UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FRONT RANGE EQUINE RESCUE, *et al.*, Plaintiffs, v. TOM VILSACK, Secretary, U.S. Department of Agriculture, *et al.*, Defendants.	Civil No. 1:13-CV-00639-MCA-RHS

PLAINTIFFS' AND PLAINTIFF-INTERVENOR STATE OF NEW MEXICO'S CONSOLIDATED REPLY BRIEF ON THE MERITS[1]

[1] This Reply Brief is filed in accordance with the Court's September 26, 2013 Order, which provides that the length of Plaintiffs' and Plaintiff-Intervenor State of New Mexico's consolidated reply brief may be up to 17,500 words. ECF No. 179. Undersigned counsel for Plaintiffs and Plaintiff-Intervenor hereby certify that this Reply Brief contains 15,771 words.

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I. INTRODUCTION

Congress has mandated that the National Environmental Policy Act ("NEPA") be broadly applied "to the fullest extent possible" to achieve its protective goals. 42 U.S.C. § 4332. Accordingly, "[n]o agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." 115 Cong. Rec. 39703 (1969). Yet that is exactly what the federal defendants ("Defendants," "USDA," or "Agency") are attempting to do here by arguing that *neither* their nationwide Directive 6130.1, Ante-Mortem, Postmortem Inspection of Equines and Documentation of Inspection Tasks ("Directive") concerning the protocol for ascertaining the presence of dangerous drug residues in horses flesh, *nor* their grants of inspections to three new horse slaughter facilities across the country, should be subject to NEPA review. Defendants also argue that even if NEPA applies to the grants of inspection, the grants are excluded from substantive review by way of a categorical exclusion ("CE").

And in a surprising show of disregard for this Court's prior ruling, the Agency has tried to invoke a *post hoc* justification for the Directive that this Court has already ruled was improper and would not be allowed. Specifically, Defendants boldly assert that they need not conduct a substantive review of the Directive, if NEPA applies, because they decided – months after issuing the Directive and in a footnote to a CE memo – that the Directive is categorically

excluded from NEPA review. As demonstrated below and in Plaintiffs' and Plaintiff-Intervenor the State of New Mexico's (collectively, "Plaintiffs") opening briefs, none of Defendants' or Defendant-Intervenors' arguments as to why the Agency's far-reaching decisions are not subject to NEPA withstands scrutiny.

The Administrative Record ("Record") and Plaintiffs' evidence in support of the preliminary injunction show that there are many unknowns and great controversy concerning the potential environmental and public health effects associated with drug residues present in American horses. This, combined with the fact that one of the new slaughter facilities has a history of environmental violations, and the fact that the three most recently operating U.S. horse slaughter facilities caused gross environmental contamination, leads inexorably to the conclusion that granting horse slaughter inspections at the very least *may* have a significant effect on the environment, and thus warrants preparation of at least an environmental assessment ("EA"). *See* 7 C.F.R. § 1b.4(a); 40 C.F.R. § 1508.4.

It is clear from the Record that one of the primary reasons why the Agency was so determined to avoid NEPA review and push through the grants of inspection is because of political and industry pressure to commence horse slaughter inspections without further delay. The Agency was apparently so eager to race forward that it even relied on *completely false and inapplicable information* in at least one of its CE memoranda. As described in detail below, in issuing its CE

decision memo for Rains Natural Meats ("RNM"), the Agency relied on information concerning a wastewater treatment facility in the town of Gallatin, *Tennessee*, instead of Gallatin, *Missouri*, where RNM is actually located. In a shocking disregard for potential environmental impacts of horse slaughter and its legal obligation to undertake reasoned decisionmaking, the Agency drew conclusions about the environmental impacts of commencing horse slaughter in Gallatin, Missouri by relying on the water system infrastructure of a completely uninvolved and unrelated city that is approximately 600 miles away from RNM.

The Agency's improper deference to political pressure, its reliance on irrelevant facts, and its effort to pave over its NEPA failures, provide further confirmation (in addition to the evidence of the potential environmental effects from the Directive and from horse slaughter) that the decisions under review fall short of the type of reasoned, responsible decisionmaking required by NEPA and the Administrative Procedure Act ("APA"). Accordingly, the Agency's decisions to issue the Directive and several grants of horse slaughter inspections without undertaking appropriate NEPA review were arbitrary and capricious and contrary to law, and should be set aside by this Court.

II. ARGUMENT

A. NEPA Requires that USDA Conduct Environmental Review Prior to Issuing the Directive.

1. The Directive is Final Agency Action and Subject to Judicial Review under the APA.

Defendants contend that the Directive is not final agency action subject to judicial review because it does not meet the test announced in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Agency action is final under *Bennett* if it "mark[s] the 'consummation' of the agency's decisionmaking process" and represents an action by which "rights or obligations have been determined, or from which legal consequences will flow." *See* Fed. Defs.' Resp. Br. Merits at 56-60, Sept. 27, 2013, ECF No. 185 ("Defs. Mem."). As this Court has already found, Order Granting Plfs.' Mot. TRO at 2-3, Aug. 2, 2013, ECF No. 94 ("TRO Order"), none of the Defendants' arguments is persuasive.[2]

First, there can be little question that the Directive marks the consummation of the Agency's decisionmaking process regarding residue testing in equines. The Record makes clear that the Agency undertook a lengthy decisionmaking process

[2] Defendant-Intervenors separately argue that the national residue testing program is not "'discrete' agency action and, therefore, that it is not a cognizable [*sic*] under the APA." Def.-Intervenors' Consol. Br. Merits at 27, Sept. 27, 2013, ECF No. 183 ("Interv. Mem."). However, the Directive is the embodiment of the residue testing plan for horses, and it is the Directive that Plaintiffs are challenging, as Defendant-Intervenors appear to concede by devoting the bulk of their argument to the Directive. *See* Interv. Mem. at 30-42.

to develop the residue testing plan for equines as a prerequisite to commencing horse slaughter inspections for the first time since 2006. In his interagency "Decision Memorandum" with the subject heading "Development of an Equine Slaughter and Further Processing Inspection Regime" ("Almanza Memo"), AR1823-29,[3] Defendant Almanza stated that:

> Given that FSIS last inspected equines 6 years ago, the Agency has determined that it needs to spend a significant amount of time reestablishing the processes needed for appropriate inspection of equines. In particular, a number of technical issues need to be addressed before the infrastructure for any equine inspection system is ready, and any establishment can receive a grant of inspection to slaughter or further process equines. These issues include: . . . residue testing.

AR1823-24; *see also* AR3189 ("[G]iven that the agency last conducted a horse inspection six years ago, FSIS has determined that despite the Congressional decision to lift the ban, the agency will require a significant amount of time to update its inspection and testing processes and methods before it is fully able to develop a future inspection regimen."). Defendant Almanza further stated that "[a] comprehensive residue testing program could be implemented by the end of the current calendar year." AR1826. Subsequently, the Agency did implement its new residue testing program for equines, which was memorialized in the Directive. AR1861-69 (noting in the "Purpose" section that, among other things, "this

[3] All citations to the Administrative Record are styled as "AR[ ]."

directive instructs [FSIS employees] . . . how to perform residue testing [for equines]").

Second, as this Court found, there is also no question that the Directive is a decision from which legal consequences flow or by which rights or obligations are determined, because the Directive enabled the Agency to grant inspections to horse slaughter facilities. *Id*.[4] As Defendant Almanza explained, the issue of residue testing "need[ed] to be addressed *before* the infrastructure for any equine inspection system [would be] ready, and [before] *any establishment can receive a grant of inspection to slaughter or further process equines*." AR1823 (emphasis added). The Agency refused to issue any grants of inspection until at least the

[4] Defendants' argument that challenged agency action must determine the rights and obligations *for plaintiffs* specifically is inaccurate. *See* Defs. Mem. at 57. Courts regularly find final agency action where the plaintiffs are not the specific target of the action at issue. *See, e.g., Ctr. For Native Ecosystems v. Cables*, 509 F. 3d 1310, 1330 (10th Cir. 2007) (holding that agency operating instructions "undoubtedly have clear and definite consequences for permittees" who were not the plaintiffs); *Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 990 (9th Cir. 2006). Nor do the cases Defendants cite hold otherwise. In *Mobil Exploration & Producing U.S., Inc. v. Dept. of Inter*., 180 F.3d 1192 (10th Cir. 1999), the court did not even analyze the "rights or obligations" prong of the *Bennett* test at issue here. *Id.* at 1199 ("Because we have determined that the [agency action] was not the consummation of the agency's decisionmaking process, we need not analyze the second prong of the finality determination . . . ."). In *Pub. Serv. Co. of Colo. v. U.S. Envt'l Prot. Agency*, 225 F.3d 1144 (10th Cir. 2000), which Defendants also cite, the court looked not only toward the rights and obligations of plaintiffs, but also toward the rights and obligations of "any other entity." *Id.* at 1148.

issue of residue testing in equines was resolved, and the Agency prepared the Directive to resolve that issue.

Once the Directive was finalized and issued in June 2013, the Agency used it as a basis for issuing its CE Memoranda and granting inspections to Valley Meat ("VM"), Responsible Transportation ("RT"), and RNM.[5] *See* VM CE Memo, AR2471 ("FSIS has addressed this [public health] risk by implementing a new drug residue testing program that will screen the meat of slaughtered horses for drug residues before the meat is allowed to enter the food supply chain[.]" (citing the Directive)); RT CE Memo, AR3285 (same); *see also* RNM CE Memo, AR4873 (noting that "FSIS has set forth its drug residue testing policy with respect to horses in FSIS Directive 6130.1").

Accordingly, despite Defendants' *post hoc* assertions to the contrary, it is clear from the Record that the Directive impacted the rights of the slaughter facilities by laying the groundwork and serving as a condition for the Agency's grants of inspections.[6] *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023

[5] Though Defendants have not yet granted RNM's application for inspection, Defendants have stated that RNM "has met all statutory and regulatory requirements for a grant of inspection for the slaughter of horses for human consumption in interstate commerce. . . ." Fed. Defs.' Notice Grant of Inspection for RNM at 1, Sept. 13, 2013, ECF No. 154.

[6] Defendants' argument that the "Directive itself had no legal consequences" because it was not until "FSIS relied on it" in the grants of inspections that there was any legal impact, Defs. Mem. at 58, is nonsensical. As discussed above, the

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(D.C. Cir. 2000) (finding that "the Guidance . . . is final agency action, reflecting a settled agency position which has legal consequences" for others). Moreover, as this Court found, the detection of residues resulting from implementation of the Directive will result in legal consequences for the slaughter facilities, such as penalties or enforcement action. *See* TRO Order at 2; *see also Swanson Grp. Mfg. LLC v. Salazar*, 2013 WL 3214940, at *11 (D.D.C. June 26, 2013) (unpublished) Informally adopted Owl Estimation Methodology used to measure incidental take of owls under the Endangered Species Act was final agency action with legal consequences for federal timber contractors because agency required compliance with the methodology as a condition of issuing biological opinions in areas with northern spotted owls).[7]

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development of the new plan was an integral part of the authorization of horse slaughter operations. *See* AR1823-29; AR3189; *see also Wilderness Soc., Ctr. for Native Ecosystems v. Wisely*, 524 F. Supp. 2d 1285, 1299 (D. Colo. 2007) (finding that "the EA and FONSI allowed the BLM to offer parcels on the South Shale Ridge for leasing, and triggered the obligation of aggrieved individuals to protest the decision to include certain lands within that sale" and "[t]hus it is clear that the September 2005 EA and FONSI constitute 'final agency action' for purposes of the ESA and APA"). In light of the evidence in the Administrative Record, it is disingenuous to suggest that the Directive impacted no rights or obligations.

[7] The fact that enforcement action would, at its root, be based on the Federal Meat Inspection Act ("FMIA") does not alter the fact that Agency compliance with the Directive could result in enforcement action for slaughter facilities. *See* Defs. Mem. at 59 n.8. Indeed, even though regulations are at bottom based on governing statutes, legal consequences clearly flow from regulations.

Defendants also put forth a series of arguments related to the issue of whether an agency decision is legally binding or has the "force of law." *See* Defs. Mem. at 58-60. But Defendants cite *no cases* holding that to be "final" for purposes of APA review, an action must be legally binding and enforceable against the agency. Instead, they cite a series of cases on whether manuals, guidance, or handbooks are *separately* enforceable in a court of law against an agency, *see Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981); *W. Radio Services Co., Inc. v. Espy*, 79 F.3d 896, 901-02 (9th Cir. 1996); *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1073 (9th Cir. 2010), not whether such manuals, guidance, or handbooks can be reviewed as potentially arbitrary and capricious under the APA. No one – and certainly not Plaintiffs – is asking the Court to *enforce* the Directive here. Therefore, these cases are inapposite.

Similarly, Defendants argue that the Directive is not final agency action because it is merely "a compilation of guidelines, not substantive rules; was not promulgated pursuant to the 'notice and comment' procedures of the APA; and is not published in the Code of Federal Regulations." Defs. Mem. at 59. However, whether an agency action is a substantive rule or a product of formal agency rulemaking is not determinative of whether it is final for purposes of APA review, and courts routinely hold that informal agency decisions are reviewable. *See Cables*, 509 F. 3d at 1330 (agency's "instructions" described as a "management

tool" subject to "further modifications" were final agency action because they "[we]re the last word before grazing begins and undoubtedly ha[d] clear and definite consequences for permittees); *Rocky Mt. Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 741 (10th Cir. 1982) (holding that an agency's promulgation of its "Wilderness Handbook and the Interim Management Policy and Guidelines constitute[d] final agency action . . . ."); *W. Energy Alliance v. Salazar*, 2011 WL 3738240, at *5-6 (D. Wyo. Aug. 12, 2011) (unpublished) (refusing to "shield the Federal Respondents from procedural . . . challenges" to the agency's instructions and guidance that "establish[ ] only the procedures BLM and USFS will follow"); *Hall v. Sebelius*, 689 F. Supp. 2d 10, 20 (D.D.C. 2009) ("[T]he possibility of future [statutory] revision of [the internal operations guidance for agency employees] does not affect [the internal guidance's] current status as final agency action because all laws are subject to change and therefore the fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." (internal quotation marks omitted)); *see also Bell v. N.J.*, 461 U.S. 773, 779 (1983) ("The possibility of further proceedings in the agency [on related issues] does not, in our view, render the [action] less than 'final.'").[8]

[8] For the same reasons, whether the Directive may be modified or "terminated at will" by the Agency is also irrelevant here. *See Appalachian Power*, 208 F.3d at 1022 (the "fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment"); *Swanson Grp.*, 2013 WL

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In short, Defendants are grasping at straws – and inapplicable legal doctrines – to avoid the obvious conclusion that the Directive, which was the culmination of a planned, focused process and which triggered the Agency's issuance of grants of inspection, was final agency action. As this Court found in its TRO Order, it clearly was.

2. The Directive Is Major Federal Action Subject to NEPA.

Defendants next contend that the Directive does not trigger NEPA review because it is not the "legally relevant cause" of any environmental impacts caused by horse slaughter operations, and thus not a major federal action pursuant to NEPA. Defs. Mem. at 60-63 (citing *Dep't. of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004)). In order to make this argument, Defendants assert that the Directive has no bearing on whether or not the Agency grants horse slaughter inspections because (1) "slaughter operations are authorized only by grants of inspection," Defs. Mem. at 61, and (2) "even in the absence of the Directive, FSIS would be legally obligated to issue and implement grants of inspections" pursuant to the FMIA. *Id.* Therefore, Defendants argue, because the Directive has no bearing on the grants of inspections, it also has no bearing on any impacts

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3214940, at *11 ("While the agencies 'anticipate updating the [owl estimation methodology] as new information becomes available,' . . . the possibility of ongoing updates does not negate the [methodology's] finality." (citations omitted)).

potentially caused by horse slaughter operations, including the dangers of drug residues in horse flesh impacting the environment and public health. *See id.*

There is no question that the Directive has a significant impact on the external environmental effects of horse slaughter, because it directly effects what drug residues may end up in the environment when horses are slaughtered. Indeed, the Directive appears to have more effect on the environment than the grants of inspection themselves, since the Directive is national in scope, is in place at every slaughterhouse where horses would be slaughtered, and directly regulates potential drug contamination of the environment.

Moreover, as already discussed, the Record plainly belies any suggestion that the Directive was some kind of free-floating, ever-changing, meaningless document that had no bearing on the nationwide commencement of horse slaughter operations. In fact, as this Court found, the Agency "adopted the Directive in response to concerns regarding the potential presence in slaughtered horses of chemical residues from drugs not previously approved for use in food animals" and "incorporated the Directive into each grant of inspection." TRO Order at 2-3. *See also Native Ecosystems Council & Alliance for the Wild Rockies v. U.S. Forest Serv. ex rel. Davey*, 866 F. Supp. 2d 1209, 1227 (D. Idaho 2012) (Forest Service was required to conduct separate NEPA analysis of its 2005 lynx habitat map "before using the map as a basis for approving the [other challenged agency

project.]"). And Defendant Almanza specifically stated that the Agency "need[ed] to spend a significant amount of time" establishing "the processes needed for appropriate inspection of equines," including the issue of "residue testing," before "*any establishment can receive a grant of inspection to slaughter or further process equines*." AR1823-24 (emphasis added).

Contrary to Defendant's current litigation position, the Directive was one of the prerequisites to the Agency's decisions to grant horse slaughter inspections after a six-year ban on the industry. *See Pub. Citizen*, 541 U.S. at 767 (for NEPA to apply there must be "a reasonably close causal relationship between the environmental effect and the alleged cause" (internal citation omitted)). The Directive is part and parcel of *both* the grants of inspection – because the Agency stated it was a precondition to the grants – *and* the conduct of those inspections after the grants were issued. As such, the Directive is an integral part of the Agency's actions challenged here.

Similarly, although Defendants claim that "even in the absence of the Directive" they would still be "obligated" to issue grants of inspection pursuant to the FMIA, and therefore would have no ability to "countermand" the effects of horse slaughter operations within the meaning of *Public Citizen*, Defs. Mem. at 61, 62-64, this is plainly not the case. First, the Agency has discretion to implement a whole range of residue testing or residue prevention options by way of its mandate

to ensure that meat is not adulterated under the FMIA; and therefore the Agency can limit the risks and potential impacts to human health and the environment resulting from drug residues. *See* 21 U.S.C. §§ 603(a), (b), 604, 607. This includes the options suggested by Plaintiffs in their Petition for Rulemaking. AR80-82. Defendants concede as much in their brief, *see* Defs. Mem. at 63 (the Agency may base the "Directive on what FSIS determines to be necessary to ensure that the meat[ ] products flowing from the regulated facility are not adulterated"), as well as in the Almanza Memo, AR1828-29 (presenting a range of possible options for controlling drug residues in horse meat).[9] A proper NEPA analysis would require the Agency to consider the varying impacts of these options on public health and the environment, and therefore guide it in arriving at the best alternative. *See* 40 C.F.R. § 1508.27 (Council on Environmental Quality ("CEQ") factors require evaluation of the "degree to which the proposed action affects public health or safety," and the "degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks. . . .").

Second, despite Defendants' protestations that they would have issued the grants of inspection even in the absence of the Directive and the residue testing

[9] Defendants' *ultra vires* argument, Defs. Mem. at 63, is simply another twist on their argument that they lack discretion to evaluate the environmental impacts of their actions, and should be dismissed for the same reasons already stated for why NEPA applies to the Directive.

plan that it embodies, because they would have been "obligated" to do so under the law, the Record again demonstrates that this is false. Defendants concede that they were prepared to, and did, await the development of the residue testing plan for equines before granting any slaughter inspections. *See* AR1823; AR 3189.[10] Further, the plain language of the CE Memoranda that the Agency prepared prior to the grants of inspection expressly incorporates and relies on the Directive, to present how the Agency will protect the public health and the environment. *See, e.g.*, VE CE Memo, AR2471. Defendants cannot credibly argue that the Directive is simultaneously irrelevant to its grants of inspections but also of such importance that it was incorporated into the grants of inspection as a mitigation measure.[11]

Defendants' contention that the Directive does not trigger NEPA because it does not represent "an irreversible and irretrievable commitment of resources" also misses the mark. *See* Defs. Mem. at 64. The question of whether an irretrievable commitment of resources will be made is simply one way of determining whether a proposed action is sufficiently concrete and presents a potentially significant effect on the environment to trigger NEPA review. *See Friends of Yosemite Valley v.*

[10] Moreover, as described below in Section II.B.1.b, even once the Agency finalized and implemented the residue testing plan through the Directive, the FMIA still afforded the Agency ample discretion to grant or deny horse slaughter inspections and to mitigate harm caused by potentially dangerous residues, and thus the grants of inspections in themselves trigger NEPA review.

[11] Defendants also urgently petition the Court not to vacate the Directive, despite their claim that it is essentially meaningless. Defs. Mem. at 70-71.

Norton, 348 F.3d 789, 800-801 (9th Cir. 2003) (describing "irretrievable commitment of resources" to mean when a "critical decision" is made).

Indeed, NEPA is often triggered in cases where an agency has made plans that are concrete and may impact the environment, but has yet to take final steps in a string of actions. *See, e.g.*, *Sierra Club v. Kimbell*, 623 F.3d 549, 554-55 (8th Cir. 2010) (reviewing agency's NEPA analysis of the first stage of its forest plan, which established overall goals and instructions, but did not permit any logging to take place); *Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 13, 34 (D.D.C. 2007) (NEPA applies to USDA's authorization of horse slaughter inspections where the Agency had merely approved a rulemaking petition without irretrievably committing any resources to horse slaughter inspections); *see also N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 718 (10th Cir. 2009) (NEPA mandates that assessment of all reasonably foreseeable impacts "must occur at the earliest practicable point, and must take place before an 'irretrievable commitment of resources' is made." (citation omitted)). The Directive does indeed commit the Agency to a particular course of action, with specific potentially significant effects on human health and the environment, and thus it is subject to NEPA review.

Consequently, because the Directive is major federal action that is the "legally relevant cause" of the commencement of horse slaughter inspections, the

Agency must undertake a substantive NEPA analysis to fully evaluate the environmental impacts of the Directive and any alternatives that would mitigate those impacts on public health and the environment. *See* Plfs. Opening Br. Merits at 27-32, Sept. 23, 2013, ECF No. 170 ("Plfs. Mem."). At an absolute minimum, the Agency must formally invoke a CE after conducting an "extraordinary circumstances" analysis. 40 C.F.R. § 1508.4; 7 C.F.R. § 1b.4(a).[12]

3. Defendants' Attempt to Invoke a CE for the Directive After Issuing the Directive Is Invalid.

Amazingly, Defendants now attempt to claim, casually, that the Agency "has already invoked a CE for the Directive." Defs. Mem. at 70 (citing AR4871).[13] The document the Agency refers to, however, is the CE Memo for RNM, which contains a *footnote* merely stating that "[e]ven if directives and notices and the

[12] As noted in Plaintiffs' opening brief, Plfs. Mem. at 18 n.17, an examination of the environmental effects of the Directive should be conducted in concert with an examination of the existing, and potential future, grants of inspection, as they are "connected" actions. *See* 40 C.F.R. § 1508.25; *Sierra Club v. U.S.*, 255 F. Supp. 2d 1177, 1183-85 (D. Colo. 2002).

[13] Defendants do not actually reference this alleged "CE" in their argument on the Directive, which suggests even they realize the baseless nature of their position. Instead, they refer to it in their argument on remedies, asserting that there is no need to vacate the Directive because any error is "harmless" in that the Agency has in fact already invoked a CE, and there is essentially nothing more to be done except for a little record clean-up and "explanation." *See* Defs. Mem. at 70. As discussed below, Defendants' attempt to invoke a CE long after the Directive has issued, and then claim that anything remaining to be done is so insignificant that the Directive and inspections should remain in effect in the interim, shows just how severely the Agency misconstrues – and disregards – its obligations under NEPA.

issuance thereof were major federal actions, they would be categorically excluded from NEPA requirements pursuant to 7 C.F.R. § 1 b.3(a)(1)." AR4817 n.4. Defendants have never before mentioned this *post hoc* CE in this litigation and did not mention it in connection with the VM CE or RT CE Memoranda, and its presence in a document submitted only *after* this Court had already reviewed the Directive speaks volumes about its impropriety.

Defendants' specious attempt to rely on a footnote contained in a document issued *long after* the Directive itself was issued merits little of the Court's attention. First, this purported "invocation" of a CE for the Directive does not even identify the Directive, and the Agency sets forth no analysis of whether the Directive may have a significant environmental effect and therefore be inappropriate for categorical exclusion – the most important part of any categorical exclusion. *See* 7 C.F.R. § 1b.4(a). Second, as this Court has already noted, "[t]here is no evidence in the record that FSIS relied on the categorical exclusion in adopting FSIS Directive 6130.1. . . . [C]ategorical exclusions cannot be summoned as post-hoc justifications for an agency's decision. Accordingly, the categorical exclusion is inapplicable to the Directive." TRO Order at 3-4 (internal citation omitted). Yet the Agency simply ignored the Court's warning, issued on August 2, 2013, and dropped this footnote into the RNM Memo on September 13, 2013,

AR4878, over two months after issuing the Directive on June 28, 2013, AR1861, and six weeks after this Court's review of the Directive.

This "invocation" of a CE constitutes a *post hoc* justification for the Agency's decision and merits no consideration. *See also Johanns*, 520 F. Supp. at 31-33 (finding arbitrary and capricious the Agency's *post hoc* invocation of a categorical exclusion in a legal argument without any explanation for its decision in the record).

B. USDA Must Prepare an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") on the Grants of Inspections.

1. NEPA Applies to Defendants' Decision to Grant Horse Slaughter Inspections.

Just as they seek to avoid NEPA compliance on the Directive, Defendants also argue that NEPA does not apply to the specific grants of horse slaughter inspections to VM, RT, and RNM. The Agency's primary argument here is that because it "lacks sufficient discretion" over its inspection grants under the FMIA, Defs. Mem. at 20, and does not have "control over the day-to-day operations" of the slaughter facilities, *id.* at 21-22, its actions in authorizing horse slaughter are not the "legally relevant cause" of the potentially significant effects of horse slaughter operations under *Public Citizen* and *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) ("*NAHB*"). *See* Defs. Mem. at 25-26.

Defendants' attempt to minimize their discretion is unconvincing. As explained below, the FMIA is readily distinguishable from the statutes at issue in *Public Citizen* and *NAHB*, and USDA in fact has ample discretion here to grant, deny, or condition its inspections such that NEPA is triggered under prevailing caselaw. Indeed, the Agency is doing exactly what Congress has instructed agencies not to do – "utilize an excessively narrow construction of . . . existing statutory authorizations to avoid compliance" with NEPA. 115 Cong. Rec. 39703 (1969); *see also* 42 U.S.C. § 4332 (mandating that NEPA be broadly applied "to the fullest extent possible" to achieve its protective goals).[14]

a. *Johanns* Precludes Defendants' Argument That NEPA Does Not Apply.

As a threshold matter, Defendants have *already litigated and lost* the question of whether NEPA applies to the Agency's authorization of FMIA inspections for horse slaughter facilities, *see Johanns*, 520 F. Supp. 2d at 27, and are collaterally estopped from re-litigating that issue here. *See San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323, 336 n.16 (2005) ("Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment,

[14] *See also Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1175 (D.N.M. 2000) (quoting *Catron County Bd. of Com'rs, N.M. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996) ("Because Federal agencies 'must comply with NEPA to the fullest extent possible,' NEPA and its demand of an EIS are broadly applied.").

that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." (quotation marks omitted)).

In *Johanns*, the Agency authorized horse slaughter operations that had been halted by Congressional defunding by creating a "fee-for-service" inspection program whereby slaughter facilities could pay for inspections under the FMIA. *See Johanns*, 520 F. Supp. 2d at 13. The same Defendants in this case argued in *Johanns* that their decision to authorize horse slaughter did not "constitute a 'major federal action' for purposes of triggering NEPA procedural requirements" because there was "no significant federal involvement in the approval and operation of the plants" and because "[a]ll the material decisions and resulting actions regarding a horse slaughter facility that can or may have environmental effects on the human environment cannot be influenced or controlled by FSIS." Defs.' Opp. to Plfs.' Mot. Summ. J., 2006 WL 1781248 (D.D.C.) (citations and quotation marks omitted). In other words, Defendants argued, exactly as they do now, that they had no discretion or ability to mitigate the environmental effects of horse slaughter and therefore NEPA did not apply.

The court in *Johanns* rejected the Agency's arguments. *See Johanns*, 520 F. Supp. 2d at 27. Distinguishing *Public Citizen*, the court noted that "when an agency serves effectively as a 'gatekeeper' for private action, that agency can no longer be said to have 'no ability to prevent a certain effect,'" 520 F. Supp. 2d at 25 (quoting

Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1242 (D. Wyo. 2005)), and held that the "horse slaughter operations and their environmental impacts are 'functionally inseparable' from the fee-for-service inspections . . . because horse slaughtering for human consumption 'may not take place' pursuant to the FMIA until FSIS has conducted ante-mortem inspections." *Id.* at 27 (quoting *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 105 (D.D.C. 2006)). Accordingly, the court found that the Agency's authorization of inspections was the "legally relevant cause" of the environmental impacts of the slaughter plants, and its action was therefore subject to NEPA. *Id.* at 26-27.[15] The Agency did not appeal this ruling, nor has it sought relief from the judgment pursuant to Fed. R. Civ. P. 60(b). Consequently, *Johanns* is binding on the Agency here. *See San Remo Hotel*, 545 U.S. at 336-37.

Even if the Agency were not precluded from re-litigating the issue of whether NEPA applies to its actions in authorizing horse slaughter, the court's reasoning in *Johanns* is relevant and persuasive here, and the Defendants' attempts to distinguish it are unconvincing. *See* Defs. Mem. at 29. The specific fact that *Johanns* involved a rule to fund FMIA horse slaughter inspections via the Agricultural Marketing Act,

[15] The *Johanns* court also pointed out that "[n]either Defendants nor Defendant-Intervenors refute[d] Plaintiffs' argument that horse slaughter operations have 'significantly' impacted the environment within the meaning of NEPA." 520 F. Supp. 2d at 19.

rather than the FMIA-funded horse slaughter inspection decision here, is a distinction without a difference. In *Johanns*, the Agency was the "legally relevant cause" of the environmental impacts of the slaughter facilities because (1) the Agency had discretion over whether to authorize horse slaughter inspections and (2) the inspections that were a prerequisite to slaughter were "functionally inseparable" from the impacts caused by horse slaughter. *Johanns*, 520 F. Supp. 2d at 26-27. Likewise, as described below, USDA plainly has discretion here over whether to authorize inspections. And, just as in *Johanns*, the grants of inspection here are "functionally inseparable" from the impacts of the horse slaughter itself because "horse slaughtering for human consumption 'may not take place' . . . until the FSIS has conducted ante-mortem inspections." *Id.*

b. USDA Has Discretion to Consider Impacts, Alternatives, and Mitigation Measures.

USDA unquestionably has discretion over whether to conduct horse slaughter inspections, and the Defendants' contention that the act of granting such inspections is "ministerial" under the FMIA does not stand up to even casual review. Defs. Mem. at 21 (quoting VM, RT, and RNM CE Memoranda). In entering the TRO, this Court implicitly rejected the Agency's position and, indeed, the FMIA and its implementing regulations make clear that the Agency is under no obligation to grant inspections to a particular facility upon the facility's request.

First, Defendants' lengthy argument about the use of the word "shall" in the FMIA is nothing but a red herring. *See* Defs. Mem. at 22-28. While the statute does say that FSIS "shall cause to be made . . . an examination and inspection of all amenable species *before they shall be allowed* to enter" a slaughterhouse, 21 U.S.C. § 603(a) (emphasis added), this does not mean that the Agency *must* grant the inspection; it simply means that *if* amenable species are going to be slaughtered and used in commerce, then they must first be inspected by the Agency before entering the slaughterhouse. Without a grant of inspection, a facility may not slaughter for human consumption, but the Agency still gets to decide in the first instance whether to grant that inspection or not. Nowhere does the statute say that if certain conditions are met, the Agency "shall grant" the inspections.[16] The "shall" in the FMIA is directed to meat processors, not USDA. This makes perfect sense, as the whole purpose of the FMIA is to protect the public from adulterated meat. 21 U.S.C. § 602. The Act was not passed to compel USDA to authorize slaughterhouse operations – a goal that would be to some extent at odds with the fundamental food

[16] The Agency itself recognizes the *discretionary* nature of its authority to grant or deny FMIA inspection services as evidenced by its own regulations, which state that FSIS "*is authorized* to grant inspection upon [its] determination that the applicant and the establishment are eligible therefore." 9 C.F.R. § 304.2(b) (emphasis added); *see P.E.A.C.H. v. U.S. Army Corps of Eng'rs*, 915 F. Supp. 378, 381 (N.D. Ga. 1995) (citing *Heckler v. Chaney*, 470 U.S. 821, 835 (1985) ("The use of the term 'authorize' (as opposed to 'shall') suggests a discretionary function.")).

safety purpose of the Act. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve.").[17]

This is in stark contrast to the statutes at issue in both *Public Citizen* and *NAHB*, upon which the Defendants so heavily rely. In *Public Citizen*, the applicable statute, 49 U.S.C. § 13902(a)(1), mandated that the Federal Motor Carrier Safety Administration (FMCSA) "*shall register* a person to provide transportation . . . as a motor carrier if [it] finds that the person is willing and able to comply with" various safety and financial requirements established by the Department of Transportation. *Public Citizen*, 541 U.S. at 766 (quoting 49 U.S.C. § 13902(a)(1)). Because the statute did not provide the agency with any choice but to register a person who could comply with the criteria, the Court held that the FMCSA had "no discretion to prevent the entry of Mexican trucks" into the United States, and thus was not the "legally relevant 'cause'" of any environmental effects arising from the entry of the trucks. *Id.* at 770.

[17] For the same reason, the legislative history of the FMIA that Defendants cite is equally irrelevant. No part of the legislative history states that the Agency "shall issue inspections" if certain criteria are met. Instead, it just restates what we already know: that the Agency "shall" conduct inspections prior to allowing any animal to be slaughtered for human consumption – meaning that no entity may slaughter amenable animals for human consumption without an inspection. But again, there is no statement, in the statute or the legislative history, mandating that the Agency grant the inspections or allow such slaughter.

Similarly, in *NAHB*, the Court found that the Environmental Protection Agency lacked discretion over its decision to transfer permitting authority to Arizona, and therefore was not required to engage in consultation with the Fish and Wildlife Service pursuant to the Endangered Species Act, because the Clean Water Act provides that the EPA "shall approve [a state's] submitted program" for transfer of permitting authority unless "adequate authority does not exist." 551 U.S. at 650-51 (quoting 33 U.S.C. § 1342(b)). Again, the agency had no option but to grant the transfer if the criteria were met. As noted above, the plain language of the FMIA, in contrast to both of these statutes, *never mandates approval of inspections*; it only mandates that inspections occur before any slaughter for human consumption shall be allowed. The Agency could choose not to authorize such inspections, which only means that an applicant would not be allowed to slaughter horses for human consumption.

Second, even if the Agency were mandated to grant inspections if the applicable criteria are met – which it is not – those criteria themselves involve considerable discretion, and for that reason alone the Agency's reliance on *Public Citizen* is misplaced. So, while the Defendants repeatedly state that the "FMIA mandates that FSIS grant inspections . . . *if a facility meets the conditions of eligibility*," Defs. Mem. at 20 (emphasis added), they falsely contend that those conditions have no relationship to the "environmental considerations" that a NEPA

analysis would take into account. *See* Defs. Mem. at 28. In fact, the conditions imposed by the FMIA and its implementing regulations provide the Agency with ample room to mitigate or minimize exactly the kinds of impacts to public health and the environment that NEPA requires agencies to consider. *See Nat'l Audubon Soc'y v. Watt*, 678 F.2d 299, 308-10 (D.C. Cir. 1982) (statutes utilizing the word "shall" but leaving the agency space "to exercise limited discretion" over some aspect of the project are statutes that "authorize[ ], indeed require[ ] . . . prepara[tion of] environmental impact statements in compliance with NEPA"); *Cal. ex rel. Harris v. Fed. Housing Fin. Agency*, 2011 WL 3794942, at *14 (N.D. Cal., Aug. 26, 2011) (unpublished) (distinguishing *Public Citizen* and noting that "[t]he FHFA's dual obligations to ensure that the regulated entities operate safely and soundly and in the public interest do not indicate that the agency's consideration of the environmental impact resulting from its actions with regard to the PACE programs is precluded").

Here, the Agency "is authorized to . . . refuse to grant inspection at any establishment if [it] determines" the plant does not meet the requirements of the FMIA or the Agency's various regulations, including requirements related to sanitary conditions, unlawful discharge into navigable U.S. waterways, product adulteration, inhumane handling or slaughtering of livestock, an applicant's truthfulness in filling out his application, and an applicant's past criminal

convictions. 9 C.F.R. § 304.2 (incorporating by reference various other FMIA regulations); *see also Sierra Club*, 255 F. Supp. 2d at 1185-86 (authority to limit mining activities constitutes discretion). Many of these factors that the Agency may consider in deciding whether to grant or deny an application for inspection *specifically relate* to the impacts that Plaintiffs and the public have alleged will result from the commencement of horse slaughter operations, including the likelihood that contaminated or "adulterated" horse meat will enter the food supply and "adulterated" byproducts of horse slaughter will threaten the natural environment in the vicinity of the slaughter plants. *See* Plfs. Mem. at 35-37 (explaining that the regular administration to horses of drugs prohibited for use in food animals can lead to harmful contaminated meat and can threaten the surrounding environment).

Despite Defendants' current contention to the contrary, the CE Memoranda for VM, RT, and RNM state that "the FMIA authorizes" Defendants to "ensure that the carcasses and meat are wholesome, unadulterated, and fit for use as human food"; "require commercial slaughter plants to maintain sanitary conditions with respect to the conduct of commercial slaughter . . . and the storage and proper disposal of condemned or inedible materials"; and "require . . . plans that identify

and prevent or control for potential food safety hazards at each step of the slaughter process." AR2469; AR3284; AR4870.[18]

These are *exactly* the kinds of impacts that NEPA requires agencies to consider when making decisions. *See* 40 C.F.R. § 1508.27 (CEQ "significance" factors include the "degree to which the proposed action affects public health or safety," and whether the "action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment"). As one district court aptly put it, "[n]o subject to be covered by an EIS can be more important than the potential effects of a federal program upon the health of human beings." *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F.Supp. 908, 927 (D. Or. 1977). Accordingly, Defendants' attempts to argue that the conditions and criteria imposed by the FMIA are inconsistent and incompatible with the environmental and public health considerations at issue in a NEPA analysis fall flat. *See* Defs. Mem. at 28.

Moreover, Defendants contradict themselves by simultaneously insisting to the Court that they have no discretion to impose conditions to address the

[18] Defendants also decided, due to VM's history of environmental law violations, that "if FSIS issues VM a grant of federal inspection for commercial horse slaughter, FSIS will post a notice on the inspection office bulletin board alerting agency inspectors that composting solid waste at Valley Meat is prohibited." AR2475. This is further evidence in the Record that Defendants have authority to make decisions in response to environmental concerns related to the grants of inspection.

environmental impacts of horse slaughter, while also touting their authority to impose policies, procedures, and regulations to address the issue of drug residues in horses destined for slaughter, including creating the very residue testing plan that Plaintiffs have alleged is inadequate to address their public health and environmental concerns. *See* Defs. Mem. at 31-32, 37-38 (arguing that they have an intricate "screening process" and "well-defined procedures" to ensure that the contaminated flesh "endangers neither public health and safety nor the local environment") (citing VM CE Memo, AR2469-71; RT CE Memo, AR3285-86; RNM CE Memo, AR4870-71).

The Almanza Memo also speaks loudly about the Agency's discretion, documenting its consideration of whether to commence horse slaughter inspections without enacting a new residue testing program, require lifetime treatment records for any horse considered for slaughter, or enact a new residue testing program in an attempt to address the unique issues associated with horse slaughter. AR1828-29. Defendants cannot have it both ways.

Defendants' expressly "*conditional* grants of inspection" are also in direct conflict with their assertion that the Agency has no discretion, and thus no obligation to conduct a NEPA analysis. *See* AR2457 (specifying conditional grant of inspection to VM); AR3275 (specifying conditional grant of inspection to RT). The *conditions* associated with the conditional grants of inspection require that the

slaughter facilities establish a "hazard analysis and critical control point" plan, *see* 9 C.F.R. § 304.3, which is required to ensure the safety of the meat products – the very issue the public and Plaintiffs want the Agency to examine in a NEPA analysis to ensure that no contaminated byproducts enter the natural environment or the food supply.[19]

In sum, despite Defendants' repeated assertions to the contrary, their own regulations, decision documents, and arguments to this Court plainly acknowledge their discretion to impose conditions and issue policies that could mitigate the potentially significant impacts from horse slaughter that would be analyzed in an EIS. Thus, their attempt to re-litigate whether NEPA applies to their actions in authorizing horse slaughter necessarily fails. *See Nat'l Audubon Soc'y*, 678 F.2d at 308-10 (statutes leaving the agency space "to exercise limited discretion" over some aspect of the project are statutes that "authorize[ ], *indeed require*[ ]" NEPA

[19] As discussed further below, Defendants' assertions to this Court that the only risk to public health from adulterated horse flesh is associated with food safety, and not environmental contamination because no adulterated horse flesh or by-products will enter the environment, *see* Defs. Mem. at 42, are based on assumptions and conclusions that have little to no factual support in the Record, and which further demonstrate the need for substantive NEPA review. For example, although Defendants rely on the slaughter facilities' promises to truck slaughter byproducts off-site, and to safely dispose of blood and wastewater, *id.*, nothing in the Record suggests that either RNM or VM has obtained a permit to dispose of its wastewater. Further, New Mexico law requires a permit even for the offsite trucking of wastewater discharged from VM. *See* N.M. Admin. Code § 20.6.2.3104.

compliance (emphasis added)); *Sierra Club v. U.S.*, 255 F. Supp. 2d at 1186. Countenancing Defendants' attempts to avoid compliance with NEPA by narrowly construing their substantial discretion to condition their grants of inspection betrays the clear Congressional purpose behind NEPA.

C. Defendants' Categorical Exclusion Decisions Are Arbitrary and Capricious.

Defendants have invoked a CE for each of the three facilities at issue here, claiming that they do not need to engage in any formal environmental impacts analysis under NEPA because they allegedly "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." Defs. Mem. at 35 (citing VM, RT, and RNM CE Memoranda, AR2471-76; AR3285-89; AR4868-78). Defendants' CE Memoranda, however, as well as their legal arguments, essentially concede the presence of potential impacts, but incongruously conclude that the impacts will not be significant because of "policies and procedures" Defendants claim will mitigate the dangers. *Id.* at 40. In other words, the Agency acknowledges the existence of potential environmental effects, but instead of undertaking an actual evaluation of their intensity and potential mitigation measures, the Agency tries to explain them away, telling the public and the Court not to worry because, "we're the experts."

But NEPA prohibits such a casual dismissal of potentially significant environmental impacts. *See Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 235 (D.D.C. 2003) (presence of one or more of the CEQ significance factors normally requires preparation of an EIS); *Conservation Cong. v. U.S. Forest Serv.*, 2013 WL 2457481, at *7-8 (E.D. Cal. June 6, 2013) (unpublished) (unique or extraordinary circumstances exist where there is evidence that "a normally excluded action *may* have a significant environmental impact," such as agency-acknowledged "possible" loss of species habitat (emphasis added)); *California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002) ("At the very least there is substantial evidence in the record that exceptions to the categorical exclusion *may* apply, and the fact that the exceptions may apply is all that is required to prohibit use of the categorical exclusion." (emphasis in original)); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 16, 23 (D.D.C. 2009) (agency violated NEPA in invoking a CE where it ignored information in the record concerning environmental impacts); *see also Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731-32 (9th Cir. 2001) ("Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data. . . ." (citation omitted)), *abrogated on other grounds by Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010).

By sidestepping any substantive analysis of horse slaughter operations, the Agency has eviscerated NEPA's central purpose to "consider environmentally

significant aspects of a proposed action" in an EA or EIS before taking action, *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1162 (10th Cir. 2002), and has deprived the public of any participation in that process. *See N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 718 (10th Cir. 2009) ("By focusing both Agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decisionmaking by agencies and allows the political process to check those decisions.").

The RNM CE Memo must also specifically be set aside as arbitrary and capricious because in preparing it, the Agency relied on information that is false, in some cases, and totally inapplicable in other cases, as described more fully below. Finally, as Plaintiffs explained in their opening brief, all three CEs should be set aside because the Agency was influenced by improper political considerations when it decided to grant slaughter inspections without undertaking substantive NEPA review. Plfs. Mem. at 45-46.

1. Authorizing Horse Slaughter May Have Significant Environmental Effects.

As Plaintiffs explained in their opening brief, the Record demonstrates without a doubt that there "may" be significant impacts resulting from the commencement of horse slaughter operations in this country – including potentially significant impacts to public health, ground water, odor pollution, and

quality of life – and therefore, a CE is inappropriate.[20] *See* Plfs. Mem. at 41-44; *see also* 40 C.F.R. § 1508.4 (actions which "may have a significant environmental effect" are not covered by a CE); 7 C.F.R. § 1b.4(a) (CE may be invoked unless "an action *may* have a significant environmental effect" (emphasis added)). Defendants' arguments to the contrary all fail.

a. The Effects of Drug Residues Associated with Horse Slaughter Are Uncertain.

Defendants argue that the effects on public health and the environment of drug residues in horse flesh and the by-products of horse slaughter are not unknown or uncertain – or indeed any cause for concern at all – within the meaning of the CEQ significance factors, 40 C.F.R. § 1508.27(b)(2), (5), because any such residues will be discovered, and the contaminated blood, flesh, and offal disposed of, through application of the Agency's "National Residue Testing Program" along with the slaughter facilities' waste disposal practices. Defs. Mem. at 37, 45-46.[21] The actual Record in this case proves the opposite, and reveals these arguments to be false.

[20] Defendants never dispute that the presence of one or more CEQ significance factors renders a CE inappropriate; rather Defendants simply assert that "none of the significance factors apply here." Def. Mem. at 35. And as the cited cases establish, if the Court agrees with Plaintiffs that at least one CEQ significance factor, if not multiple factors, is implicated in the grants of inspection, then a CE is inappropriate.

[21] Notably, Defendants carefully avoid mention of the Directive in their argument regarding the grants of inspection, despite the fact that they relied on the Directive to justify their decision to forego a substantive NEPA analysis of the grants of

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Defendants carry on at length about how the Agency has determined, in accordance with its expertise, *see, e.g.*, Defs. Mem. at 36, 39, that its residue testing program, which it claims will "test[ ] for the most common substances" present in horse flesh, will "address . . . concerns" over the existence of dangerous drug residues in horse flesh and byproducts, *id.* at 40, and "adequately protect public health." *Id.* at 39. The Agency arrived at this conclusion, however, only by summarily dismissing undisputed evidence in the Record of numerous drugs and dangerous substances commonly administered to horses in the United States, none of which the Agency ever has tested or currently plans to test during the inspection process. Plfs. Mem. at 12-14. Although the Agency claims it has identified the "most common substances" found in horses, it has never actually investigated (at least not as reflected in the Record) what substances are in fact most commonly present in horses. Nor has the Agency even attempted to refute Plaintiffs' evidence of over 100 substances routinely administered to American horses.[22]

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inspection. *See* VM CE Memo, AR2469-71; RT CE Memo, AR3285-86; RNM CE Memo, AR4870-71. Defendants' attempts to alter their legal argument to avoid a ruling that the Directive is final agency action cannot succeed, as described above in Section II.A.1.

[22] It is ironic (and convenient) for Defendants to suggest that they have already properly conducted a substantive review of the presence of dangerous drug residues in horses in the course of developing their drug residue testing plan, when they simultaneously contend that the Directive – which memorializes that plan – is

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Instead, the Agency arrived at its list of "most common substances" administered to horses by combining (1) substances tested for in horses prior to 2006 because they were tested for in traditional food animals such as cattle, AR2285, and (2) less than one-third (31 in total) of the substances on *Plaintiffs'* list of 115 substances, identified in Plaintiffs' Rulemaking Petition, AR1826; AR1851-52; AR94-123.[23] The Agency characterized this limited number of substances as "compounds administered to equines that [Petitioners] believe[] pose food safety risks." AR1826. This mischaracterizes Plaintiffs' concerns. Whether a substance is among these 31 randomly selected substances says nothing about how commonly it is administered to horses, how harmful it may be to humans who ingest it or come into contact with it, or how harmful it may be to the environment.[24] And though Defendants concede that at least nine substances

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not subject to judicial review. In other words, under the Defendants' formulation, their actions concerning drug residues in horses are entirely insulated from review.

[23] It is astounding that the Agency relied on Plaintiffs' Petition to identify substances to test for in horses without undertaking any independent investigation, and now defends its actions as the product of expertise while repeatedly asserting that the Petition arguments "lack merit." Defs. Mem. at 36.

[24] Defendants identified 42 substances it intended to test for of the 115 substances identified by Plaintiffs, AR1826, but excluded from its testing plans 11 substances that are applied to horses topically. *See* AR1851-52. Plaintiffs did not identify these 42 substances as more harmful than any of the other dozens of substances commonly administered to horses but only as substances identified in the Code of Federal Regulations as prohibited for use in horses to be slaughtered for food. *See* AR17-27, 65-69.

identified as hormones and tranquilizers are commonly administered to horses, *see* Defs. Mem. at 39; AR1851-52, the Agency will not even begin testing horses or horse flesh for these substances until 2014. AR1851-52. Nothing in the Record suggests that Defendants have considered how their failure to test for these particularly dangerous substances will affect the environment.[25]

Plaintiffs' Petition, along with its numerous supporting documents and expert affidavits, demonstrates that the dozens of other substances that the Agency dismissed out of hand, has *never* tested for, and does not plan to test for, can be equally dangerous to humans, and are in fact not permitted to be administered to food animals under the Food, Drug, and Cosmetics Act. *See* 21 U.S.C. § 342(a)(2)(C) (establishing that food containing certain veterinary drugs and similar substances – called "new animal drugs" and "food additives" – is adulterated unless those substances have explicitly been approved for use in that food); *see also* 21 U.S.C. § 348 (food additives); 21 U.S.C. § 360b (new animal drugs); AR17-23; AR65-69.[26] As Plaintiffs have also explained, the substances

[25] Put another way, nothing in the Record shows that Defendants have paid any mind to the environmental hazards that could occur when these untested substances are discharged into ground water, storm water, the land, or the air.

[26] Defendants' dismissal of numerous affidavits in Plaintiffs' Petition, attesting to the fact that most American horses have been administered one or more of the drugs listed in Exhibit 1 to the Petition, as mere "conclusory assertions" only further demonstrates the lengths to which Defendants will go and have gone to ignore opposing evidence in the Record and the arbitrary nature of their actions.

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present in traditional food animals are not necessarily the ones most commonly administered to horses. *See* Plfs. Mem. at 13-14, 38-39. Therefore, testing for those substances in horses provides no assurance that a majority of the dangerous substances actually present in horse flesh will be discovered.

By deciding to test only for a small fraction of the drugs administered to American horses, arbitrarily determining that these are the "most common" substances administered to horses without any empirical evidence that this is the case and despite overwhelming undisputed evidence in the Record to the contrary, and then concluding that such testing will protect the public and the environment from any harmful residues in horse flesh and byproducts, the Agency has acted in an arbitrary and capricious manner. *See Olenhouse*, 42 F.3d at 1574 (Agency action is arbitrary and capricious where it has "failed to consider an important aspect of the problem" or "offered an explanation that runs counter to the evidence before the agency."). At a minimum, the Record as to the drug residues – and even the dispute between Defendants and Plaintiffs in their briefing – reflects that the presence of residues in horse flesh and byproducts, and their effects on human health and the

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This is the epitome of arbitrary and capricious decisionmaking. *See Motor Vehicle Mfrs. of U.S. v. State Farm*, 463 U.S. 29, 47-48 (1983) (finding agency action arbitrary and capricious where agency acted without proper consideration of relevant factors); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994).

environment, remains uncertain and unknown. *See Fund for Animals v. Babbitt*, 89 F.3d 128, 130 (2d Cir. 1996) ("Categorical exclusions may *never be invoked* if the action at issue may have . . . highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks." (emphasis added.)).[27]

b. There Is Public Controversy Over the Nature and Effects of the Grants of Inspection.

For the same reasons, there is without question a public controversy over the "size, nature, or effect" of the Agency's grants of inspection here. *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002); *see*

[27] Similarly, the Agency's contention that none of the byproducts of horse slaughter – including blood, offal, or tissue – will enter the local environment lacks support in the Record. *See* Defs. Mem. at 42. VM plans to use the same wastewater disposal systems for horse slaughter as it used for its prior slaughter operations. AR2574-76 (VM discharge permit application); VM CE Memo, AR2473 (noting that "there will be no significant difference between the methods that Valley Meat will use to conduct commercial horse slaughter at its facility and the methods that it previously used to conduct the slaughter of other amenable species"). Yet, according to a 2010 letter from an Agency employee to a New Mexico state agency, VM has a "settling pond" – a lagoon – about 100 yards behind its facility, that contains blood and byproducts from the slaughter plant. AR4151 ("The liquid is red. I assume that is blood from the slaughter plant."). Similarly, as discussed in Plaintiffs' opening brief and explained further below, byproducts produced by the last three horse slaughter plants to operate in this country frequently made their way into the surrounding environment. Plfs. Mem. at 8-10. The Agency's optimistic assurances to the contrary notwithstanding, there is every reason to believe that similar discharges of byproducts into the local environment will inevitably occur at the new facilities.

Plfs. Mem. at 24.[28] The Agency's CE Memoranda, briefing, and declaration of Dr. Daniel Engeljohn ("Engeljohn Decl.") all evidence the significant dispute between the Agency's staff on the one hand, and respected scientists and members of the public on the other hand, who have expressed their opinions as to the dangers of drug residues in horse flesh and byproducts. *See* AR11-33; AR124-148, 4034-48. While Defendants attempt to brush off any controversy over the effects of drug residues in horse flesh on human health and the environment as merely a result of Plaintiffs' "opinion," Defs. Mem. at 36, the Record makes clear that there is legitimate disagreement over the presence and effects of drug residues in horse flesh, and the extent to which the Agency's current testing system will control those currently unknown risks. *See Jones v. Gordon*, 792 F.2d 821, 829 (9th Cir. 1986) (finding CE inadequate and noting that "[w]hile the Service report disputes or rebuts several of these points, it nowhere explains why these points do not suffice to create a public controversy based on potential environmental consequences").[29]

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[28] Defendants impute to Plaintiffs an argument that Plaintiffs have never made – that *opposition* to an agency action itself is enough to create controversy. *See* Defs. Mem. at 40-41.

[29] As Plaintiffs explained in their opening brief, Plfs. Mem. at 38-39, the declaration Defendants provide from Dr. Engeljohn actually *highlights* the need for environmental review under NEPA, rather than after-the-fact rationalizations. *See* ECF No. 66-1. Dr. Engeljohn entirely ignores the numerous material differences between traditional food animals and horses, including that Americans treat and medicate their horses more like dogs or cats than food animals such as cows, pigs, or chickens – animals raised and regulated from birth to become food. Moreover,

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Instead of burying its head in the sand and refusing to consider the intensity of the risks and the potential need to implement further controls, or writing off these risks in self-serving CE Memoranda, the Agency must undertake a substantive NEPA analysis to fully assess all of the conflicting information, research the full range of dangerous and potentially dangerous substances administered to horses, and evaluate the likelihood that current controls will properly manage the risks. *See Nat'l Parks & Conservation*, 241 F.3d at 737 (NEPA document inadequate where it identified "an environmental impact" but "did not establish the intensity of that impact") ; *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978) (NEPA's mandate "is to insure a fully informed and well-considered decision").

The Agency's steadfast focus on the residue testing program as a means of controlling any dangerous substances that exist in horse flesh, as well as its insistence that the slaughter facilities will carefully control any contaminated

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according to Dr. Engeljohn, the National Residue Program testing of horses from 1997 to 2006 yielded few positive results for the classes of drugs tested, which he takes to mean that the likelihood of the slaughter process yielding tainted meat and byproducts is minimal. Engeljohn Decl., at ¶ 17. However, of the 115 substances commonly administered to horses identified in Plaintiffs' Petition, at most a few dozen of them were tested for in horses when horses were previously slaughtered. *See* AR94-123; AR714-715; AR835-36. These "exceedingly low" positive results signify grossly inadequate residue testing – not a safe system – and emphasize the unknown impacts and controversy at stake here.

byproducts, alone demonstrates the existence of potentially significant impacts. *See* Defs. Mem. at 43-46; AR2471; AR3285-86; AR4872-73. That the Agency feels compelled to address the potential environmental impacts and assert procedures to mitigate those impacts *outside of the NEPA process* makes absolutely clear that such impacts may be present and may be significant. Hence the Agency's NEPA obligations are triggered, and the Agency must complete at least an EA and cannot invoke a CE. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059, 1090 (N.D. Cal. 2007) (agency violated NEPA by invoking a CE for its rule that changed forest management standards because "the invocation of any CE is inappropriate if the agency action may have significant effects on the environment as defined by the CEQ regulations"); *Catron County*, 75 F.3d at 1439 (explaining that even an environmental *protection* measure, specifically the designation of critical habitat for endangered species, triggers NEPA because "[w]hen the environmental ramifications of [the challenged agency action] are unknown, we believe Congress intends that the [agency] prepare an EA leading to either a FONSI or an EIS"); 40 C.F.R. § 1508.27; *cf. Am. Bird Conservancy, Inc. v. F.C.C.*, 516 F.3d 1027, 1033-34 (D.C. Cir. 2008) ("Indeed, the *Order*'s emphasis on 'conflicting studies' and 'sharply divergent views' regarding the number of birds killed confirms, rather than refutes, that towers may have the requisite effect. . . . Under such circumstances, the Commission's regulations mandate at least the

completion of an EA before the Commission may refuse to prepare a programmatic EIS.").

c. The Agency Failed to Consider Environmental Harm Caused by Horse Slaughter and VM and RNM's Compliance with State Law.

Defendants' attempts to dismiss the significant concerns that authorizing inspection at three new horse slaughter facilities will result in violations of local and state environmental laws, and thus implicate another CEQ significance factor, 40 C.F.R. §1508.27(b)(10), are also unavailing. First, Defendants' decided to *simply ignore* the evidence of environmental damage caused by the only three recently existing American horse slaughter facilities, apparently because that evidence came from "laypeople" who observed and suffered those harms. Defs. Mem. at 44. This is not only insulting to the citizens and local officials who lived in the shadow of this havoc, but demonstrates the utterly result-driven and arbitrary nature of the Agency's actions here. *See id*.[30] It does not take an expert to report on nausea and

[30] The evidence relates to land, water, and odor pollution from the previous facilities and includes declarations from citizens and public officials regarding blood spills, a severe stench, declining property values, and ongoing waste discharge violations, as well as administrative orders documenting these violations. *See* Plfs. Mem. at 8-10. The Agency did not include this information in its Administrative Record, although the Agency was well aware of it. *See Johanns*, 520 F. Supp. 2d at 19 ("Neither Defendants nor Defendant-Intervenors refute Plaintiffs' argument that horse slaughter operations have 'significantly' impacted the environment within the meaning of NEPA. . . ."). As Plaintiffs have argued in prior briefs as well as herein, this information is all relevant to the Agency's decision to grant inspections now and therefore should have been included in the

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illness from ongoing odor pollution, nor does it take an expert to understand that the sight of rotting carcasses or horse blood in tap water is not healthy for the environment or human health.[31] There is nothing in NEPA that says that an agency should only consider environmental impacts if they are presented by scientists – and

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Administrative Record. But the fact that it was excluded from the Record does not make it irrelevant to review of the Agency's actions and does not preclude the Court's consideration of it. *See* Plfs. Opp. Mem. at 3-5, Sept. 23, 2013, ECF No. 169; *see also Olenhouse*, 42 F.3d at 1575; *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1280 (D. Colo. 2010) ("By its very nature, evidence which the agency fails to consider is frequently not in the record. Accordingly, in order to allow for meaningful, in-depth, probing review, such extra-record evidence is often properly included in the Administrative Record."). Rather, the Agency's failure to consider this information prior to taking action renders its decisionmaking process arbitrary and capricious. *See also Olenhouse*, 42 F.3d at 1575.

[31] *See* Declaration of Bruce Wagman ("Wagman Decl.") ¶¶ 2-11, Jul. 2, 2013, ECF No. 6; Declaration of Robert Eldridge, Wagman Decl., Ex. 2, ECF No. 13 (Kaufman, Texas resident "unable to use [his] yard" because of stench of plant, seeing blood spills and animal parts concerned for loss of property values); Declaration of Tonja Runnels, Wagman Decl., Ex. 3, ECF No. 13 (same); Declaration of Juanita Smith, Wagman Decl., Ex. 4, ECF No. 13 ("blood in my bathtub, sinks, and toilets," unable to have family over because of "severe stench on daily basis"); Declaration of Yolanda Salazar, Wagman Decl., Ex. 5, ECF No. 13 (Fort Worth, Texas resident unable to go outside for activities because of stench); Declaration of Margarita Garcia, Wagman Decl., Ex. 6, ECF No. 13 ("constantly exposed to the severe stench of the plant;" cannot open windows because "odor is unbearable"); Declaration of Mary Farley, Wagman Decl., Ex. 7, ECF No. 13 (DeKalb, Illinois resident stating that "smell was so bad, and it would linger in my head for the rest of the day"); Declaration of Elizabeth Kershisnik, Wagman Decl., Ex. 8, ECF No. 13 (describing "ongoing water pollution violations"; "polluted, green foam oozing from the plant's wastewater treatment tank"); and Declaration of James Kitchen, Wagman Decl., Ex. 9, ECF No. 13 (same).

for good reason. The vast majority of the adverse impacts of agency decisions fall on ordinary members of the public, and oftentimes people of limited economic means.

The fact that the Agency found the real world experience of former neighbors of horse slaughter irrelevant – and did not so much as mention it in any of its CE Memoranda – demonstrates the arbitrary nature of its actions here. *See Caldwell v. Life Ins. Co. North Am.*, 287 F.3d 1276, 1282 (10th Cir. 2002) ("Indicia of arbitrary and capricious decisions include lack of substantial evidence, mistake of law, [and] bad faith . . ."); *see also State Farm*, 463 U.S. 29, 47-48 (1983) (action is arbitrary and capricious where agency fails to consider relevant factors); *Olenhouse*, 42 F.3d at 1581.[32]

Moreover, even setting aside the environmental damage caused by the previously existing facilities, there is ample evidence that VM has violated, and

[32] Defendants' efforts to distinguish *Reed v. Salazar*, 744 F. Supp. 2d 98 (D.D.C. 2010), gain them little ground. *See* Defs. Mem. at 44-45. The fact that the previously existing facilities were operated by different individuals than VM, RT, and RNM, does not detract from the relevance of how those previous facilities operated. Indeed, Cavell, Beltex, and Dallas Crown were the only three recently operating horse slaughter facilities, and all three of them caused significant environmental harm to the surrounding communities. This is the *only* firsthand horse slaughter experience available, and, given that fact alone, it deserves serious consideration. There is surely good reason to believe that new facilities, conducting the same kind of slaughter operations, will have similar impacts. At the very least, the evidence of past facilities should trigger a searching, substantive environmental review – not the dismissive back of the hand approach that the Agency has taken here by invoking CEs.

may in the future continue to violate, key state and local environmental laws. Although the Agency asserts that "USDA is aware of only one environmental violation at Valley Meat in its twenty year history as a cattle slaughter facility," Defs. Mem. at 46, the Agency is either being less than candid, or it has ignored key evidence that came before it.

First, notably, the "compost pile" violation was in fact a huge pile of rotting, maggot-infested cow carcasses that the USDA itself expressed serious concern about. *See* AR2766-69. That condition went on for *years*, and, under New Mexico law, each day is a separate violation – resulting in hundreds of violations on that issue alone. N.M. Code R. § 20.9.3.27.A; N.M. Stat. Ann. § 74-9-38.

Second, one of the Plaintiffs sent a letter in April 2013 to USDA, listing a decades-long series of food safety and environmental violations committed by VM. *See* Letter from Bruce Wagman to Tom Vilsack and Alfred V. Almanza, April 22, 2013, attached hereto as Exh. 1. While the Agency omitted that letter from the Administrative Record, Plaintiffs also submitted another letter in May 2013, AR4270-74, that cites and summarizes the violations listed in the April 22 letter.[33]

[33] This letter states that "[f]or ten years after Ricardo De Los Santos took over Valley Meat, the company failed to comply with the rules and conditions of its discharge permit, failing to submit monitoring reports, pumping manifests, groundwater sampling reports, wastewater sampling reports, and reports on the volume of wastewater discharge, and failed to protect the surrounding land by closing out its existing clay and manure lined lagoon. Further, in 2009, Valley

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Accordingly, it is clear that VM has disregarded, and may well continue to disregard, key laws for the protection of the environment. The Agency's assertion that it is "not aware" of this information is flatly contradicted by the Record, and again demonstrates that the Agency has "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. Consequently, its decision to issue a CE memorandum for VM, at minimum, is arbitrary and capricious. *See id.*

Similarly, although the Agency contends that RNM has "attested that [it] will not discharge into navigable waters," Defs. Mem. at 46, and that RNM has provided all necessary permits to allow it to safely dispose of horse blood and wastewater, *id.* at n.6, the Agency has no basis for relying on this information. In fact, nothing in the Record suggests that RNM has acquired the necessary permit under the Missouri Clean Water Law that would allow it to discharge horse blood and other liquid waste into its lagoons. *See* 10 CSR 20-6.015(2)(A). Nor can RNM legally dispose of its wastewater at the City of Gallatin Wastewater Treatment Facility, because the Missouri Department of Natural Resources has prohibited the City of Gallatin from accepting wastewater from equine slaughter. *See* Sept. 20, 2013 Email from Steve Feeler, MO DNR to City of Gallatin, ECF 187-1(C) (as of September 20, 2013, "the City of Gallatin is not authorized to

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Meat simply let its discharge permit expire and kept operating its cow slaughter facility in violation of New Mexico law." AR4270 n.1.

accept wastewater from an equine processing facility").[34] Accordingly, Defendants again have acted arbitrarily and capriciously by ignoring important information that should raise considerable doubt as to whether RNM will be in compliance with state and local laws intended to protect the environment. *See* 40 C.F.R. § 1508.27(b)(10).[35]

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[34] The Court should consider this evidence because it demonstrates, again, that the Agency has ignored "an important aspect of the problem." *State Farm*, 463 U.S. at 43; *see also Olenhouse*, 42 F.3d at 1575; *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d at 1280 . Any argument that the Court may not consider this evidence lacks merit, as it implies that an Agency's reliance on false information must go unchallenged if the Agency omitted the only relevant, accurate, contrary information from the Record.

[35] Defendants are also wrong that these grants of inspection do not establish a precedent for future actions. *See* Defs. Mem. at 48. Once the Agency has decided that its residue testing plan and other "controls" adequately protect human health and the environment in granting one application for inspection, they are almost certain to decide the same with respect to future facilities. In fact, the Agency has already done that: it copied verbatim much of the text from the VM CE Memorandum for the RT CE Memorandum, and then did the same with respect to the RNM CE Memorandum, to which it also added new text in an attempt to address flaws identified by Plaintiffs and the Court. The fact that there are no other slaughter applications being actively pursued right now is of no moment, Defs. Mem. at 48; the inspection decisions represent a precedent for all future horse slaughter facilities, not only the ones currently on the table. Moreover, by dismissing each individual grant of inspection as categorically excluded, the Agency has also deprived the public of an analysis of the potentially significant cumulative impacts of authorizing numerous horse slaughter facilities throughout the country. *See Fuel Safe Washington v. F.E.R.C.*, 389 F.3d 1313, 1329-30 (10th Cir. 2004) ("An environmental impact statement must analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts."); 40 C.F.R. § 1508.25(a)(2), (c). Defendants' contention that they do not need to undertake a full cumulative impacts analysis because they invoked a CE is circular reasoning at its best. *See* Defs. Mem. at 48-49. Rather, the cumulative impacts

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In short, the Record and Defendants' own legal arguments make clear that there may indeed be potentially significant environmental impacts resulting from USDA's grants of inspections to horse slaughter facilities. This is all that is required under controlling caselaw to render the CEs inadequate, and trigger the preparation of an EA at a minimum. *See Citizens for Better Forestry*, 481 F. Supp. 2d at 1090.[36]

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associated with this decision are part of what makes it extraordinary, and demands preparation of an EA or EIS. *Utah Environmental Congress v. Bosworth*, 443 F.3d 732, 741 (10th Cir. 2006), is not to the contrary. That court noted that while the basic premise behind a CE is that no cumulative impacts exist, "we agree that it may be conceptually possible for a large number of small projects to collectively create conditions that could significantly effect [sic] the environment," and "the regulation itself contains a provision to address that concern, namely the extraordinary circumstances exception." *Id.* In other words, the possibility of cumulative impacts itself could be enough to take a project out from the cover of a CE.

[36] To the extent the Agency believes that the CE Memoranda can substitute for an EA or EIS, *see* Defs. Mem. at 33 n.4, the Agency is mistaken. One level of NEPA documentation or review cannot substitute for another, unless the document fulfills *all* NEPA requirements. *Nat'l Indian Youth Council v. Andrus*, 501 F. Supp. 649, 656-57 (D.N.M. 1980), *aff'd* 664 F.2d 220 (10th Cir.1981) ("[A]n EA is not the functional equivalent of an EIS or a supplement."); *Catron County*, 75 F.3d at 1437 ("Partial fulfillment of NEPA's requirements, however, is not enough . . . ." (quotations omitted)). An EA must "reflect the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project. . . ." *Dine Citizens Against Ruining our Env't v. Klein*, 747 F. Supp. 2d 1234, 1257 (D. Colo. 2010) (internal quotation marks and citations omitted); *see also* 40 C.F.R. § 1508.9(b) (an EA shall, at minimum, "include brief discussions of the need for the proposal, of alternatives . . . of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted"). The CE Memoranda at issue here do not even come close to this level of consideration, nor to making the necessary "convincing case" that the potential environmental impacts are insignificant and that no EIS is required. *New York v. Nuclear Reg.*

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2. The Agency's Invocation of a CE for RNM Is Arbitrary and Capricious Because It Is Based on False Information.

The CE decision for RNM must also specifically be set aside as arbitrary and capricious because Defendants relied on information that is false and irrelevant, specifically, information about a wastewater treatment program in a different city and state than RNM, that was supposedly going to protect the environment around RNM. If an agency relies on false or inapplicable information in making its decision, that decision is likely to be arbitrary and capricious. *See, e.g.*, *Olenhouse*, 42 F.3d at 1575 ("In addition to requiring a reasoned basis for agency action, the 'arbitrary or capricious' standard requires an agency's action to be supported by the facts in the record."); *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030-31 (2d Cir.1983) ("If the district judge finds . . . that the EIS sets forth statements that are materially false or inaccurate, he may properly find that the EIS does not satisfy the requirements of NEPA, in that it cannot provide

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Comm'n, 681 F.3d 471, 477 (D.C. Cir. 2012). Moreover, the Agency's avoidance of substantive NEPA review deprived the public and experts of participation in this process. NEPA regulations require the Agency to allow for public participation – which would allow the scientific community, as well as the numerous parties that have come forward to have a place in this litigation, to weigh in on the disputed issues of drug residues and environmental impacts. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 970 (9th Cir. 2003) (depriving plaintiffs "of the opportunity to comment on the USDA's EA and FONSI . . . violated their rights under the regulations implementing NEPA"); *Fund for Animals*, 281 F. Supp. 2d at 228 (FONSI was arbitrary and capricious because, *inter alia*, agency "efforts to ensure public involvement in the EA process were deficient"). The CEs may not substitute for a proper substantive NEPA analysis.

the basis for an informed evaluation or a reasoned decision."); *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005) (holding that the Forest Service "violated NEPA's procedural requirement to present complete and accurate information to decision makers and to the public to allow an informed comparison of the alternatives considered in the EIS" where the EIS was based on mistaken market demand projections that inflated the economic benefits and discounted the environmental impacts of the foresting plan).

In finding that that the RNM facility does not risk violation of the Missouri Clean Water Law, USDA relied on information related to the wastewater management system of *a completely different city in a completely different state* than where RNM is located – relying on information about Gallatin, *Tennessee*, instead of Gallatin, *Missouri*. *See* RNM CE Memo at AR4877 (citing www.gallatinutilities.com/wastewater.html).[37] Specifically, the Agency stated the following, which was based on entirely inapplicable information: "in accordance with [Missouri's] Clean Water Law, Rains Natural Meats will discharge its wastewater into the City of Gallatin's wastewater collection system which consists of over 191 miles of sanitary sewer lines and 22 sanitary sewer pumping stations." *Id.* It then went on to describe additional features of the Gallatin, *Tennessee*

[37] *See also* http://www.gallatinutilities.com/contact_us.html (attached hereto as Exh. 2). The Court can take judicial notice of the fact that Gallatin, Missouri and Gallatin, Tennessee are two different cities. *See* Fed. R. Evid. 201.

wastewater treatment system, none of which are even remotely applicable to how RNM's wastewater will be managed in Gallatin, *Missouri*. This alone should invalidate the CE for RNM, and put into serious question the Agency's attention to environmental concerns associated with horse slaughter.

Because the Agency relied on inaccurate information, the Court should set aside the RNM CE. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d at 1035 ("A decision made in reliance on false information, developed without an effort in objective good faith to obtain accurate information, cannot be accepted as a 'reasoned decision'").

3. The CE Decisions Are Arbitrary and Capricious Because They Were the Product of Improper Political Considerations.

Finally, all three CE decisions for the grants of inspection should be set aside as arbitrary and capricious because in preparing them the Agency "relied on factors which Congress has not intended for it to consider" – political considerations. *Olenhouse*, 42 F.3d at 1574; *see* Plfs. Mem. at 45-46 (citing *Wyoming v. U.S. Dept. of Agr.*, 277 F. Supp. 2d 1197, 1232 (D. Wyo. 2003)). As Plaintiffs have explained, the Almanza Memo illustrates that, while purporting to "objectively" address the Agency's discretionary determinations with respect to horse slaughter inspections, the Agency may never have had an open mind as to whether it would conduct a substantive NEPA analysis on the decisions to issue the

grants of inspection, because to do so would take additional time, and the Agency was already seen as "dragging its feet on the equine slaughter issue." AR1827 (also noting that additional delay could result in "punitive congressional action"); *see also* AR 1827-1829 (listing several "cons" associated with undertaking additional review of possible residue control plans).

Defendants attempt to deflect these serious concerns about political considerations by arguing that the document was not about "whether to prepare an environmental analysis," Defs. Mem. at 52, but was instead a discussion of options "relating to the reinstatement of equine inspections." Defs. Mem. at 53. However, the two are inextricably related, because the question of when and whether to reinstate horse slaughter operations necessarily involves the decision of whether to undertake NEPA review. The Agency decisionmakers' concerns about political backlash if they took any more time to reinstate equine slaughter inspections improperly overrode any concern about undertaking the required, and potentially time-consuming, NEPA review.

It is clear that the Agency's decisions at issue here – both in selecting the path of least resistance in choosing a residue plan that ignored and rejected the required undertaking of significant studies or evaluations,[38] and in deciding not to

[38] *See* AR1828-29 (noting an option – which it did not undertake – that would involve "further evalu[ation] of residue presence in equine tissue").

undertake substantive NEPA review for the Directive or the grants of inspection – were heavily influenced by political considerations and the desire to move forward quickly with horse slaughter inspections. As such, they should be set aside as arbitrary and capricious. *See, e.g.*, *Earth Island Inst. v. Evans*, 256 F. Supp. 2d 1064, 1069 (N.D. Cal. 2003) (finding likelihood of success on merits that action was arbitrary and capricious because it was based on political considerations, and noting that "[w]hile the Secretary has wisely refrained in this case from expressly invoking trade policy concerns as grounds for affirming his final finding, there is little doubt that he has continued to face pressure to consider factors beyond the scientific evidence.").[39]

[39] Defendant-Intervenors – but notably not Federal Defendants – also argue that Plaintiffs lack standing to challenge the grant of inspection to RT. Interv. Mem. at 23-26. Plaintiffs are challenging a federal agency's *national* residue testing program and authorization for horse slaughter operations *across the United States*. Plaintiffs' harm arises from the Agency's failure to comply with NEPA prior to taking these actions of national scope. Because both Plaintiffs' harm and the challenged actions are on a *national scope*, standing as to each individual slaughter facility is unnecessary. *See Heartwood, Inc. v. U.S. Forest Serv.*, 73 F. Supp. 2d 962, 980 (S.D. Ill. 1999) (rejecting defendants' claim that plaintiffs lack standing in NEPA case because plaintiffs "have not demonstrated a 'personal stake' in all circumstances in which CE's are applied or may be applied in the future" and granting nationwide injunction against all agency actions pursuant to challenged CEs). Plaintiffs have already demonstrated that they have standing to bring this action. Plfs. Mem. at 27 n.14 (citing declarations and cases).

III. THE COURT SHOULD SET ASIDE THE DIRECTIVE AND GRANTS OF INSPECTIONS

Defendants argue that if the Court finds that they have violated NEPA as to the Directive and the grants of inspection, it should neither vacate those decisions nor enjoin further inspections pending the Agency's compliance with its NEPA obligations. This baseless argument reveals just how little regard the Agency has for NEPA and its underlying goals and just how much pressure the Agency was under to commence horse slaughter inspections.

First, under well-established case law, including numerous opinions from the Supreme Court, setting aside or vacating an agency decision is the presumed remedy when that decision violates Section 706(2)(A) of the APA, because the APA instructs that the "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be [ ] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Fed. Commc'ns Comm'n v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 300 (2003) ("'*In all cases* agency action *must be set aside* if the action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.'" (emphasis added) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-14 (1971)); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (explaining that "[i]f the decision of the agency is not sustainable on the administrative record made, then the . . .

decision must be vacated and the matter remanded"); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case."); *see also Johanns*, 520 F. Supp. 2d at 37 (noting that vacatur is the "standard" remedy for violation of APA); *Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (op. of Randolph, J.) ("Setting aside means vacating; no other meaning is apparent."), *superseded by regulation*, 17 C.F.R. § 201.102(e), *as recognized in Marrie v. Sec. Exch. Comm'n*, 374 F.3d 1196 (D.C. Cir. 2004). Thus, the presumptive relief here is to vacate both the Directive and the specific grants of inspection pending the Agency's compliance with NEPA.

Second, vacatur of the unlawful decisions is even more critical in a case where the Agency has violated NEPA, because NEPA's primary purpose is to require federal agencies to analyze and publicly disclose the environmental impacts of their proposals *before* implementing a final decision that could have negative environmental effects. *See* 42 U.S.C. § 4332(c); 40 C.F.R. §§ 1500.1, 1501.2; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-49 (1989). If the Agency is allowed to continue implementation of its illegal decisions while it undertakes NEPA review, then NEPA review would be pointless. *See, e.g., Alpine Lake Prot. Soc'y v. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir.1975) (noting that the policies underlying NEPA "weight the scales in favor of

those seeking the suspension of all action until the Act's requirements are met"); *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 718 (10th Cir. 2009) (NEPA mandates that assessment of all reasonably foreseeable impacts "must occur at the earliest practicable point, and must take place before an 'irretrievable commitment of resources' is made") (quoting 42 U.S.C. § 4332(2)(C)(v)); *Mass. v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) (finding that preliminary injunctive relief is normally appropriate in NEPA cases because "NEPA is designed to influence the decisionmaking process[,] to make government officials notice environmental considerations and take them into account. Thus, when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.").

Defendants' position that the Directive and grants of inspection should remain in place while they undertake a proper NEPA analysis demonstrates that they completely misunderstand the goals of NEPA. If the decisions remain in place and inspections occur *before* the Agency conducts a proper analysis of the potential environmental impacts of those actions, then the potential damage is already done, without the benefit of any NEPA analysis.

Moreover, the fact that Defendants speciously contend that they in fact already invoked a CE on the Directive, and that therefore the "only action" that

remains is for the Agency to provide "further explanation" for that purported "invocation," Defs. Mem. at 70, demonstrates the Agency's disdain for its NEPA obligations. As noted in Section II.A.3 above, the Agency's supposed CE is a *footnote* in the RNM CE Memo, AR4871 n.4, that does not reference the Directive or provide any analysis of its potential environmental impacts. *See* 7 C.F.R. § 1b.4(a). Moreover, the RNM Memo was issued on September 13, 2013, AR4824, *nearly three months after* the Directive was issued on June 28, 2013, AR1861. This supposed "invocation" of a CE constitutes a wholly impermissible *post hoc* justification for the Agency's decision. *See* TRO Order at 3-4 (citing *Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 825 n.4 (10th Cir. 2008)). Thus, not only has the Agency never undertaken any "explanation" for why a CE is appropriate for the Directive, it has not even properly invoked a CE at all.[40]

The proper remedy here is for the Court to set aside the Directive and the grants of inspections pending the Agency's *proper* compliance with NEPA.

[40] The absent "explanation" for why a CE is appropriate, Defs. Mem. at 70, is of course the most important part of a CE invocation in this case. *See* 7 C.F.R. § 1b.4(a). But there is no such explanation in Defendants' throwaway footnote. It is also telling that while on the one hand Defendants insist that the Directive is meaningless and horse slaughter can proceed without it, they also strenuously argue that it should not be vacated pending NEPA review.

IV. CONCLUSION

For all of these reasons, as well as those set forth in Plaintiffs' opening brief and the State of New Mexico's opening brief, Plaintiffs and the State of New Mexico respectfully request that the Court set aside the Agency's Directive, as well as the grants of inspection to VM, RT, and RNM, and enjoin the Agency from conducting further inspections of equine slaughter facilities or granting inspections to additional horse slaughter facilities pending compliance with NEPA.

Respectfully submitted this 11th day of October 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2013, I filed through the United States District Court ECF System the foregoing document to be served by CM/ECF electronic filing on all counsel of record.

/s/ Bruce A. Wagman
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