adopting a "national program of horse slaughter," and any claim attempting to challenge this "program" would not be cognizable under the APA.

In *Lujan v. National Wildlife Federation*, the Supreme Court reversed the lower courts' grant of a blanket injunction suspending the Bureau of Land Management's ("BLM's") "land withdrawal review program." 497 U.S. 871, 879-80, 900 (1990). That withdrawal program

constituted BLM's process of deciding whether hundreds of individual public land withdrawals should be continued or terminated. As here, the plaintiffs alleged that the agency's failure to prepare an EIS for the "program" violated NEPA. *Id.* at 879.

In rejecting this claim, the Supreme Court stated:

> [BLM's "land withdrawal program"] is not an "agency action" within the meaning of § 702 [of the APA], much less a "final agency action" within the meaning of § 704. The term "land withdrawal review program" * * * does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which [the federal agencies] have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by [law].

Id. at 890. Thus, even though BLM was taking specific actions under its "land withdrawal program," the Supreme Court held that "it is at least entirely certain that the flaws in the entire 'program' -- consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well -- cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members." *Id.* at 892-93.

The reasoning in *Lujan* applies squarely to Plaintiffs' present attempt to obtain a blanket injunction against the purported "national program of horse slaughter." Like the "land withdrawal program" in *Lujan*, FSIS's "program" is not a discrete final agency action, but rather a collection of individual decisions in which the agency determines whether facilities seeking to slaughter amenable species for human consumption qualify for federal inspections. As in *Lujan*, this "program" was not created by FSIS but by Congress in enacting the FMIA, and does not refer to a single FSIS decision, but a constantly changing set of decisions granting, denying, suspending, and revoking inspections across the country, not only for horses, but for cattle,

sheep, swine, goats, mules, and other equines as well. 21 U.S.C. § 601(w). Plaintiffs "cannot demand a general judicial review of [an agency's] day to day operations," but instead must challenge an "identifiable action or event." *Lujan*, 497 U.S. at 899. Like the "land withdrawal program" in *Lujan*, the purported "national program of horse slaughter" is not a discrete final agency action subject to judicial review under the APA. Therefore, any claim that Federal Defendants must prepare an EIS for this "program" must be rejected.

Plaintiffs' claim that Federal Defendants violated NEPA "[b]y 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," ECF No. 1 ¶ 165, fares no better. Again, although Plaintiffs' papers are not entirely clear in identifying what they contend is this "drug residue testing plan for horse slaughter," it appears that Plaintiffs may be challenging FSIS Directive 6130.1, ECF No. 22-3. As discussed above, this Directive provides "instructions" to FSIS inspectors "on how to perform ante-mortem inspection of equines before slaughter and post mortem inspection of equine carcasses and parts after slaughter." *Id*. at 1.[12] While the Directive provides for intensified random drug residue testing of healthy-appearing equines, *id.* at 6-7, the method for testing is the same as testing for other types of livestock. Engeljohn Decl., Exhibit A ¶¶ 8-10; 14-16. The Directive instructs inspectors to test a *minimum* of four normal-appearing equine from every lot of 100 or more animals, but the actual number is left to the judgment of the inspector and may be far more than that. ECF No. 22-3 at 7.

[12] Directive 6130.1 specifically states that inspection program personnel are "to use the existing residue policies . . . in FSIS Directive 10,800.1, *Procedures For Residue Sampling, Testing, and Other Responsibilities for the National Residue Program* . . . ." ECF No. 22-3 at pdf 7. Directive 10,800.1 sets forth well-established residue testing procedures that FSIS follows at all federally inspected slaughter facilities for all amenable species, not just horses. FSIS is not creating a "new" drug residue testing program specific to horses; rather, it is incorporating an existing residue testing program used for all amenable species into Directive 6130.1, which deals exclusively with horses.

Plaintiffs' attempted challenge to the Directive also fails under *Lujan*, as well as the Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997). In *Bennett*, the Supreme Court established that two conditions must be satisfied for agency action to be "final" for purposes of the APA, 5 U.S.C. § 704. First, the action "must mark the 'consummation' of the agency's decisionmaking process,' and not be 'of a merely tentative or interlocutory nature.'" *Bennett*, 520 U.S. at 177-78. Second, the action "must be one from which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178. Where either condition is not met, there is no final agency action subject to judicial review.

FSIS's Directive is an internal agency instructional document that provides guidance on how FSIS inspectors are to meet their legal obligations under the FMIA and its implementing regulations in their day-to-day inspection activities at the slaughter facilities. *See generally* ECF No. 22-3 (providing detailed summaries of how inspectors should conduct their activities, citing a litany of statutory and regulatory requirements under the FMIA, as well as numerous other Directives). Such internal agency guidance documents are not binding on the agency, nor legally enforceable in court. *See, e.g., Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981) (holding that federal agency's internal instruction manual "is not a regulation[,] has no legal force, and it does not bind the [federal agency]"); *W. Radio Services Co., Inc. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996) (holding that the USDA Forest Service's Manual and Handbook governing the actions of agency employees "do not have independent force and effect of law").

Thus, the FSIS Directive fails both tests for judicial review under the APA. It does not constitute an "agency action" pursuant to 5 U.S.C. § 702 because it merely guides FSIS inspectors' day-to-day activities. *See Lujan*, 497 U.S. at 899 (holding that plaintiffs "cannot demand a general judicial review of [a federal agency's] day-to-day activities"). Nor does the

Directive determine any rights or obligations or have any legal consequences, as required for "final agency action" pursuant to 5 U.S.C. § 704. *See Bennett*, 520 U.S. at 178.

Even if the FSIS Directive were subject to judicial review under the APA, it is not an action that would trigger any obligation under NEPA. The Directive is not the "legally relevant cause" of any effect on the environment, as it must be to trigger review under NEPA. *See Public Citizen*, 541 U.S. at 770. The Directive does not pertain to the issuance of a grant of inspection in the first instance, and only informs how the inspectors should satisfy their obligations under the FMIA and its implementing regulations *after* the grant is already issued. And, even in the absence of the Directive, inspectors would carry out their duties in accordance with existing regulations and directives. The Directive is not a legal prerequisite to inspections at facilities such as Valley Meat, and thus even if the Court were to set the Directive aside, there is no basis in law for the inspections to be enjoined as a result. Because inspections and horse slaughter operations at the Valley Meat facility can occur with or without the Directive, that Directive cannot be the legal cause of any environmental impacts under NEPA.

The FSIS Directive is not subject to judicial review under the APA and, in any event, does not trigger any obligation for review under NEPA. Therefore, Plaintiffs' "drug residue testing plan" NEPA claim will fail along with Plaintiffs' other NEPA claims. Plaintiffs cannot meet the likelihood of success on the merits requirement for a preliminary injunction to issue.

II. PLAINTIFFS CANNOT DEMONSTRATE IRREPARABLE INJURY

To succeed on their motion, Plaintiffs must show that they are likely to suffer irreparable harm in the absence of preliminary relief. *Winter*, 555 U.S. at 374. Under this standard, "[i]t is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction

should issue. . . ." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010) (emphasis in original). An injunction may issue only if it is "needed to guard against any present or imminent risk of likely irreparable harm." *Id.* at 2760. And, importantly, Plaintiffs must show that these irreparable injuries are "likely to occur before the district court rules on the merits." *Greater Yellowstone*, 321 F.3d at 1260.

To constitute irreparable injury, "an injury must be certain, great, actual and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (citation and internal quotation marks omitted). "[T]he party seeking injunctive relief must [also] show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id*. (quotation omitted; emphasis in original). This requires a plaintiff to demonstrate by specific facts that there is a credible threat of immediate and irreparable harm. Fed. R. Civ. P. 65(b)(1)(A). Injury that is merely speculative in nature does not constitute irreparable harm sufficient to warrant granting a preliminary injunction. *Heideman*, 348 F.3d at 1189. *See also Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002) ("Plaintiffs must still make a specific showing that the environmental harm results in irreparable injury to their specific environmental interests.").

Contrary to Plaintiffs' assertion, Pls. PI Br. at 27, the Supreme Court has rejected a presumption of irreparable injury in environmental cases. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545-46 (1987). The gravity of the environmental harm is instead incorporated into the hardship balancing test, and thus no presumption of harm is necessary. *Id*. at 545.

Plaintiffs have failed to establish any non-speculative, imminent, irreparable injury to their concrete interests.[13] Many of Plaintiffs' allegations of irreparable injury are based on

[13] Plaintiffs fail to offer any declarations regarding irreparable injury from equine slaughter operations in Iowa.

unsubstantiated fears of "contamination" of local waters or of fish living in those waters. *See, e.g.*, Pls. PI Br. at 25-27; Trahan Decl. ¶ 8 ("fear" of eating fish from local waters); *id*. ¶ 9 ("worried" about discharges into local waters); Gross Decl. ¶ 13 ("worried" about discharges into local waters); Seper Decl. ¶ 6 ("fear" of eating fish from local waters). Importantly, Plaintiffs have not presented any expert scientific evidence of contamination in local waters or in other meat products or any reasonable expectation that such contamination will occur. Plaintiffs' declarations are based wholly on conjecture and apprehension that contamination might occur.[14] Plaintiffs' vague, unsupported and speculative fears are inadequate to establish irreparable harm.

On the other hand, FSIS has set forth detailed regulations and directives for the inspection, testing, handling and labeling of livestock, including equines. These regulations and directives are based on the Agency's extensive scientific expertise and experience in carrying out its congressionally-mandated duties. Specifically, the drug residue testing program for all livestock, including equines, assesses many types of drug residues, including those of potential public health concern. Engeljohn Decl., Exhibit A ¶ 8; *see also id*. ¶ 17 (describing chart showing classes of drugs for which FSIS has previously tested in equines). For equines, FSIS "will enforce a zero tolerance standard." *Id* ¶ 15. That is, any detection of a drug residue will result in the carcass being condemned. *Id*. ¶¶ 15-18. FSIS inspectors will test four in one hundred animals, and, under certain circumstances, may test up to one hundred percent of

[14] Courts have also long held that unfounded fears are insufficient to establish Article III standing, and therefore, are insufficient to establish irreparable harm. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013) (plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm. . . ."); *Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983) (plaintiff's "subjective apprehensions" that allegedly unlawful conduct would occur again were not enough to support Article III standing); *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011) ("Of course, as our decision illustrates, a plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm necessary to obtain it.").

equines to be slaughtered. *Id*. ¶ 16. Thus, it is clear that Plaintiffs' fears are unfounded and do not support a finding of irreparable injury.

Plaintiffs allege that they will be harmed because they "will be unable to continue their personal and family recreational activities of fishing and camping in and on waterways that *may* be tainted by the discharge of contaminated horse slaughter byproducts." Pls. PI Br. at 26 (emphasis added). Plaintiffs claim that they recreate in lakes and streams "in proximity to and downstream from Valley Meat," and that "any contamination from [Valley Meat] will eventually get into the lakes and streams" used by Plaintiffs. *Id*. (citing Trahan Decl. ¶¶ 6-7). As discussed above, Plaintiffs' allegations of contamination are mere conjecture. Plaintiffs fail to offer any expert, scientific evidence that the horse slaughter facilities at issue may "contaminate" local waters, that "contamination" from facilities might enter the water supply, and if this occurred, that any "contamination" would reach the unidentified "lakes and streams" at which Plaintiffs recreate.

Moreover, as explained in the Declaration of Daniel Engeljohn, Ph.D., the Valley Meat and Responsible Transportation facilities will not discharge blood, inedible and other waste products of commercial horse slaughter into the septic tanks and lagoon systems located on those properties, nor into municipal wastewater/sewer systems, or local waterways. Engeljohn Decl. , Exhibit A ¶ 20. At bottom, Plaintiffs' argument is that horses slaughtered *might* be contaminated, that this contamination *might* reach nearby waters, and that this contamination *might* enter those unidentified lakes and streams at which Plaintiffs *might* be recreating. These attenuated, speculative allegations of harm are insufficient to establish irreparable injury. To constitute irreparable injury, "an injury must be certain, great, actual and not theoretical." *Heideman*, 348 F.3d at 1189 (citation and internal quotation marks omitted). *See also RoDa*

Drilling Co., 552 F.3d at 1210 ("Purely speculative harm will not suffice"); *Greater Yellowstone*, 321 F.3d at 1258 (plaintiff must show "a significant risk of irreparable harm" to obtain a preliminary injunction). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

Also insufficient to demonstrate irreparable harm is Plaintiffs' allegation that the "possibility" of contaminated runoff into local waterways "threaten[s] the Plaintiffs' health and their communities." Pls. PI Br. at 26. In support, Plaintiffs cite two cases involving the denial of health benefits by insurance providers, but in each of those cases the plaintiffs offered "substantial evidence" that the insurance providers' denial of health benefits was likely to cause serious medical issues. *See Bowen v. Consol. Elec. Distrib., Inc. Emp. Welfare Benefit Plan*, 461 F. Supp. 2d 1179, 1183-84 (C.D. Cal. 2006); *M.R. v. Dreyfus*, 697 F.3d 706, 726 (9th Cir. 2012). By contrast here, Plaintiffs have not presented any evidence that operations at these horse slaughter facilities may cause contamination, let alone "substantial evidence." Plaintiffs have also failed to present evidence that operations may cause health problems. *See* Pls. PI Br. at 26, citing Trahan Decl. ¶¶ 7-11. These vague allegations of harm are insufficient to make the "clear showing" and "substantial proof" that an injunction is necessary, *Mazurek*, 520 U.S. at 972. Plaintiffs' speculative allegations as to health impacts are insufficient to demonstrate irreparable harm.

Plaintiffs allege they will be irreparably harmed because "[t]hey will be subjected to regular viewing of horses going to slaughter." Pls. PI Br. at 25. As an initial matter, Plaintiffs are already subjected to "regular viewing of horses going to slaughter," *id.*, because thousands of

horses are shipped to Mexico and Canada every year. Government Accountability Office ("GAO") Report 11-228, Exhibit D, Pt. 1 at pdf 19 (the number of U.S. horses exported to Canada and Mexico for the purposes of commercial horse slaughter increased from approximately 33,000 in 2006 to approximately 138,000 in 2010). Viewing horses awaiting auction will not change this trend, even if the Court grants Plaintiffs' motion. *Id*.

To support their argument that Plaintiffs will be harmed by viewing horses going to slaughter, Plaintiffs rely on an unpublished decision from the District of Oregon that is easily distinguishable. Pls. PI Br. at 25 (citing *Humane Society of the U.S. v. Bryson*, No. 3:12-cv-642, 2012 WL 1952329, at *6 (D. Or. May 30, 2012)). There, the plaintiffs sued to prevent the lethal removal of certain California Sea Lions. *Id*. at *1. The court granted the plaintiffs' motion for preliminary injunction finding that the plaintiffs had established a likelihood that they would be irreparably harmed by the lethal removal of individual, specifically-identified California sea lions. *Id*. at *6. The court based this decision on the fact that the plaintiffs had alleged that they had "developed relationships" akin to relationships with family pets with individual Sea Lions that had been identified for removal. *Id*. Here, Plaintiffs do not make similar allegations about individual horses and do not aver that they have relationships with individual horses to be slaughtered. *See generally* Trahan, Smith, Gross and Cordova Declarations, ECF No. 13, Exhibits 20-23. Plaintiffs make only generalized allegations that they will suffer "emotional and aesthetic injury" from the knowledge that horses will be killed. Pls. PI Br. at 25. Thus, the *Bryson* case is inapposite.

Plaintiffs also cite *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 433 (D.C. Cir. 1998), to support their argument that they may be injured from viewing horses going to slaughter. Pls. PI Br. at 25. In *Glickman*, the court found that a plaintiff had Article III standing

-- not irreparable harm in the context of emergency relief -- to pursue a case involving inhumane conditions for animals at a game farm, holding that "[p]eople have a cognizable interest in viewing animals free from inhumane treatment." 154 F.3d at 433 (internal quotation marks and citation omitted). But as discussed above, allegations that Plaintiffs have standing are insufficient to demonstrate irreparable harm. Plaintiffs must do "more than merely allege imminent harm sufficient to establish standing. . . ." *Associated Gen. Contractors v. Coal. for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991). *See also Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012) ("the question here is not just whether [plaintiff] faces a concrete and imminent injury, but whether such an injury will be irreparable without the injunction"); *Ctr. for Food Safety*, 636 F.3d at 1171 n.6. Plaintiffs have not met this burden.

Plaintiffs' allegations that horse slaughter is "inherently inhumane" also do not show irreparable injury. Smith Decl. ¶ 11; Trahan Decl. ¶ 12; Gross Decl. ¶ 17; Cordova Decl. ¶ 9. Plaintiffs have offered no evidence to support these unfounded allegations. Moreover, Congress has enacted, and USDA vigorously enforces, statutes governing the humane treatment of horses during transportation to slaughter facilities and during the slaughter process. *See* The Humane Methods of Slaughter Act, 21 U.S.C. § 603(b); The Commercial Transportation of Equine for Slaughter Act, 7 U.S.C. §§ 1901-1907. Plaintiffs have failed to demonstrate irreparable harm.

Plaintiffs' allegations of harm due to odor emanating from the facilities also do not demonstrate irreparable injury.[15] Pls. PI Br. at 4; Seper Decl. ¶ 7; Gross Decl. ¶ 16. The Valley Meat facility is located in an area zoned for industrial use. ECF No. 22-4 at 3. Chaves County requires slaughter facilities to be in an industrial area far from residential areas to prevent

[15] To the extent Plaintiffs rely on events that occurred at the now-closed Dallas Crown and BelTex facilities in Texas and the Cavel facility in Illinois, Pls. PI Br. at 4, Seper Decl. ¶7; Sink Decl. ¶ 10, the Valley Meat and Responsible Transportation facilities will utilize waste water systems different from the systems used at the Dallas Crown, BelTex and Cavel facilities. *See* Engeljohn Decl., Exhibit A ¶ 20.

nuisances such as noise and odors. Chaves County, NM, Extraterritorial Zoning Ordinance Art. 14 (2005). The nearest neighbors to Valley Meat are located approximately one mile to the east and one mile to the west. ECF No. 22-4 at 4. Additionally, Valley Meat has existed as a slaughter facility since 1982, during which it has slaughtered cattle, sheep, goats, and hogs. *Id.* As discussed above, there are no appreciable differences between the commercial slaughter of equines and the commercial slaughter of other livestock. Thus, even assuming Plaintiffs' allegations regarding odors at the Valley Meat were accurate, these odors would be no different than odors at the facility for the past several years.[16] Moreover, this alleged inconvenience, even if accurate, would not constitute an injury that rises to the level of "serious or substantial," let alone "certain, great, actual and not theoretical." *Heideman*, 348 F.3d at 1189.

Plaintiffs' allegations regarding lost property values, Pls.' PI Br. at 4, lack any nexus to FSIS's actions or to Plaintiffs' claims in this case. Even assuming, *arguendo*, that FSIS's actions lowered property values, Plaintiffs' requested relief -- to remand the grants of inspection back to the Agency for further environmental review -- would not remedy this alleged injury. *Lee v. U.S. Air Force*, 354 F.3d 1229, 1241-42 (10th Cir. 2004) (Air Force need not consider in detail impacts to property values from overflights). In addition, as discussed above, Valley Meat has operated as a cattle slaughter facility since 1982. ECF No. 22-4 at 1. Plaintiffs have not presented any evidence that a switch to equine slaughter will alter property values in any way. Moreover, it is "well settled that simple economic loss" usually does not constitute irreparable harm as such losses are compensable by monetary damages. *Heideman*, 348 F.3d at 1189. Thus, this type of alleged injury does not constitute irreparable harm.

[16] In fact, because New Mexico has prohibited the composting of inedible livestock product on the property surrounding the Valley Meat facility, the odors from the equine slaughter operation are expected to be substantially less than had occurred in the past from the other livestock slaughter operations. There is no reason to presuppose that odors from equines are greater than that of other livestock.

Plaintiffs' assertions that they might suffer aesthetic injury because of the possibility of cross-contamination of beef with horse meat, ECF No. 16, Smith Decl. ¶¶ 7-8; Trahan Decl. ¶¶ 10-11; Gross Decl. ¶¶ 14-15, are speculative, remote, and lack any nexus to Plaintiffs' claims of environmental harms. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) ("injury must be both certain and great") (internal quotation marks and citation omitted). FSIS regulations require that establishments that slaughter equine species be completely separate from establishments that slaughter cattle, sheep, swine, or goats. 9 C.F.R. § 305.2(b). Additionally, as explained in the Engeljohn Declaration, Exhibit A ¶ 5, horse carcasses and meat food products produced under federal inspection must bear a unique inspection legend clearly identifying them as horse meat and all other containers of equine products produced under inspection must identify the species from which they are derived. 21 U.S.C. § 619; 9 C.F.R. §§ 312.3; 317.9; 327.26. Therefore, Plaintiffs' allegations of irreparable harm regarding cross-contamination with beef are nothing more than speculation.

Finally, Plaintiffs claim they are irreparably harmed because USDA "depriv[ed] them of their statutory right to participate in the NEPA review process." Pls. PI Br. at 24 n.24. The Court should not reach this question because USDA fully complied with its NEPA obligations, as explained above. *See Monsanto*, 130 S. Ct. 2757-58 (holding that even in cases where a NEPA violation has been found, "[a]n injunction should issue only if the traditional four-factor test is satisfied.") (quoting *Winter*, 555 U.S. at 32-34).

Plaintiffs' speculative concerns about possible future activities fail to provide "clear and unequivocal" evidence of irreparable harm. *RoDa Drilling Co.*, 552 F.3d at 1210; *SCFC*, 936 F.2d at 1098. Plaintiffs have not met their burden on this requirement. For this reason alone, the Court should deny Plaintiffs' motion.

III. THE BALANCE OF HARMS AND PUBLIC INTEREST DO NOT FAVOR A PRELIMINARY INJUNCTION

A preliminary injunction would be adverse to the public interest in FSIS carrying out congressionally-mandated federal inspections of the slaughter of equine species and would harm the slaughter establishments that cannot produce meat for human consumption and sell or distribute it in commerce without federal inspection. In contrast to Plaintiffs' failed showing of irreparable injury, these harms are real and concrete. Because Plaintiffs cannot meet their burden of showing that a preliminary injunction is both in the public interest and that there is a threat to the environment that outweighs the establishments' legitimate business interests, Plaintiffs cannot demonstrate that a preliminary injunction may issue.

A. A Preliminary Injunction Is Not In The Public Interest

Plaintiffs argue that a preliminary injunction is in the public interest because: 1) "the public interest is advanced by having NEPA carried out as intended by Congress;" and 2) a "majority" of Americans are opposed to horse slaughter. Pls. PI Br. at 28-29. Each of these arguments lacks merit. NEPA does not apply here because FSIS lacks discretion, but even if NEPA did apply, FSIS properly documented its decisions pursuant to a categorical exclusion in accordance with NEPA. The public has an interest in FSIS fulfilling its statutory mandate of providing federal inspections for facilities meeting the requirements of the FMIA. Plaintiffs have failed to demonstrate that the public interest favors injunctive relief.

The public interest standard is a separate consideration in determining whether to grant equitable relief. *RoDa Drilling*, 552 F.3d at 1208; *Amoco*, 480 U.S. at 545. A federal court must deny a preliminary injunction, even where irreparable injury to the movant exists, if the injunction is contrary to the public interest. *See Winter*, 555 U.S. at 22 (holding that even though plaintiffs showed a "near certainty" of irreparable injury to marine mammals resulting from the

Navy's use of mid-frequency active sonar, that harm was outweighed by the public interest in facilitating effective naval training exercises); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) ("[W]here an injunction is asked which will adversely affect a public interest . . . the court may in the public interest withhold relief . . . though the postponement may be burdensome to the plaintiff") (quoting *Yakus v. United States*, 321 U.S. 414, 440 (1944)).

Plaintiffs argue that an injunction is in the public interest because the results of one survey purportedly found that a "majority" of Americans are opposed to horse slaughter. Pls. PI Br. at 28-29. Public interest surveys are notoriously unreliable – turning on the wording of the questions presented, their context and how they are presented, and the bias of the organization behind the survey (here, the American Society for the Prevention of Cruelty to Animals). *Id*. at 3, 29. It is thus not surprising that Plaintiffs fail to offer any legal support that the public interest requirement for a preliminary injunction may be gauged by such surveys.

Instead, federal courts often look to acts of Congress to determine where the public interest lies. *See, e.g., Amoco*, 480 U.S. at 545-46. Here, the FMIA expressly covers equine species, 21 U.S.C. § 601(w), and mandates FSIS inspections of horse slaughter facilities that qualify under the FMIA. *Id.* § 603-04. Implementing those requirements satisfies the public interest prong. While Plaintiffs express confidence that Congress will enact new legislation banning horse slaughter, Pls. PI Br. at 6, until such legislation becomes law the current state of the law – and, hence, the public interest -- is that horse slaughter subject to FSIS inspections is both legal under the FMIA *and* funded by Congress.

Moreover, halting domestic equine slaughter for human consumption may result in unintended effects, as explained in GAO Report No. 11-228, "Horse Welfare: Action Needed to Address Unintended Consequences from Cessation of Domestic Slaughter." Exhibit D, Pts. 1, 2.

The GAO report found that after Congress defunded domestic horse slaughter inspections beginning in 2007, State, local and Tribal governments reported a sharp rise in investigations for horse neglect and abandonment. *Id*. Pt. 1 at pdf 24. The decline in horse welfare strained the resources of State, local and Tribal governments. *Id*. Horse rescue operations are at, or near, maximum capacity throughout the country, with some organizations taking on more horses than can be properly cared for. *Id*. Pt. 1 at pdf 25, Pt. 2 at pdf 3. Tribes in particular report increases in the abandonment of horses on their lands, exacerbating the overpopulation of horse herds on Tribal lands. *Id*. Pt. 1 at pdf 27. There may be as many as 30,000 abandoned horses on Tribal lands in the United States. *Id*. Domesticated horses abandoned on public lands generally have poor survival prospects and may introduce diseases to wild herds. *Id*. Finally, government officials noted "significant degradation" of public and Tribal lands due to overgrazing from large populations of wild horses. *Id*. GAO suggested that "Congress may wish to reconsider restrictions on the use of federal funds to inspect horses for slaughter." *Id*. Pt. 1at pdf 3.

There is a public interest in protecting horse welfare, preventing overgrazing, and lessening the burden of abandoned horses on tribal and public lands. *Weinberger*, 456 U.S. at 312-13 (holding that impairment of a public interest, "even temporarily," is grounds for denying an interlocutory injunction). The GAO report thus supports finding that it is in the public interest for the congressionally-approved program under the FMIA to move forward.

B. The Balance Of Harms Weighs Against Preliminary Injunctive Relief

In addition being adverse to the public interest as described above, any interim injunction will harm Valley Meat, Responsible Transportation, and other establishments that may qualify for grants of inspection under the FMIA during the pendency of the injunction. Because grants of inspections are required in order to produce meat for human consumption and for sale or

distribution in commerce, 21 U.S.C. §§ 603(a), 604, and because the slaughter and processing of amenable species for these purposes are unlawful pursuant the FMIA in the absence of federal inspections, *id.* § 610(c), Valley Meat and these other companies will be prohibited from operating their otherwise lawful and legitimate businesses during an injunction. While Federal Defendants defer to the establishments to present evidence of their specific harms from an injunction, it is clear that the concrete losses to the establishments' business interests easily outweigh Plaintiffs' speculative and unfounded claims of environmental injury from the slaughter of horses and other equines that will be carefully screened and processed under FSIS's rigorous inspection program. *See, e.g.*, *Amoco*, 480 U.S. at 545 (holding that the district court had properly denied a motion for preliminary injunction, because injury to the environment "was not at all probable" and outweighed by the economic investment of third parties relying on the governmental action challenged in the litigation); *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (considering harm to local economy and companies in balancing harms). As in *Amoco*, Plaintiffs have not met the balance of harms requirement for preliminary injunctive relief. Plaintiffs have failed to satisfy any of the equitable considerations required for preliminary injunctive relief, let alone all of them. Plaintiffs' motion should be denied.

IV. SHOULD THE COURT GRANT PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, THE COURT SHOULD IMPOSE A SECURITY BOND AS REQUIRED BY FEDERAL RULE OF CIVIL PROCEDURE 65(c)

If the Court concludes that Plaintiffs are entitled to emergency injunctive relief in the form of a preliminary injunction or temporary restraining order, the Court should require Plaintiffs to post a fully compensatory security bond in accordance with Federal Rule of Civil Procedure 65(c). This Rule provides, in relevant part:

> The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to

> pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained . . . .

Fed. R. Civ. P. 65(c). On its face, Rule 65(c) admits no exceptions; in other words, the bond is a condition of the injunction. Courts have affirmed the ongoing validity of the bond requirement. *See, e.g.*, *Novus Franchising, Inc. v. Oksendahl*, Nos. 07-1964, 07-1965, 2007 WL 2084143, at *6 (D. Minn. July 17, 2007) ("[Rule] 65(c) does not allow the parties to waive the bond-posting requirement"); *Midwest Gov't Sec., Inc. v. Brittenum & Assocs., Inc.*, No. 85c4373, 1985 WL 1268, at *1 (N.D. Ill. May 3, 1985).

There is no "public interest exception" to Rule 65(c); non-profit and environmental plaintiffs are not exempt from the bond requirement. *See, e.g.*, *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 457 (7th Cir. 2010) (rejecting plaintiffs' argument that non-profit entities should be exempt from the requirements of Rule 65(c) as "fl[ying] in the face of Rule 65(c)"). *See also Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005); *Utahns for Better Transp. v. U.S. Dep't of Transp*., Nos. 01-4216, 01-4220, 2001 WL 1739458 at *5 (10th Cir. Nov. 16, 2001). Absent extraordinary circumstances, a court errs in failing to grant a request for a bond. *Reinders Bros., Inc. v. Rain Bird E. Sales Corp.*, 627 F.2d 44, 54 (7th Cir. 1980).

Here, a bond is required and appropriate. If an interim injunction were to issue, Valley Meat, Responsible Transportation, and other establishments that are prevented from securing inspections from FSIS as a result of the injunction will undeniably be harmed because they will not be able to operate their facilities. Federal Defendants do not seek a bond to cover the United States' potential harm, but defer to the establishments that have been allowed to intervene in this litigation to demonstrate to the Court the amount of costs and damages they may sustain during the course of an injunction.

CONCLUSION

Plaintiffs have failed to meet their burden of demonstrating any of the four requirements necessary for this Court to grant the extraordinary and drastic remedy of a preliminary injunction or temporary restraining order. NEPA does not apply to FSIS's mandatory grants of inspection under the FMIA and, even if it did, FSIS reasonably determined that its grants of inspection fell within the Agency's CE in accordance with NEPA. Plaintiffs' proffer of fear and conjecture about harms to the environment does not establish irreparable injury, and certainly not injury of a magnitude to outweigh the harms to the legitimate business interests of Valley Meat, Responsible Transportation, and other establishments qualifying for federal inspections in accordance with the FMIA. Federal Defendants respectfully request that the Court deny Plaintiffs' July 2, 2013 "Motion for Temporary Restraining Order and Preliminary Injunction," ECF No. 16-1.

Respectfully submitted this 19th day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2013, I filed through the United States District Court ECF System the foregoing document to be served by CM/ECF electronic filing on all counsel of record.

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