UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' AUGUST 14, 2013 MOTION TO MODIFY TEMPORARY RESTRAINING ORDER AND OBJECTIONS ON BOND [ECF NO. 112]

Plaintiffs' August 14, 2013 "Motion to Modify the Temporary Restraining Order and Objection to Magistrate [Judge]'s Order Requiring Injunction Bond," ECF No. 112, is without merit and should be denied. The Court's August 2, 2013 temporary restraining order, ECF No. 94, appropriately included Valley Meat and Responsible Transportation in the scope of the injunction. Well-settled case law establishes that nonfederal parties are properly enjoined in National Environmental Policy Act ("NEPA") cases when, as here, their activities depend on the challenged federal agency action. Plaintiffs' request for the Court to reconsider that aspect of the temporary restraining order (solely to avoid having to post a bond) is contrary to law and should be rejected.

Magistrate Judge Scott's August 8, 2013 order requiring Plaintiffs to post a compensatory bond, ECF No. 102, also was correct. As with their argument to modify the temporary restraining order, Plaintiffs' argument that Magistrate Judge Scott erred by failing to require the posting of only a nominal bond is contrary to well-established case law. Even in "public interest" cases, Federal Rule of Civil Procedure 65(c) requires the posting of a compensatory bond, unless Plaintiffs can demonstrate that they are unable to do so and that the requirement of posting a bond would thwart their lawsuit. Plaintiffs, who collectively are worth hundreds of millions of dollars, did not and cannot make such a showing. Magistrate Judge Scott thus properly set a bond amount based on the unrebutted evidence put forth by Valley Meat and Responsible Transportation of the real and substantial economic harms they are presently suffering as a result of Plaintiffs' temporary restraining order. Plaintiffs have not shown that Magistrate Judge Scott erred, and their motion should be denied.

A. The Court Properly Included Defendant-Intervenors In The Scope Of Its Temporary Restraining Order

In its August 2, 2013 temporary restraining order, the Court recognized that "Valley Meat and Responsible Transportation will suffer significant economic harm if they are prohibited from operating during the pendency of the present litigation." ECF No. 94 at 6. In an attempt to evade the mandatory bond requirement of Federal Rule of Civil Procedure 65(c), Plaintiffs assert that the Court erred in including these Defendant-Intervenors in the scope of the interim injunction. Plaintiffs are wrong.

While NEPA imposes procedural obligations on federal agencies, it is well-settled that injunctive relief in NEPA litigation appropriately extends to nonfederal entities that rely on the challenged federal action. For instance, in *Foundation on Economic Trends v. Heckler*, 756 F.2d 143 (D.C. Cir. 1985), the D.C. Circuit rejected the same argument that Plaintiffs make here, in a

case in which the district court had found that a federal agency had violated NEPA in authorizing the University of California's genetic engineering experiment. The University argued that the district court "had no power to enjoin the University, as a private party, . . . because NEPA applies only to federal agencies." *Id.* at 155 (quotation marks and citation omitted). In rejecting this argument, the *Foundation* Court recognized that "it is well established that judicial power to enforce NEPA extends to private parties where 'non-federal action cannot lawfully begin or continue without the prior approval of a federal agency,'" because "'[w]ere such non-federal entities to act without the necessary federal approval, they obviously would be acting unlawfully and subject to injunction.'" *Id.* (quoting *Biderman v. Morton*, 497 F.2d 1141, 1147 (2d Cir. 1974)). The *Foundation* Court thus affirmed the district court's injunction, holding that "[w]ithout valid [federal agency] approval *under* NEPA, the University cannot lawfully go forward with its experiment, and it can thus be enjoined by the court." *Id.* (emphasis in original).

In *Biderman*, the Second Circuit had stated that "if NEPA is construed to mandate that the requisite [federal] agency decision be enlightened by and grounded on an EIS [("environmental impact statement")], *it is beyond cavil* that the court may then enjoin the non-federal actors pending completion of that impact statement." 497 F.2d at 1147 (emphasis added). Similarly, in *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391 (9th Cir. 1992), the Ninth Circuit stated that "[n]onfederal actors may also be enjoined under NEPA if their proposed action cannot proceed without the prior approval of a federal agency." *Id.* at 1397. *See also Don't Ruin Our Park v. Stone*, 749 F. Supp. 1386, 1387-88 (M.D. Pa. 1990) ("[A] non-federal entity may be enjoined along with the federal agency pending completion of an EIS [including] when non-federal action cannot lawfully begin or continue without the prior approval of a federal agency."); *Sierra Club v. U.S. Fish and Wildlife Serv.*, 235 F. Supp. 2d 1109, 1142 (D. Or. 2002)

(enjoining a nonfederal entity, along with the federal agency that had been found to have violated NEPA, because "an injunction may issue against a non-federal party in a NEPA action if it receives federal assistance for the challenged activity") (citation omitted). *Cf. Homeowners Emergency Life Prot. Comm. v. Lynn*, 541 F.2d 814, 818 (9th Cir. 1976) ("[I]t can be said that an injunction in a NEPA context can issue against a nonfederal party who receives federal financial assistance in furtherance of the challenged activity.") (citations omitted).

Consistent with this well-established principle of NEPA case law, this Court in *Dickman v. City of Santa Fe*, 724 F. Supp. 1341 (D.N.M. 1989) (Parker, J.), cited *Biderman* and preliminarily enjoined a nonfederal entity, the City of Santa Fe, from proceeding with a highway construction project based on a finding of a likelihood of success on the merits of a NEPA claim, *id.* at 1343, 1348, even while noting that "[a] finding of federal action is essential because Congress did not intend [NEPA] to apply to state, city or private actions." *Id.* at 1345. Indeed, in *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002), the central case in Plaintiffs' preliminary injunction and bond arguments, the Tenth Circuit expressly held that nonfederal actors are subject to injunctions for federal agency violations of NEPA. *Id.* at 1110 n.2 ("Where NEPA is implicated by a highway project in which state agencies are participating, the state agencies are also proper parties and we have the authority to instruct the district court to enjoin the state agencies from further construction on the highway project.") (citing *Sw. Williamson Cnty. Cmty. Ass'n v. Slater*, 243 F.3d 270, 277 (6th Cir. 2001)). As the Court did here, the Tenth Circuit in *Davis* ordered "a preliminary injunction barring further road construction" *by the nonfederal entity* based on the finding that the federal agency had likely violated NEPA. *Id.* at 1126.

Plaintiffs' argument that this Court erred by including Defendant-Intervenors Valley Meat and Responsible Transportation in the scope of the Court's temporary restraining order

thus finds no support in the law. There is no dispute that in the absence of federal inspectors these facilities cannot conduct horse slaughter operations to sell or distribute in commerce meat that is intended for human consumption. *See* 21 U.S.C. § 610(c) ("No person, firm, or corporation shall, with respect to 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 . . . sell, transport, offer for sale or transportation, or receive for transportation, in commerce . . . any articles required to be inspected under [the Federal Meat Inspection Act] unless they have been so inspected and passed."); *see also* First Am. Compl., ECF No. 54 ¶¶ 117-18, 154. Because the private facilities "cannot lawfully begin or continue without the prior approval of a federal agency," if they were "to act without the necessary federal approval, they obviously would be acting unlawfully and subject to injunction.'" *See Biderman*, 497 F.2d at 1147. The Court properly included the facilities in the scope of its injunction.

Plaintiffs' goal is to put horse slaughter operations out of business, including those in which Valley Meat and Responsible Transportation are heavily invested. *See, e.g.*, First Am. Compl., ECF No. 54 ¶ 13 ("FRER [Plaintiff Front Range Equine Rescue] has been actively advocating against horse slaughter operations in the United States for years."); *id.* ¶ 15 ("Since 2011, . . . FRER has been forced to expend a large portion of its annual budget in an effort to prevent the slaughter of American horses."); *id.* ¶ 21 (stating that Plaintiff Humane Society of the United States ("HSUS"') "has opposed the slaughter of horses for human consumption for more than fifty years."). Plaintiffs are only using NEPA as the tool for targeting these facilities, as they readily admit, because "if the [federal] grant of inspection is set aside, then the horse slaughter plants will be prohibited from operating, the current status quo of no horse slaughter in the United States will continue, and there will be no detrimental health, environmental, aesthetic,

or economic impacts felt by members." *Id.* ¶ 27. Federal Defendants do not slaughter horses and do not propose to slaughter horses. As this Court recognized, the real harm from an injunction is to the lawful activities of the slaughter facilities.

Plaintiffs are attempting to game the system by having this Court modify the temporary restraining order solely to evade responsibility if they are later found to have wrongfully obtained an injunction significantly harming the legitimate business interests of Valley Meat and Responsible Transportation. As presented above, the well-established case law on injunctive relief under NEPA does not countenance such a result. Plaintiffs' motion to modify the temporary restraining order is without merit and should be denied.

B. The Magistrate Judge Properly Ordered Plaintiffs To Post Compensatory Bonds

Based on the requirements of Federal Rule of Civil Procedure 65(c) and the evidence adduced at the bond hearing, Magistrate Judge Scott properly ordered Plaintiffs to post a compensatory bond. Plaintiffs object to Magistrate Judge Scott's order requiring Plaintiffs to post a bond that would potentially help compensate Valley Meat's and Responsible Transportation's "significant economic harm" that this Court found they will suffer as a result of the injunction. ECF No. 94 at 6. Plaintiffs cannot satisfy the highly deferential "clearly erroneous or contrary to law" standard of review for overturning Magistrate Judge rulings on non-dispositive issues. *See* 28 U.S.C. § 636(b)(1)(A); *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1461-62 (10th Cir. 1988). "[T]o be found clearly erroneous, a magistrate's decision '. . . must strike us as more than just maybe or probably wrong; it must . . . strike us with the force of a five-week old, unrefrigerated dead fish.'" *Ctr. for Biological Diversity v. Norton*, 336 F. Supp. 2d 1155, 1158 (D.N.M. 2004) (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec. Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)). Plaintiffs cannot satisfy their burden.

Relying on *Davis*, Plaintiffs assert that the Magistrate Judge was required to set only a nominal bond amount pursuant to a "public interest" exception, regardless of the potential serious harm to Valley Meat and Responsible Transportation. But *Davis* requires no such thing. Contrary to Plaintiffs' representations, the Tenth Circuit in *Davis* did not order a nominal bond, but only stated that on remand "a minimal bond amount should be *considered*." 302 F.3d at 1126 (emphasis added). The *Davis* Court did not set forth the factors that should be considered in setting a bond in a public interest case, but referred the district court to the Ninth Circuit's decision in *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 322-23 (9th Cir. 1975). *See id.*

In *Brinegar*, the Ninth Circuit recognized that "environmental interest groups and individual plaintiffs *usually have limited resources*" and thus requiring such parties to "post substantial bonds in NEPA cases in order to secure preliminary injunctions" could preclude "effective and meaningful" judicial review and could "seriously undermine the mechanisms in NEPA for private enforcement." 518 F.2d at 323 (emphasis added). Thus, as the *Brinegar* Court indicated, a key consideration in determining whether to impose a nominal bond in a public interest case is the plaintiffs' ability to post a fully compensatory bond. *See also California ex rel. Van de Kamp v. Tahoe Rg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) (relying on *Brinegar* for the proposition that "[t]he court has discretion to dispense with the security requirement, or to request mere nominal security, *where requiring security would effectively deny access to judicial review*") (emphasis added).

The burden on a plaintiff to demonstrate an inability to post more than a nominal bond, as required by *Brinegar*, was also central to the Ninth Circuit's decision in *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005). "So long as a district court does not set such a high bond that it serves to thwart citizen actions, it does not abuse its discretion." *Id.* at 1126 (citing

Brinegar, 518 F.2d at 323). Applying this principle, the *Save Our Sonoran* Court affirmed the district court's imposition of a substantial bond because the district court had conducted a hearing at which the plaintiff "had the opportunity to show that the imposition of anything other than a nominal bond would constitute an undue hardship" but failed to do so. *Id.*

In accordance with the principle set forth in *Brinegar*, then, as adopted by the Tenth Circuit through *Davis*, Magistrate Judge Scott did not err in declining to relieve Plaintiffs from posting a compensatory bond in accordance with Federal Rule of Civil Procedure 65(c). Plaintiffs made no attempt whatsoever to demonstrate that they would be unable to post a compensatory bond to keep the injunction in effect and, on the contrary, they in fact posted the bonds that Magistrate Judge Scott appropriately found should be required in this case. *See* ECF Nos. 114-16.[1] Thus, Magistrate Judge Scott did not abuse his discretion in setting the bond amounts because the requirement for posting a compensatory bond did not "serve to thwart" Plaintiffs' continued prosecution of this NEPA case.

Plaintiffs posited an incorrect interpretation of the law – erroneously asserting that bond amounts must always be nominal in NEPA cases, regardless of Plaintiffs' immense resources here – and Magistrate Judge Scott properly rejected it. Defendant-Intervenors Valley Meat and Responsible Transportation are small private companies that this Court found would be substantially harmed by the injunction. Plaintiffs sought to shut down their lawful businesses, and these companies presented unrebutted evidence of their anticipated damages from being enjoined from commencing operations during the first thirty days of the temporary restraining order. Magistrate Judge Scott carefully questioned the companies' counsel at the hearing and

[1] Plaintiffs' lack of an attempt at showing an inability to post a compensatory bond is not surprising, given that both HSUS and New Mexico each have assets in excess of $200 million. *See, e.g.*, ECF No. 56-6.

examined the evidence in setting the bond amounts. His bond order is neither clearly erroneous nor contrary to law, and Plaintiffs' objections are without merit and should be overruled.

CONCLUSION

This Court properly included Valley Meat and Responsible Transportation in the scope of the temporary restraining order, and Magistrate Judge Scott properly required Plaintiffs to post a compensatory bond. Plaintiffs' motion has no basis in law or fact and should be denied.

Respectfully submitted this 21st day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 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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