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April 16, 2013

VIA FEDERAL EXPRESS

Ms. Sally Jewell
Secretary of the Interior
Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Ms. Noreen Walsh
Regional Director
U.S. Fish & Wildlife Service
Mountain-Prairie Region
134 Union Blvd.
Lakewood, CO 80228

Tom Vilsack
Secretary of Agriculture
Department of Agriculture
1400 Independence Ave., SW
Washington, D.C. 20250

Dr. Jenifer Beasley-McKean
District Manager
U.S. Department of Agriculture
District 40
1100 Commerce Street, Rm. 516
Dallas, TX 75242

**Re: Sixty-Day Notice of Intent to Sue the United States Department of
Agriculture Pursuant to the Endangered Species Act**

Dear Secretary Vilsack and Mses. Jewell, Walsh, and Dr. Beasley-McKean:

This letter provides notice that Front Range Equine Rescue ("FRER") and the Humane Society of the United States ("HSUS") intend to file suit pursuant to the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), to challenge any United States Department of Agriculture ("USDA") grant of inspection to Valley Meat Company without consulting with the Secretary of the Interior through the U.S. Fish and Wildlife Service ("FWS") concerning the impact of Valley Meat's horse slaughter operations on threatened and endangered species and their critical habitat in the vicinity of Valley Meat's slaughter facility in Roswell, New Mexico. The USDA is in violation of the ESA by failing to engage in that consultative process to ensure that its actions are not likely to jeopardize ESA-listed species or result in the destruction or adverse modification of critical habitat pursuant to 16 U.S.C. § 1536(a)(2).

I. Factual Background

Valley Meat is located at 3845 Cedarvale Road, Roswell, New Mexico 88203. Valley Meat, operated by Ricardo De Los Santos, plans to slaughter horses and export their meat for



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consumption. Valley Meat cannot legally slaughter horses until USDA grants its application for inspection.

The horse slaughtering process produces by-products and waste products that are a threat to the environment and to wildlife in the vicinity of the slaughter facility. Horse slaughtering produces the following: (1) manure, contents of rumen and intestines; (2) edible products, including offal and blood; (3) inedible products such as hair, bones, and feathers; (4) fat; and (5) large volumes of wastewater. Most slaughterhouse processes require the use of water, and the pollutants contained in wastewater can impact the environment when the wastewater runoff enters into groundwater, streams, and rivers. Horse slaughtering also requires large amounts of hot water and steam for sterilizing and cleaning. Generating the energy for heating water emits gasses, which contribute to air pollution.

Valley Meat is located near South Spring River, Pecos River, Bitter Lake Wildlife Refuge, and Bottomless Lakes State Park. Threatened and endangered species are found within the vicinity of Valley Meat, and their continued existence may be jeopardized by the horse slaughtering activities. Valley Meat's operations may also adversely affect or destroy the habitats of the threatened and endangered species. Affected species may include, but are not limited to, the Pecos bluntnose shiner, the Least tern, the Pecos Assiminea snail, Koster's springsnail, Roswell springsnail (collectively "snails"), and Noel's Amphipod.

The Least tern is a bird listed as endangered by FWS. The tern's breeding area is in the Bitter Lake refuge and some breeding may occur at the Bottomless Lakes. The tern and its habitat, both Bitter Lake and the Bottomless Lakes, could be impacted by air emissions and wastewater from the slaughterhouse.

The Pecos bluntnose shiner is a fish listed as threatened by FWS. In 2006, the FWS New Mexico Ecological Services Field Office issued a 5-year review of the shiner stating that the shiner's habitat is in the Pecos River—from the Fort Sumner Irrigation District Diversion Dam to Brantley Reservoir—and has been found near Valley Meat's location. FWS has issued a final rule designating as a critical habitat for the shiner large portions of the Pecos River, located both upstream and downstream from Valley Meat's location. The shiner and its critical habitat may be adversely affected by the introduction of wastewater from the slaughterhouse into the waterways.

Additionally, the snails and Noel's Amphipod may be affected by Valley Meat's activities. FWS issued a final rule designating critical habitat for the snails and Noel's



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Amphipod. The designated critical habitats are in close proximity to Valley Meat and are within Bitter Lake refuge and part of the Pecos River. The snails and Noel's Amphipod, and their critical habitats, may be adversely affected by any wastewater or air emissions.

Given the complexity of the environmental impacts of wastewater and air emissions, USDA should have completed a comprehensive consultation before granting Valley Meat's application for inspection.

II. Endangered Species Act

A. Legal Framework

The purpose of the ESA is to conserve the ecosystems on which threatened and endangered species depend, and to conserve and recover those species so that they no longer require the protections of the ESA. 16 U.S.C. § 1531(b); 16 U.S.C. § 1532(3) (defining conservation as "the use of all methods and procedures which are necessary to bring any endangered ... or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary"). Threatened and endangered species are to be "afforded the highest of priorities." *Tennessee Valley Authority v. Hill*, 47 U.S. 153, 174 (1978). Congress intended that endangered species are to be given priority even over "primary missions" of federal agencies. *Id.* at 185.

Section 7(a)(2) of the ESA requires federal agencies to ensure that any of their activities, including the granting of licenses and permits, will not jeopardize the continued existence of threatened or endangered species or adversely modify a species' critical habitat. *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 692 (1995) (citing 16 U.S.C. § 1536(a)(2)); 50 C.F.R. § 402.14(a). To accomplish this goal, the action agency must first determine whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species or designated or proposed critical habitat may be present, the action agency typically must prepare a "biological assessment" to determine whether the listed species *may* be affected by the proposed action. *Id.* The biological assessment must generally be completed within 180 days. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i). Action agencies must formally consult with FWS whenever their actions "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). Whether an action affects a listed species or habitat is determined by considering the direct, indirect, and cumulative effects of the agency action, after identifying the environmental baseline, and interrelated or interdependent acts. 50 C.F.R. § 402.02; see *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1991) (stating that the



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agency must consider incidental and indirect effects on the listed species). Agency "action" consists of "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States.... Examples include, but are not limited to ... (d) actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02. Section 7 applies to "actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Whether USDA grants an application to inspect is a matter of discretion. 9 C.F.R. § 304.2 (establishing that the Administrator of USDA's Food Safety Inspection Service has the authority to grant or deny an application for inspection).

Agencies must review their actions "*at the earliest possible time* to determine whether any action *may* affect a listed species or critical habitat." 50 C.F.R. § 402.14(a) (emphases added). If an action may affect a listed species or critical habitat, a formal consultation is required. *Id.* Section 7(b)(1)(A) requires that any consultation "with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated." 16 U.S.C. § 1536(b)(1)(A). The FWS and the action agency may agree to extend the time in which they are required to complete the consultation, but the extension cannot be for an undefined amount of time. *See* 50 C.F.R. § 402.14(e) ("[T]he Service and the Federal agency may mutually agree to extend the consultation for a specific period of time.").

B. The USDA Has Failed to Ensure that Granting Valley Meat's Application for Inspection Will Not Jeopardize the Continued Existence of Threatened and Endangered Species and the Destruction of Habitat of Such Species.

Under Section 7, USDA must ensure that its 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 [critical habitat]." 16 U.S.C. § 1536(a)(2). To facilitate compliance with this substantive mandate, Section 7 establishes the obligations for an agency to determine whether its action could affect listed species or critical habitat and to seek consultation with the FWS when the agency's actions may affect a listed species or critical habitat. *Id.* § 1536(a), (c). To the best of our knowledge, the USDA has never assessed whether its actions might affect listed species or their critical habitat, or requested a Section 7 consultation from FWS, and FWS has not completed a Section 7 consultation with respect to Valley Meat's current application. The USDA has failed to consult with FWS even though granting an application for inspection to Valley Meat may adversely affect several threatened and endangered species and critical habitats. Under these circumstances, the USDA is in violation of the substantive and procedural provisions of the ESA and its implementing regulations. 16 U.S.C. § 1536; 50 C.F.R. Part 400.



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III. Conclusion

If the USDA does not come into compliance with the ESA, upon expiration of the 60-day notice, FRER and HSUS intend to file suit against the USDA pursuant to this federal statute.

Very truly yours,

Bruce A. Wagman

BAW/ifi

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