UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FRONT RANGE EQUINE RESCUE, THE HUMANE SOCIETY OF THE UNITED STATES, MARIN HUMANE SOCIETY, HORSES FOR LIFE FOUNDATION, RETURN TO FREEDOM, RAMONA CORDOVA, KRYSTLE SMITH, CASSIE GROSS, DEBORAH TRAHAN, and BARBARA SINK, SANDY SCHAEFER, TANYA LITTLEWOLF, CHIEF DAVID BALD EAGLE, CHIEF ARVOL LOOKING HORSE and ROXANNE TALLTREE-DOUGLAS,

Plaintiffs,

v.

TOM VILSACK, Secretary U.S. Department of Agriculture; ELIZABETH A. HAGEN, Under Secretary for Food Safety, U.S. Department of Agriculture; and ALFRED A. ALMANZA, Administrator, Food Safety and Inspection Service, U.S. Department of Agriculture,

Defendants.

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

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION[1]

[1] Three briefs have been filed in opposition to Plaintiffs' motion – two by parties to the action and one by proposed intervenors. Federal Defendants' Opposition at 1, July 19, 2013, ECF No. 66 ("Defs. Mem."). Defendant-Intervenor Responsible Transportation's Opposition, July 19, 2013, ECF No. 46 ("Def. Intv'r RT Mem."); Defendant-Intervenors Rains Natural Meats, Valley Meat Company, LLC, and Chevaline, LLC Opposition, July 19, 2013, ECF No. 56. Plaintiffs submit this single reply brief for the Court's consideration, consolidating arguments addressed in all three opposition briefs.

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I. INTRODUCTION

Federal Defendants[2] object that a case must be "extraordinary" to warrant a preliminary injunction. Federal Defendants' Opposition at 1, July 19, 2013, ECF No. 66 ("Defs. Mem."). This case is indeed extraordinary. The Department of Agriculture ("USDA" or "Agency") has made a controversial decision to authorize horse slaughter for the first time in six years – an act that previously triggered a federal court judgment against the Agency for violating The National Environmental Policy Act ("NEPA"), *Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 35-36 (D.D.C. 2007), and which has precipitated the intervention of public interest groups, Native American rights advocates, national horse protection figures, the former governor of New Mexico, and even the State of New Mexico.

All of these parties are here because, whether you support horse slaughter or not, this decision is a major federal action that raises a multitude of potentially significant environmental, public health, food safety, and Native cultural issues. Yet, unlike the typical NEPA cases that come before this Court, the Agency did not even bother to undertake the preparation of either an environmental impact statement ("EIS"), *see Coal. of Ariz./N.M. Counties for Stable Growth v. U.S. Fish and Wildlife Serv.*, Civ. 03-508 (MCA/LCS) (July 6, 2004), or even a very basic environmental assessment ("EA"), *see Forest Guardians v. U.S. Forest Serv.*, Civ. 04-0011 (MCA/RHS) (Feb. 4, 2004). Thus, this is not a case where the parties are debating the adequacy of the Agency's environmental review document, but rather one in which the Agency has conducted no environmental review at all.

This is no small omission. The fact is that USDA regularly prepares EAs for even the most routine agency decisions, including publishing not one, but two EAs for relatively small land transfers in the last thirty days alone. *See, e.g.*, USDA, *Draft Environmental Assessment for the Cotton Quality Research Station Land Transfer* (July 10, 2013) http://www.ofr.gov/(X(1)S(mimopoihnsmvd3ky1lbc31e1))/OFRUpload/OFRData/2013-

[2] Tom Vilsack, Elizabeth A. Hagen, and Alfred A. Almanza.

17245_PI.pdf ("10 Acre Land Transfer EA"). As demonstrated by its papers, the Agency is operating under the mistaken view that the decision at issue is some kind of "ministerial" act, like ordering stationary or business cards, and far less likely to lead to environmental impacts than a routine transfer of ten acres to a state entity without any change in the use of that land. *Id.* at 2. This is the fundamental error in the decision under review, the reason why Plaintiffs already have a judgment against the Agency for violating NEPA with their previous authorization of horse slaughter, and why Plaintiffs are likely to prevail here.

None of the specific arguments in Defendants' papers can change these inescapable facts. As described below, Defendants' contention that NEPA does not apply to the Agency's grant of inspections flies in the face of the judgment in Johanns, where the court specifically found that NEPA does apply to horse slaughter inspection authorizations. *See Johanns*, 520 F. Supp. 2d at 27. Yet Defendants are trying to relitigate the issue here, hoping for a different result. Even if that case did not bind USDA, the Federal Meat Inspection Act ("FMIA") provides the Agency with ample discretion to grant, deny, or place conditions on its inspections based on several environmental and public health factors, and agencies are barred from placing self-serving limits on their authority which impair NEPA's important goals.

Defendants also offer the Court grossly conflicting assertions, claiming on the one hand that the Agency has no legal authority to impose conditions based on environmental concerns, Defs. Mem. at 13, while on the other hand insisting that the FMIA gives the Agency authority to regulate "a broad range of actions at slaughterhouses," *id*. at 7, and that it has "set forth detailed regulations and directives" to address environmental and public health concerns. *Id.* at 29. It cannot be that Defendants are simultaneously powerless to act, but have also taken appropriate steps to ensure public health and environmental issues are addressed.

Nor can Defendants rely on their decision to exempt themselves from preparation of an EA or EIS based on a cursory categorical exclusion memorandum. As described below, the Agency's own regulations state that it cannot avoid preparation of an EA or EIS if the action under review "may have a significant environmental effect." 7 C.F.R. § 1b.4 (emphasis added); *see Citizens for*

Better Forestry v. U.S. Dep't of Agric., 481 F. Supp. 2d 1059, 1090 (N.D. Cal. 2007). The reality is that the plants here, like previous horse slaughter plants, not only "may" but likely "will" have potentially significant impacts. As described in the record, individuals in the vicinity of previous horse slaughter plants were forced to endure a noxious stench, and sometimes found blood and horse tissue running through their water faucets instead of water. Plaintiffs' Mem. In Support of Preliminary Injunction, ECF No. 5 ("Pls. Mem.") at 3-5; *see* Declarations of Robert Eldridge, Tonja Runnels, Juanita Smith, Yolanda Salazar, Margarita Garcia, Mary Farley, Elizabeth Kershisnik, ECF No. 13, Exs. 2-8. While the Defendants struggle mightily to show that such impacts cannot happen here, that is precisely the question that should be explored in a properly prepared NEPA document, with public participation and expert comment – especially in light of the fact that at least one of the plants has a laundry-list of past state environmental violations, as documented in New Mexico's intervention papers. Pl. Intervenor State of New Mexico Mem. ("Pl. Int. Mem."), ECF No. 69, at 2.

Defendants' efforts to belittle the potential irreparable harm to the neighbors and communities surrounding these slaughter facilities are entirely unpersuasive. Defendants make a cursory effort to dismiss Plaintiffs' declarations as "too speculative," but they present no contrary evidence, and fail to acknowledge that the harms alleged in Plaintiffs' declarations – and the harms that befell the residents of the communities where previous horse slaughterhouses operated – are exactly the kinds of harms that courts have repeatedly found to be irreparable. *See, e.g.*, *Davis v. Mineta*, 302 F.3d 1104, 1115-16 (10th Cir. 2002) (finding irreparable harm where project would "impair the aesthetic attributes" of the area and "disrupt the natural setting and feeling of the park").

Nor is there any merit in Defendants' claim that a preliminary injunction is inappropriate because the environmental damage at issue has not yet come to fruition. *See* Defs. Mem. at 28-31. As the Tenth Circuit has noted, an injury "is not speculative simply because it is not certain to occur." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003). Moreover, the entire reason why a party seeks a preliminary injunction is to ensure that the risk of such harm

is actually studied in a NEPA analysis before it occurs. The entire point of this lawsuit is to ensure that the status quo is maintained so that the Agency can undertake a proper analysis of the potential environmental impacts of horse slaughter operations – and do something about it if warranted – before it is too late and the impacts have already occurred.

In short, Defendants' briefing does nothing to suggest that an injunction is not warranted here to temporarily preserve the status quo pending resolution of this case. There has been no horse slaughter for six years. Despite all of their posturing and inflated claims of financial ruin, the fact is that a minor delay of a few months, following what has already been a multi-year delay in domestic horse slaughter, is clearly warranted in order to ensure that Defendants are not running roughshod over their environmental review obligations under NEPA, and short-circuiting this Court's judicial review function under the Administrative Procedure Act.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. NEPA Applies to Defendants' Grant of Horse Slaughter Inspections.

Defendants' primary argument here, as in the *Johanns* case, is that NEPA does not apply to their authorization of horse slaughter because USDA "lacks discretion" over its actions and its actions are not the "legally relevant cause" of the environmental and public health impacts of horse slaughter operations. Defs. Mem. at 12-17. These arguments are completely unavailing.

Congress has mandated that NEPA be broadly applied "to the fullest extent possible" to achieve its protective goals. 42 U.S.C. § 4332. Thus, "no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." 115 Cong. Rec. 39703 (1969).[3] Yet that is exactly what Defendants are attempting to do here – construing the FMIA in an overly cramped manner to avoid complying with NEPA.

[3] *See also Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1175 (D.N.M. 2000) ("Because Federal agencies 'must comply with NEPA to the fullest extent possible,' NEPA and its demand of an EIS are broadly applied." (quoting *Catron County Bd. of Comm's v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir. 1996)).

1. *Johanns* Precludes USDA from Denying that NEPA Applies.

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, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."). 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. These same Defendants argued in *Johanns*, as they do here, that their decision to authorize horse slaughter did not "constitute a proposal for major federal action subject to an environmental document because [it did not] demonstrate[] any significant federal involvement in the approval and operation of the plants," Defs' Opp. to Summary Judgment, 2006 WL 1781248, *4 (D.D.C.) (citations and quotation marks omitted).[4]

The court in *Johanns* considered and rejected the Agency's arguments. *See Johanns*, 520 F. Supp. 2d at 27. Distinguishing *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), 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-

[4] *Compare* Defs. Mem. at 13-14, 16 (arguing that their decisions did not trigger NEPA because the agency "is under a mandatory duty to grant inspections to facilities that meet the requirements of the FMIA" and has no "authority or control over the day-to-day operations" of slaughter plants, and the inspection is not the "legally relevant cause" of impacts), *with Johanns*, 520 F. Supp. 2d at 36 (quoting defendants' argument that because "the FMIA does not allow for the withholding of [inspection] services for environmental purposes, NEPA's purpose must necessarily yield to the food safety law".

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.[5] 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.[6]

Even if the Agency were not precluded from relitigating the applicability of NEPA to its actions in authorizing horse slaughter, the court's reasoning in *Johanns* is clearly applicable. The specific fact that *Johanns* involved a rule to fund FMIA horse slaughter inspections via the Agricultural Marketing Act, rather than the FMIA funded horse slaughter inspection decision here, is a distinction without a difference. *See* Defs. Mem. at 16-17. In both cases, the Agency's actions are the "legally relevant cause" of the environmental impacts of the slaughter facilities, *Johanns* at 26, and thus subject to NEPA. In *Johanns*, the Agency was the "legally relevant cause" of the environmental impacts of the slaughter facilities because (a) the Agency had discretion over whether to authorize horse slaughter inspections and (b) the fee-for-service inspections that were a prerequisite to slaughter were "functionally inseparable" from the impacts caused by horse slaughter. *Id.* Likewise, as described below, here USDA plainly has discretion here over whether to authorized inspections. And, just as in *Johanns*, the grant of inspections here is "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.*

[5] The *Johanns* court 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.

[6] Defendants misspeak when they say that "the *Johanns* court noted FSIS's lack of discretion under the FMIA." Defs. Mem. at 16. The court said no such thing; it merely quoted the same statutory language that Defendants have in their brief, that inspections are required before animals can be slaughtered or sold, without suggesting that this means the Agency lacks discretion or must grant the inspections. *Johanns*, 520 F. Supp. 2d at 27 (quoting 21 U.S.C. § 603).

2. USDA Has Discretion to Consider Impacts, Alternatives, and Mitigation.

As in *Johanns*, and "despite Defendants' protestations to the contrary," *id.*, USDA does have discretion over whether to conduct inspections here, and the act of granting the inspections is far from "ministerial." Defs. Mem. at 13 (*quoting* Valley Meat Categorical Exclusion Memo ("VM CE Mem."), ECF No. 22, Ex. C). The FMIA and its implementing regulations make clear that the Agency is under no obligation to grant inspections to a particular facility, and Defendants' assertions to the contrary lack support. *See* Defs. Mem. at 14.

First, 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, they must first be inspected by the Agency. Without that grant, the facility may not operate, but it is still the Agency's decision whether to grant that inspection or not.[7]

Second, while the Defendants repeatedly claim they are "mandate[d]" to "grant inspections of the slaughter of amenable species *if a facility meets the conditions* of eligibility under the FMIA," Defs. Mem. at 12 (emphasis added), they fail to ever spell out what those conditions are, or could be. In fact, the statute and implementing regulations provide the Agency with ample room for discretion to ensure that it mitigates or minimizes exactly the kinds of impacts to public health and the environment that NEPA requires them to consider, and by which Plaintiffs here are likely to be harmed. *See National Audubon Society 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").

[7] The Agency itself clearly recognizes the *discretionary* nature of its authority to grant or deny FMIA inspection services as evidenced by its own regulations, which state that the 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 also P.E.A.C.H. v. U.S. Army Corps of Eng's*, 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.")).

For example, FSIS "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 v. U.S.*, 255 F. Supp. 2d 1177, 1185-86 (D. Colo. 2002) (authority to limit mining activities constitutes discretion). Many of these factors that the Agency may consider in granting or denying 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 as well as contaminate the natural environment in the vicinity of the slaughter plants, *see* Pls. Mem. at 14-23 (explaining that the use of drugs in domestic horses not meant for slaughter can lead to harmful contaminated meat, and can threaten the surrounding environment). 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").

Moreover, while on the one hand insisting to the Court that they have no discretion to impose conditions to address the environmental impacts of horse slaughter, Defendants later contradict themselves by acknowledging – indeed, 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 adulteration and environmental concerns. *See* Defs. Mem. at 18-21 (arguing that they have an intricate "screening process" to ensure that the contaminated flesh "endangers neither public health and safety nor the local environment," and that the residue testing plan further ensures the safety of public health and the environment); *see also* VM CE Memo., ECF No. 22, Ex. C at 5; Responsible

Transportation CE Mem. ("RT CE Mem."), ECF No. 22, Ex. D at 4-5. Defendants cannot have it both ways.

Defendants' admittedly "*conditional* grants of inspection" to Valley Meat and Responsible Transportation are also in direct conflict with the assertion the Agency has no discretion. *See* Defs. Mem. at 3. Indeed, the *conditions* associated with the conditional grant of inspection require that the slaughter facility 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 thing 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. *See* Pls. Mem. at 16-20.

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 addressed in an EIS. Thus, their attempt to relitigate whether NEPA applies to their actions in authorizing horse slaughter necessarily fails. *See National Audubon Society*, 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 compliance) (emphasis added); *Sierra Club v. U.S.*, 255 F. Supp. 2d at 1186.[8]

B. Defendants' Categorical Exclusion Is Arbitrary and Capricious.

As Plaintiffs have explained, the Agency has made a far-reaching and precedent-setting decision to grant inspections to a facility with a well-documented record of environmental violations, *see* Pls. Mem. at 6-7; Pl. Int. Mem., ECF No. 69, at 2, as well as to other facilities

[8] *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) is not to the contrary. Defs.' Mem. at 14 n.8. In *NAHB*, the court deferred to a regulation promulgated under a law mandating that the EPA "shall" approve a transfer of permitting authority to a State "unless [it] determines that adequate authority does not exist" to ensure that nine explicit criteria are satisfied. *NAHB*, 551 U.S. at 650-51 (citing 33 U.S.C. §1342(b)). Nowhere in the statute or the regulation was there any room for discretion. Here, USDA has significant discretion to grant, deny, or condition inspections such that NEPA does apply. *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), is also unavailing. In that case, as the *Johanns* court explained, the agency had no ability to "prevent a certain effect due to its limited statutory authority over the relevant actions." *Id.* at 770.

throughout the nation that may have equally troubling environmental impacts, *see* Pls. Mem. at 3-5 (describing impacts from previously existing horse slaughter plants), without so much as preparing a basic EA to evaluate the significance of those impacts. This decision is not only arbitrary, capricious and contrary to law, *see Citizens for Better Forestry*, 481 F. Supp. 2d at 1090, but it is also contrary to the Agency's own practice.[9]

Nevertheless, for some reason here, Defendants have invoked a Categorical Exclusion, which by law is not an environmental analysis under NEPA, but rather a decision *not* to engage in such analysis at all. *See United States v. Coal. for Buzzards Bay*, 644 F.3d 26, 34-35 (1st Cir. 2011) (noting that "[t]he Coast Guard's reliance on a CE permitted it to avoid any environmental analysis"); *Sierra Club*, 255 F. Supp. 2d at 1182-83. In their CE memos, Defendants claim they do not need to engage in any formal environmental impacts analysis under NEPA because there are "no unique or extraordinary circumstances that would render the CE inapplicable," and because the Agency "specifically assessed Plaintiffs' central claim that Valley Meat operations will cause significant public health risks and environmental impacts." Defs. Mem. at 18. Defendants' purported "assess[ment]," however, essentially admits the presence of potential impacts, but discounts them and denies the need for an EA or EIS because of procedures and controls that they claim will mitigate these impacts. *See id.* at 18-21. In other words, the Agency argues that it did not need to undertake an EA or EIS, because it *did in fact* undertake an environmental review in the CE, and found there to be no significant impacts. But that is the purpose of an EA not a CE, and again Defendants miss the point of NEPA by deciding there is no need for environmental review while justifying that conclusion with proof of that need.

[9] In the past two months alone USDA has determined that the preparation of an EA was warranted for far less significant actions. For example, the Agency prepared EAs for the transfer of a mere ten acre parcel of land, where there was no substantial change in the manner in which the land would be used. *See* 10 Acre Land Transfer EA; *see also* USDA, *Draft Environmental Assessment for the J. Phil Campbell, Senior, Natural Resource Conservation Center Land Transfer* (June 25, 2013) http://www.ofr.gov/OFRUpload/OFRData/2013-16209_PI.pdf.

This is a textbook example of short-circuiting NEPA, and eviscerates the Act's central purpose to "consider environmentally significant aspects of a proposed action" in an EA or EIS and to ensure that the public can participate in that process. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1162 (10th Cir. 2002); *see N.M. ex rel. Richardson v. B.L.M.*, 565 F.3d 683, 703 (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.").

1. **An EA or EIS is Required Before Horse Slaughter Inspections Can Begin.**

As Plaintiffs explained in their opening brief, Pls. Mem. at 14-23, the authorization to inspect horse slaughter facilities is precisely the kind of action that mandates an EA or EIS because, without a doubt, there "may" be significant impacts resulting from the commencement of horse slaughter operations in this country, including impacts to public health, waterways, odor pollution, and quality of life. *See generally* Cordova Decl., Sink Decl., K. Smith Decl., Trahan Decl., and Seper Decl., ECF No. 13, Exs. 20-25; *see also* 40 C.F.R. § 1508.4 (actions which "may have a significant environmental effect" are not subject to CE); 7 C.F.R. § 1b.4(a) (CE applies unless "an action *may* have a significant environmental effect" (emphasis added)). Horse slaughterhouses that previously operated in the United States wreaked havoc on the environment and surrounding community by dumping blood, entrails, urine, feces, heads, and hooves into local water systems, overwhelming local wastewater infrastructures, and causing numerous environmental violations. Pls. Mem. at 3-5; *see* Declarations of Robert Eldridge, Tonja Runnels, Juanita Smith, Yolanda Salazar, Margarita Garcia, Mary Farley, Elizabeth Kershisnik, ECF No. 13, Exs. 2-8.

Further, the disposal of horse byproducts containing drug residues presents a particularly unique environmental threat, including the potential contamination of groundwater and entry into the food chain. Rulemaking Petition, ECF No. 12, ex. 1 at 61-78. And in *Johanns*, these Defendants did not even "refute Plaintiffs' argument that horse slaughter operations have

'significantly' impacted the environment within the meaning of NEPA." 520 F. Supp. 2d at 19. At an absolute minimum, an EA was required to assess whether these indisputable potential impacts may be "significant." *See Citizens for Better Forestry*, 481 F. Supp. 2d at 1090.

Instead of explaining why a CE is appropriate because there is no chance of their action causing any significant impacts, Defendants' CEs actually admit that such impacts may exist. For example, Defendants' documents "recognize[] that the potential impacts of commercial horse slaughter on public health may cause concern with segments of the public," including "the potential public health risks that could arise from the presence in horse meat of trace amounts of certain classes of drugs that have not been approved for use in animals that will or could be slaughtered to produce food for human consumption." VM CE Mem. at 5; *see also* RT CE Mem. at 4. Thus, the Agency specifically acknowledges the "potential public health risks" stemming from the slaughter and sale of contaminated meat, as well as the public controversy over the significance of those risks. *Id.* (noting the public concern over these impacts); *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, 702 F.3d 1156, 1181 (10th Cir. 2012) (a project is "highly controversial" if there is "a substantial dispute as to the size, nature, or effect of the action"). These concessions alone are enough to satisfy at least two of the CEQ significance factors and trigger substantive NEPA review. *See* 40 C.F.R. § 1508.27 (requiring agencies to consider "the degree to which the proposed action affects public health or safety" and "the degree to which the effects on the quality of the human environment are likely to be highly controversial"); *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).

Defendants' briefing also highlights the need for NEPA review, by admitting the existence of drug residues in horse meat and the concerns over their potential impacts, and spending considerable time trying to refute those concerns by reference to tests, studies, and expert declarations. *See* Defs. Mem. at 19-21. For example, Defendants contend that "residues do not remain in animals forever," and that FSIS will fully protect consumers from harm by enforcing a zero tolerance . . . policy for substances in horse meat." *Id.* at 20. With every breath, the Agency

is acknowledging a controversy over these risks and potential impacts, as well as the fact that there are "unique or unknown risks" associated with contaminated horsemeat.[10] 40 C.F.R. § 1508.27; *see American 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."); *Jones v. Gordon*, 792 F.2d 821, 829 (9th Cir. 1986) (finding CE inadequate and noting "[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").[11]

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[10] Thus, the declaration Defendants provide from Daniel Engeljohn ("Engeljohn Decl.") actually *highlights* the need for environmental review, rather than after-the-fact rationalizations. *See* ECF No. 66, Ex. A. 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, according to 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. Engeljohn fails to mention that of the 115 substances commonly administered to horses identified by FRER and HSUS in their petition for rulemaking, at most 20 of them were tested for in horses when horses were tested. *See* 2006 FSIS National Residue Program Data at 43-44 (USDA 2007); 2007 FSIS National Residue Program Data at 39-40 (USDA 2008); Rulemaking Petition, ECF No. 12, Ex. 1. Therefore, these "exceedingly low" positive results signify grossly inadequate residue testing and further highlight the unknowns that mandate NEPA review.

[11] By unreasonably dismissing each individual grant of inspection to slaughter facilities 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* Pls. Mem. at 22-23 (discussing potential cumulative impacts). "In determining whether an action requires an EA or EIS or is categorically excluded, federal agencies must not only review the direct impacts of the action, but also analyze indirect and cumulative impacts." *Sierra Club v. United States*, 255 F. Supp. 2d 1177, 1182 (D. Colo. 2002) (citing 40 C.F.R. §§1508.7, 1508.8); *accord 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."); *Wyoming Outdoor Council Powder River Basin Res. Council v. U.S. Army Corps of Engineers*, 351 F. Supp. 2d 1232, 1241 (D. Wyo. 2005). Defendants' contention that they do not need to undertake a full cumulative impacts analysis because they invoked a CE is circular reasoning. *See* Defs. Mem. at 21-22. Rather, the cumulative impacts associated with this decision are one of the things that 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

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Rather than preparing an EA to further analyze the "intensity" of these impacts and whether they may be significant and thus require an EIS, Defendants simply dismiss the impacts of horse slaughter by claiming to have "addressed this 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." VM CE Mem. at 5; Defs. Mem. at 19 (Defendants' "screening process" will "ensur[e] that [residues] endanger[] neither public health and safety nor the local environment"). But it is the very purpose of an EA (or an EIS if the EA determines the impacts may be significant) to provide for public input and thoroughly assess the intensity of the potential impacts – rather than simply acknowledging their existence and dismissing them. *See National Parks and Conservation Ass'n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001), *abrogated on other grounds by Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757, (2010) (NEPA document inadequate where it identified "an environmental impact" but "did not establish the intensity of that impact"); *Vermont 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"). That the Agency feels compelled to address the impacts and assert procedures to mitigate them makes absolutely clear that such impacts are present, and may be significant. *See Citizens for Better Forestry*, 481 F. Supp. 2d at 1090; *Catron County*, 75 F.3d at 1439.

Defendants should not be allowed to short-circuit the NEPA process by acknowledging potential impacts in a decision document, and then summarily asserting that they have those impacts under control, instead of analyzing their potential reach. Defendants' decision to forego preparation of an EA to examine whether their actions have significant environmental effects, because they believe there will not be any, is akin to a driver deciding to forego her driver's test because she believes she is a good driver; or a corporate officer cancelling a required internal audit because she has already looked at the books and decided they are fine. The Agency entirely misses

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that could significantly effect 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.

the purpose of NEPA review, depriving the public of the opportunity to comment and obtain the information that would be provided in a properly prepared EA or EIS.[12]

2. **USDA's CE Cannot Substitute for the Required EA or EIS.**

To the extent the Agency believes that the CE memos can substitute for the required EA or EIS because it purportedly "addressed" potential impacts and found them to be insignificant, the Agency is mistaken. One level of NEPA documentation or review cannot substitute for another, unless the document fulfills all NEPA requirements. *National 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 Bd. Of Com'rs, N.M. v. U.S. Fish and Wildlife Serv.*, 75 F.3d 1429, 1437 (10th Cir. 1996) ("Partial fulfillment of NEPA's requirements, however, is not enough[, and agencies must comply with NEPA] to the fullest extent possible. . . ." (quotations omitted)).

Thus, even if the Court were to consider treating the Agency's CE memos as an attempt at an EA, the document would be plainly inadequate. 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) (quoting *Silverton Snowmobile Club v. U.S. Forest Service*, 433 F.3d 772, 781 (10th Cir. 2006) (quotations omitted)), and demonstrate that the agency has taken the requisite "hard look" at the potential environmental impacts. *Kleppe v. Sierra Club*, 427 U.S. 390, 410; *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 Agency has not taken this hard look, nor has it engaged in a thoughtful

[12] Nor can Defendants dismiss potential impacts by proposing future studies or mitigation measures should the impacts turn out to be significant. *See* Defs. Mem. at 19. The point of NEPA review is to assess unknown or potentially significant impacts *before* they occur and *before* the damage is done. *See New Mexico ex rel. Richardson*, 565 F.3d at 707-08 ("All environmental analyses required by NEPA must be conducted at "the earliest possible time [because] NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done." (internal quotations and citations omitted)).

reflection of the possible impacts of horse slaughter, nor has it considered *any* alternatives; instead, it has acknowledged the existence of potentially significant impacts, and summarily dismissed them. This does not come close to making a "convincing case" that the potential environmental impacts are insignificant and that no EIS is required. *City of Waltham v. U.S. Postal Service*, 786 F. Supp. 105, 121 (D. Mass. 1992).

The CE memos are also an inadequate substitute for an EA or EIS because the NEPA regulations require the Agency to allow for public participation – which gives interested parties an opportunity to voice their views and concerns, and allows the scientific community to weigh in on the very disputed issues of drug residues and environmental impacts that the Agency chose to summarily dismiss. *See Citizens for Better Forestry*, 341 F.3d at 970 (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"). Defendants released the CE memos to the public *after* the grant of inspection, depriving stakeholders of any opportunity to participate – which is why so many groups, including the State of New Mexico, Native American groups, and industry groups – are coming forward to have a place in this proceeding. This discussion should be undertaken in the course of preparation of an EA, as contemplated by NEPA and its regulations, and not raised for the first time in litigation.

In short, the Agency's CEs and filings make clear that there may indeed be potentially significant environmental impacts resulting from its grant of inspections to horse slaughter facilities. This is all that is required under controlling caselaw to render the CE inadequate, and trigger the preparation of an EA. *See Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 821 (10th Cir. 2008); *Citizens for Better Forestry*, 481 F. Supp. 2d at 1090. Accordingly, Plaintiffs are almost certain to prevail on the merits of their NEPA claim.

III. PLAINTIFFS HAVE DEMONSTRATED IRREPARABLE HARM.

The test for irreparable harm is met if a plaintiff demonstrates a significant likelihood of harm that cannot be compensated by monetary damages. *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003). Where plaintiffs are challenging agency action pursuant to an environmental statute, the court can lessen the weight attributable to the irreparable harm factor, and give more weight to the public interest in injunctive relief. *U.S. v. Power Eng'g Co.*, 10 F.Supp.2d 1145, 1149 (D.Colo.1998), *aff'd* 191 F.3d 1224 (10th Cir.1999) ("When a case is brought pursuant to an environmental or public health statute, however, the primary focus shifts from irreparable harm to concern for the general public interest."). Under either standard, Plaintiffs have easily established that preliminary relief is appropriate.

A. Authorizing Horse Slaughter Inspections Will Harm Plaintiffs.

Defendants have authorized the commencement of horse slaughter at two facilities, and could authorize more throughout the country. The harms that will befall the residents of the surrounding communities are certain, and are likely to be no different than those that befell the residents of previously existing facilities, as the operations will be substantially similar. Those former facilities effectively "robbed [ ] citizens of the quiet and peaceful enjoyment of their property," Declaration of Paula Bacon ("Bacon Decl."), ECF No. 13, Ex. 13 at ¶ 4, causing extensive environmental and other harms, including the destruction of community members' ability to enjoy their surroundings, and the contamination of the waste management and disposal systems.[13] Individuals in the vicinity of the Cavel plant in DeKalb, Illinois were forced to endure

[13] *See* Eldridge Decl. (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), ECF No. 13, Ex. 2; Runnels Decl. (same), ECF No. 13; J. Smith Decl. ("blood in my bathtub, sinks, and toilets," unable to have family over because of "severe stench on daily basis"), ECF No. 13, Ex. 4; Salazar Decl. (Fort Worth, Texas resident unable to go outside for activities because of stench), ECF No. 13, Ex. 5; Garcia Decl. ("constantly exposed to the severe stench of the plant;" cannot open windows because "odor is unbearable"), ECF No. 13, Ex. 6; Declaration of Mary Farley ("Farley Decl.") (DeKalb, Illinois resident stating that "smell was so bad, and it would linger in my head for the rest of the day"), ECF No. 13, Ex. 7; Declaration of Elizabeth Kershisnik ("Kershisnik Decl.") (describing "ongoing water pollution violations"; "polluted, green foam oozing from the plant's wastewater treatment tank"), ECF No. 13, Ex. 8; and Declaration of James Kitchen ("Kitchen Decl.") (same), ECF No. 13, Ex. 9.

the noxious stench emitted from the plant, and found blood and horse tissue in their faucets instead of water.[14]

Similar harms are likely to occur here if the Court does not enjoin horse slaughter inspections while the Agency undertakes adequate NEPA review to properly assess and mitigate these impacts. Plaintiffs have shown a significant risk of harm to their aesthetic, emotional, cultural and environmental interests, because horse slaughter in their communities will cause them to regularly view horses being sent to slaughter, will degrade their ability to recreate in the area and to enjoy their communities, and will threaten their health and the quality of their water.[15] Plaintiffs would be harmed with the regular viewing of horses and horse parts being trucked into and away from the slaughter facility in their communities,[16] and would curtail their regular hiking, camping, fishing, and other recreation in their community as a result of the slaughter operations.[17]

Defendants' attempt to discount Plaintiffs' injuries by claiming that "Plaintiffs are already subjected to 'regular viewing of horses going to slaughter,'" Defs. Mem. at 31, is simply inaccurate. None of the Plaintiffs or declarants currently lives in a location that is on the route to any foreign slaughterhouse, and thus Defendants are just offering the Court wild speculations untethered to any facts in the case. Defendants' claim that Plaintiffs have not offered a declaration for a resident near the slaughter facility in Iowa is also unavailing. Not only do Plaintiffs FRER and The HSUS have members and supporters in Iowa who would be harmed if horse slaughter

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[14] Former Mayor Paula Bacon, *Open Letter to State Legislatures Considering Pro-Horse Slaughter Resolutions* (Feb. 2009), *available at* http://animallawcoalition.com/open-letter-to-state-legislatures-considering-pro-horse-slaughter-resolutions ("Paula Bacon Letter").

[15] *See* Cordova Decl., Sink Decl., Smith Decl., Trahan Decl., and Seper Decl., ECF No. 13, Exs. 20-25.

[16] *See* Smith Decl., ¶¶ 11-16, ECF No. 13, Ex. 20 (being "directly confronted with the view of horses in holding pens" will "cause [her] intense aesthetic injury"); Trahan Decl., ¶ 12, ECF No. 13, Ex. 21 (will experience an "immediate and long-lasting injury from viewing those trucks and animals"); Gross Decl., ¶¶ 17-18, ECF No. 13, Ex. 22; Cordova Decl., ¶¶ 10-11, ECF No. 13, Ex. 23 (seeing trucks carrying horse carcasses "will affect [her] deeply"); Sink Decl., ¶¶ 9-11, ECF No. 13, Ex. 24 (she "will suffer distress" upon seeing "horses on their way to the auction and then to slaughter at Rains Natural Meats."); and Seper Decl., ¶ 8, ECF No. 13, Ex. 25.

[17] Cordova Decl., ¶¶ 6-8, ECF No. 13, Ex. 23; Sink Decl., ¶¶ 7-8, ECF No. 13, Ex. 24; K. Smith Decl., ¶¶ 3-7, ECF No. 13, Ex. 20; Trahan Decl., ¶¶ 6-7, ECF No. 13, Ex. 21.

commences in Sigourney, but the Court also has discretion to extend a preliminary injunction to encompass and enjoin the grant of inspection to Responsible Transportation based on the established irreparable harm in other locations. *See Tom Doherty Assoc., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 40 (2d Cir. 1995) (affirming preliminary injunction that encompassed all of Defendant's properties despite absence of showing of irreparable harm with respect to some of the properties). Nor do Defendants gain any ground by trying to dismiss potentially grave irreparable impacts by reference to the procedures touted in their CE memos. *See* Defs. Mem. at 30-31. As discussed above, these are *exactly* the measures that the Agency must consider in a thorough NEPA analysis *before* relying on them and allowing the project to proceed, and exactly the reason why the Court should temporarily enjoin the Agency's inspections. *See id.*[18]

B. Identical Harms Have Been Recognized by Other Courts in Granting Injunctive Relief.

While Defendants attempt to belittle the harms Plaintiffs have alleged as "speculative" and not "concrete," these are precisely the kinds of emotional, aesthetic, and quality of life injuries that courts routinely find to be irreparable and warranting preliminary injunctive relief. *See, e.g.*, *Davis*, 302 F.3d at 1115-16 (impaired "aesthetic attributes" of a park, increased noise levels, and impaired use and enjoyment of the area for recreation, education, and observing wildlife constitute irreparable harm); *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, No. 08-00462, 2008 WL 1946818, *6-*8 (D. Colo. Apr. 30, 2008) (disruption of recreation activities and impact on wetlands and wildlife constitute irreparable harm, even though alternatives for recreation were available and the water quality impact would be minimal and temporary); *Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1197 (D. Or. 2012) (same as *Davis*); *Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urban Dev.*, CIV-07-1161-R, 2007 WL 3232610, at *4 (W.D. Okla.

[18] Defendant-intervenor Responsible Transportation's contention that Plaintiffs are attempting to alter the status quo by changing the way USDA grants inspections, and for this reason, a heightened burden must be met to warrant injunctive relief, is simply wrong. Def. Intv'r RT Mem., ECF No. 46, at 7. The status quo at issue is not the process of granting inspections, but the absence of horse slaughter in the United States for six years. The status quo is currently no horse slaughter and no horse slaughter inspection.

Nov. 1, 2007) ("In making the determination of irreparable injury, there is no specific formula to use. The court must consider, among other things, whether money damages would provide an adequate remedy for any violation a plaintiff ultimately makes out.")

Claiming that Plaintiffs' harms are "speculative" is simply no answer in a NEPA case. Cases seeking preliminary relief are by their very nature cases where the harm *has yet to occur*, and thus cannot be foreseen with absolute clarity or certainty. *See Davis*, 302 F.3d at 1115 ("[t]he substantive harm contemplated . . . is the actual harm to parkland or historic sites *that will occur*" if the agency does not comply with NEPA (emphasis added)). For this reason, the Tenth Circuit has held that "*an injury is not speculative simply because it is not certain to occur . . .* [but exists] if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *Greater Yellowstone Coalition v. Flowers*, 321 F.3d at 1258-61 (the significant risk of potential harm to bald eagles and the aquatic ecosystem posed by a proposed development justified a preliminary injunction).

Defendants' attempt to distinguish the multitude of decisions that have issued injunctions for harms virtually identical to those pled here must also fail. For example, contrary to Defendants' claim, *Humane Soc'y of the U.S. v. Bryson*, No. 12-CV-642, 2012 WL 1952329 (D. Ore. May 30, 2012) (unreported), which holds that the killing of California Sea Lions constitutes injury to Plaintiffs' emotional and aesthetic interests that is real and irreparable, is not distinguishable. Defs. Mem. at 32. In assessing the plaintiffs' irreparable harms, the *Bryson* court did not rely exclusively on individual relationships with animals, but also relied on harms to the local environmental in general, such as the impairment of viewing, photographing, and generally interacting with all sea lions in the area. *Bryson*, 2012 WL 1952329 at *6. Moreover, the cases that the *Bryson* court relied on in reaching its decision did not focus on individual relationships with the animals that would be killed, but on the overall irreparable injury that stems from harm to animals.[19]

[19] *See Bryson*, 2012 WL 1952329 at *6 (citing *Humane Soc'y v. Gutierrez*, 527 F.3d 788, 790 (9th Cir. 2008) (noting in a prior iteration of this case that "the lethal taking of the California sea lions is, by

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Finally, harm to the environment, which NEPA aims to prevent, is normally considered to be irreparable. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable."); *Davis*, 302 F.3d at 1114 ("Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment."); *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir. 1996) ("The injury of an increased risk of harm due to an agency's uninformed decision is precisely the type of injury NEPA was designed to prevent.").

Thus, there is nothing speculative or unusual about the irreparable harm claimed by Plaintiffs here. Plaintiffs have introduced unrefuted evidence that they are likely to suffer a panoply of harms, not dissimilar to those suffered by residents living near previous facilities, and of exactly the type found to be irreparable by numerous courts. That these harms, if they come to fruition, will be irreparable and potentially destructive to their quality of life is without doubt.

IV. THE PUBLIC INTEREST WARRANTS A PRELIMINARY INJUNCTION.

Defendants incorrectly attempt to frame the public interest in terms of the FMIA, rather than NEPA. Defs. Mem. at 37. However, the legal violation at issue here is of NEPA, and that statute must guide the assessment of the public interest. *See Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1338 n.9 (10th Cir. 1982) ("Congress has chosen the procedural protections of NEPA to serve the public's interest in protecting the environment."); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) ("This court has also recognized the public interest in

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definition, irreparable"); *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (finding irreparable harm where plaintiffs lived near and enjoyed the bison in national parks, and "seeing or even contemplating the type of treatment of the bison inherent in an organized hunt would cause them to suffer an aesthetic injury that is not compensable in money damages"); *Fund for Animals v. Espy*, 814 F. Supp. 142, 151 (D.D.C. 1993) (finding irreparable harm where each plaintiff "enjoys the neighboring Yellowstone bison in much the same way as a pet owner enjoys a pet, so that the sight, or even the contemplation, of treatment in the manner contemplated of the wild bison, which they enjoy and have seen and are likely to see capture for the program would inflict aesthetic injury"); *Fund for Animals*,, 281 F. Supp. 2d at 220–21 (collecting cases holding that the killing of animals causes irreparable harm to those with a special interest in the animals).

careful consideration of environmental impacts before major federal projects go forward, and we have held that suspending such projects until that consideration occurs comports with the public interest."); *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998). In the Tenth Circuit, courts increase the weight given to the general public's interest in enforcing environmental and public health statutes. *See Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 05-CV-329-GKF-SAJ, 2008 WL 4453098 (N.D. Okla. Sept. 29, 2008) *aff'd sub nom., Attorney Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769 (10th Cir. 2009); *Power Eng'g Co.*, 10 F. Supp. 2d at 1149 (D. Colo. 1998).

The vindication of the public interest driving NEPA is particularly compelling here, where the welfare and quality of life in numerous communities hang in the balance. While there is admittedly a public interest in the safety and inspection of meat products, there is no requirement that the Agency grant the inspections, and there is certainly no requirement that it do so right now, prior to undertaking serious environmental review. *See* 115 Cong. Rec. 39703 (1969), *quoted in Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971) ("[N]o agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid [NEPA] compliance.").[20]

As the Tenth Circuit has made clear, the public interest in favor of NEPA compliance is strong where the action at issue has not yet begun. Because the *status quo* is no horse slaughter in the United States – as it has been for six years – the public interest favors issuing an injunction to preserve the status quo for the life of this case. *See Davis*, 302 F.3d at 1116 ("[T]he proposed

[20] Moreover, the two objectives of meat safety and environmental protection are not mutually exclusive; both can be achieved. Defendants assert that Congress has indicated where public interest lies by legalizing horse slaughter under the FMIA and by funding it through 2013. Defs. Mem. at 37. This point is irrelevant. The public interest requires that agencies fully undertake all required NEPA procedures in order to make a well-informed decision at the earliest possible stage, *before taking action*. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (NEPA ensures that "important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast").

highway construction has not yet begun, and so we are not confronted with equities in favor of completion of a partially-completed project.")

V. THE BALANCE OF EQUITIES FAVORS A PRELIMINARY INJUNCTION.

Defendants unconvincingly attempt to counter Plaintiffs' irreparable harms by asserting various business and economic harms that will allegedly befall the two approved facilities if a preliminary injunction issues. Defs. Mem. 38-39. However, future economic harms have consistently been deemed insufficient to override the mandates of federal environmental laws such as NEPA.[21] Moreover, the financial harms asserted by intervenors are highly speculative, and not necessarily caused by the requested injunction here. There has been no horse slaughter in the United States for more than six years. Congress has repeatedly defunded inspections for slaughter, and is poised to defund it again in the very near future. Several states have outlawed the practice, and others such as the State of New Mexico have already or are considering declaring it a violation of existing food safety laws. In this hostile business environment, it is a stretch indeed for intervenors to claim that their financial losses are caused by this Court mandating NEPA compliance, as opposed to their own poor investment decisions. *See Davis*, 302 F.3d at 1116 (discounting "self-inflicted" harms in balancing inquiry); *Bad Ass Coffee Co. of Hawaii, Inc. v. JH Nterprises, LLC*, 636 F. Supp. 2d 1237, 1251 (D. Utah 2009) ("[W]hen a party knowingly takes actions that increase the potential for harm if an injunction is ordered against them, courts give those harms little weight in the balancing test." (citation omitted)).

On the other hand, Plaintiffs may face the immediate destruction of their quality of life if Defendants' actions are not enjoined pending adequate NEPA review of the potential environmental impacts of the slaughter facilities. Their lives may be permanently damaged,

[21] *See Colorado Wild, Inc. v. U.S. Forest Service*, 523 F. Supp. 2d 1213, 1222 (D. Colo. 2007) (pecuniary harm is not irreparable and does not outweigh the risk of harm to the environment); *Colorado Wild v. U.S. Forest Service*, 299 F. Supp. 2d 1184, 1190 (D. Colo. 2004) ("Plaintiff's injury is irreparable while the Forest Service's injury is primarily economic."); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1125 (9th Cir. 2005) (rejecting fact that developer "may suffer financial harm" if injunction was issued due to likelihood of irreparable harm if development was allowed to proceed without proper NEPA review).

without any available remedy. This devastation far outweighs the incomparable financial woes alleged by USDA and intervenor defendants. *See Davis*, 302 F.3d at 1116 (environmental harm outweighs even "significant financial penalties" resulting from delay).

VI. A BOND IS NOT REQUIRED IN THIS PUBLIC INTEREST CASE

Contrary to Defendants' claim, federal courts typically waive injunction bonds, or at minimum require only a nominal bond amount in environmental and public interest cases in order to avoid a chilling effect on future litigation. *See Landwatch*, 905 F. Supp. 2d at 1198 ("It is well established that in public interest environmental cases the plaintiff need not post bonds because of the potential chilling effect on litigation to protect the environment and the public interest. Federal courts have consistently waived the bond requirement in public interest environmental litigation, or required only a nominal bond." (citing *People of State of Calif. ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319 (9th Cir. 1985)). The Court has the power to waive the bond requirement, or to set a minimal bond to cover out-of-pocket court costs only.[22] Plaintiffs respectfully request that in making its bond determination, this Court keep in mind the potential chilling effect that an injunction bond could have on future environmental and public interest litigation that seeks to ensure that government agencies fully consider the environmental ramifications of their actions before proceeding. *See Davis*, 302 F.3d at 1126 (10th Cir. 2002) ("Ordinarily, where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered.").

[22] This is commonly done in public interest and environmental protection cases. *See, e.g.*, *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, No. 08-CV-2828, 2009 WL 3048739, *9 (E.D. Cal. Sept. 18, 2009) (unreported) (no bond required for non-profit organizations seeking to protect Lake Tahoe); *Baykeeper v. U.S. Army Corps of Engineers*, No. 06-CV-1908, 2006 WL 2711547, *17 (E.D. Cal. Sept. 20, 2006) (no bond required to prevent a "chilling effect" on public interest litigants seeking to protect the environment); *Sierra Club v. Norton*, 207 F. Supp. 2d 1342, 1343 (S.D. Ala. 2002) (nominal bond appropriate where plaintiffs seek to enforce federal environmental statute); *Natural Resources Defense Council, Inc. v. Morton*, 337 F. Supp. 167, 169 (D.D.C. 1971) (requiring minimal $100 bond).

VII. CONCLUSION

For all of these reasons, as well as those set forth in Plaintiffs' opening brief and the papers submitted by the State of New Mexico, Plaintiffs respectfully request the Court enter a brief stay of the agency action under review so that the *status quo* – which has existed for the last six years – can be maintained for a few more months pending judicial review.

Respectfully submitted this 26th day of July 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 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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