IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 13-2187

FRONT RANGE EQUINE RESCUE, *et al.*,
Plaintiffs-Appellants

and

THE STATE OF NEW MEXICO,
Plaintiff-Intervenor-Appellant

v.

TOM VILSACK, Secretary of the
U.S. Department of Agriculture, *et al.*,
Defendants-Appellees

and

RESPONSIBLE TRANSPORTATION, LLC, *et al.*,
Defendants-Intervenors-Appellees

On Appeal from the United States District Court for the
District of New Mexico (Hon. M. Christina Armijo)

FEDERAL APPELLEES' RESPONSE TO APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

ROBERT G. DREHER
Acting Assistant Attorney General

ANDREW A. SMITH
ALISON GARNER
MARK R. HAAG
VIVIAN H.W. WANG
Attorneys
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 514-3977
vivian.wang@usdoj.gov

OF COUNSEL:
ANDREW R. VARCOE
Office of General Counsel
U.S. Department of Agriculture

Plaintiffs Front Range Equine Rescue, *et al.* and Plaintiff-Intervenor the State of New Mexico (collectively, "Front Range") seek the extraordinary remedy of an injunction pending appeal to halt Defendant-Appellee U.S. Department of Agriculture's (USDA) provision of inspection services to horse slaughter facilities meeting the requirements of the Federal Meat Inspection Act, 21 U.S.C. §§ 601–625. Front Range argues that, prior to carrying out its nondiscretionary duty of granting inspections to facilities meeting all legal requirements, the USDA Food Safety and Inspection Service (FSIS) was required to prepare an environmental assessment (EA) or even a full-blown environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq*. Front Range also challenges FSIS's internal instructions to its agency employees on how to carry out these inspections.

This Court should deny Front Range's motion for an injunction pending appeal. Front Range does not demonstrate a likelihood of success on its claims that NEPA applies to FSIS's nondiscretionary duty and that a revocable, non-binding internal agency directive triggers NEPA requirements.[1] Moreover, the equities weigh against granting the injunction. Front Range fails to establish any non-speculative, imminent, irreparable injury to its concrete interests. Its allegations of irreparable injury are based on conjecture and speculative fears of "contamination" of local

[1] Indeed, Front Range does not even attempt to show that the district court erred in holding that NEPA does not apply to the Directive, and thus has waived that claim as the basis for their motion.

waters. FSIS's regulations and directives for the inspection, testing, handling, and labeling of livestock, including equines, include a drug residue testing program for all livestock. Any detection of a drug residue will result in the carcass being condemned. The unfounded fears of Front Range's declarants do not support a finding of irreparable injury, and Front Range's motion should be denied.

A. STATUTORY AND REGULATORY BACKGROUND

1. Federal Meat Inspection Act — Congress enacted the Federal Meat Inspection Act ("the Act") in 1907, "after Upton Sinclair's muckraking novel *The Jungle* sparked an uproar over conditions in the meatpacking industry." *Nat'l Meat Ass'n v. Harris*, 132 S.Ct. 965, 968 (2012). The Act, as amended, "regulates a broad range of activities at slaughterhouses to ensure both the safety of meat and the humane handling of animals." *Id.* The statute applies to certain "amenable species," including "cattle, sheep, swine, goats, horses, mules, and other equines." 21 U.S.C. § 601(w).

The Act imposes a nondiscretionary duty on FSIS to grant inspections at slaughter facilities meeting the requirements of the Act. FSIS "shall" inspect all "amenable species" prior to their "be[ing] allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in commerce." 21 U.S.C. § 603(a). The Act also requires that FSIS "shall" inspect "the carcasses and parts thereof of all amenable species to be prepared at any slaughtering,

meat-canning, salting, packing, rendering, or similar establishment in [the United States] as articles of commerce which are capable of use as human food." *Id.* § 604. The Act prohibits the sale or transport "in commerce" of any article involving amenable species "or any carcasses, parts of carcasses, meat or meat food products of any such animals" if the article has not been "inspected and passed" by FSIS in accordance with the Act. *Id.* § 610(c).

Inspections under the Act must be conducted by "inspectors appointed for that purpose." 21 U.S.C. §§603(a), 604. FSIS, as the delegate of the Secretary of Agriculture, is responsible for "caus[ing]" those inspections to take place. *Id.* §§601(a), 603(a), 604; 7 C.F.R. §2.53(a)(2)(ii). "[E]ach person conducting operations at an establishment subject to [the Act]" must "make application" to FSIS before "inspection is granted." 9 C.F.R. §304.1(a). "[FSIS] is authorized to grant inspection upon [its] determination that the applicant and the establishment are eligible therefor and to refuse to grant inspection at any establishment if [FSIS] determines that it does not meet the requirements." *Id.* at §304.2(b).

2. NEPA — NEPA is a procedural statute that requires federal agencies proposing "major Federal actions significantly affecting the quality of the human environment" to prepare an EIS. 42 U.S.C. § 4332(2)(C). Implementing regulations, 40 C.F.R. §§ 1500–08, allow an agency to comply with NEPA in one of three ways. First, an agency may prepare an EIS, 40 C.F.R. § 1501.3. Second, it may prepare an EA, *see id.* §§ 1501.4(b), 1508.9, to determine whether the action will have a

“significant” effect on the environment and therefore require preparation of an EIS. Third, if the agency determines that the proposed action falls within an established “categorical exclusion” or “CE,” it does not need to prepare an EA or an EIS. *See id.* §§ 1501.4(a)(2), 1501.4(b); *West v. Sec’y of Dep't of Transp.*, 206 F.3d 920, 926–27 (9th Cir. 2000). CEs are defined as “categor[ies] of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in [NEPA] procedures adopted by a Federal agency.” 40 C.F.R. § 1508.4. USDA has categorically excluded FSIS’s programs and activities from NEPA requirements. 7 C.F.R. § 1b.4(6).

B. FACTUAL BACKGROUND

Three facilities are at issue in this appeal. Valley Meat Company, LLC (“Valley Meat”) is a small cattle slaughter and processing facility in Roswell, New Mexico. *See* Valley Meat Decision Memo at ECF p.4, Pl. Exh. 10 (“Valley DM”). Its current owner has conducted federally-inspected commercial slaughter of cattle and other species at the facility since approximately 1991. *Id.* On March 2, 2012, Valley Meat applied to FSIS to receive inspection services for the commercial slaughter of horses, mules, and other equines for human consumption. Valley DM at 4. On June 27, 2013, FSIS approved Valley Meat’s application, after concluding that the action fell within the CE and that no extraordinary circumstances existed that would cause the action to have a significant environmental effect and trigger NEPA requirements. *Id.* at 8.

Responsible Transportation, LLC, is a facility located in Sigourney, Iowa. *See* Responsible Transportation Decision Memo at ECF p.3, Pl. Exh. 16 ("RT DM"). The facility was previously used for processing beef products. *Id.* On December 13, 2012, Responsible Transportation filed an application with FSIS to grant federal meat inspection services for commercial horse slaughter operations for human consumption. *Id.* FSIS approved Responsible Transportation's application after finding it to be consistent with the CE. *Id.*

Rains Natural Meats in Gallatin, Missouri, submitted an application on January 15, 2013, and FSIS is in a position to issue a grant of inspection pending resolution of this action. *See* Fed. Exh. 1, Engeljohn Decl. ¶ 7; *see also* Dist. Dkt. 154. FSIS issued a corrected CE decision for the Rains facility on October 21, 2013, *see* Dist Dkt. 201, but was enjoined by the district court from granting inspections. Dist. Dkt. 142, 179.

On June 28, 2013, FSIS issued Directive 6130.1. Pl. Exh. 13. This internal agency guidance provides instructions to FSIS inspectors "on how to perform ante-mortem inspection of equines before slaughter and post mortem inspection of equine carcasses and parts after slaughter." *Id.* at 1. The Directive also instructs FSIS inspectors on "making ante-mortem and post-mortem dispositions of equines, how to perform residue testing, verify humane handling, verify marking of inspected equine products, and document results." *Id.* The Directive requires FSIS inspectors to conduct intensified random drug residue testing of healthy-appearing equines. *Id.* at 6–7. While inspectors will test equines more frequently than many other types of

livestock slaughtered for human consumption, the method for testing equine tissue is not different from the method for testing other types of livestock. *See* Engeljohn Decl. ¶¶ 8–10, 14–16. The drug residues tested include those of potential public health concern for all livestock, including equines. *Id.*

C. PROCEDURAL HISTORY

On August 2, 2013, the district court granted Front Range's request for a temporary restraining order enjoining USDA "from dispatching inspectors to the . . . facilities operated by Intervenor[s]-Defendants Valley Meat and Responsible Transportation until further order of the Court." Pl. Exh. 18, Order at 6–7. On September 20, 2013, in response to USDA's notice that it was prepared to issue a grant of inspection for Intervenor-Defendant Rains Natural Meats, *see* Pl. Exh. 15, the district court issued an order enjoining USDA from dispatching inspectors to Rains' facility. Dist. Dkt. 168. On September 25, 2013, the parties stipulated to extend the effectiveness of the temporary restraining order until October 31, 2013, the date by which the district court expected to issue its decision on the merits. Dist. Dkt. 178. On November 1, 2013, the district court affirmed USDA's actions granting inspections and denied Front Range's request for a permanent injunction. Dist. Dkt. 205. This appeal followed, and on November 2, 2013, Front Range filed a motion for an injunction pending appeal in this Court, without first doing so in the distort court. On November 4, this Court entered a temporary injunction to give it additional time to consider the motion.

STANDARD FOR AN INJUNCTION PENDING APPEAL

Preliminary injunctions are "extraordinary" remedies. *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991). To obtain this extraordinary relief, Front Range bears the burden of establishing, by "clear and unequivocal" evidence: (1) a likelihood of success on the merits, (2) the threat of irreparable harm to Front Range if the injunction is not granted, (3) that the balance of equities tips in Front Range's favor, and (4) that an injunction is in the public interest. *Atty. Gen. of Ok. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009); *see* 10th Cir. R. 8.1.

Front Range incorrectly asserts that if it establishes "that the three harm factors tip decidedly in its favor, the probability of success requirement is somewhat relaxed." Mot. 9. This standard did not survive *Winter v. NRDC*, in which the Supreme Court held that plaintiffs must demonstrate that they are both "likely to succeed on the merits" and "likely to suffer irreparable harm in the absence of preliminary relief." 555 U.S. 7, 20 (2008). This leaves no room for this Court to relax the merits factor of the injunction test, even if Front Range were to make a strong showing on the irreparable harm factor — which it has not done.

ARGUMENT

I. FRONT RANGE HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIMS

A. NEPA Does Not Apply to FSIS' Grants of Inspection

Front Range is unlikely to prevail on the merits of its NEPA claims. "The

touchstone of whether NEPA applies is discretion. . . . [If] the agency does not have sufficient discretion to affect the outcome of its actions, and its role is merely ministerial, the information that NEPA provides can have no [e]ffect on the agency's actions." *Citizens Against Rails-To-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001); *see also Public Citizen v. Dep't of Transp.*, 541 U.S. 752, 756, 759 (2004); *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1262 (10th Cir. 2001).

The Act *requires* FSIS to grant inspections of facilities that meet applicable humane handling and food safety requirements. If those conditions are met, FSIS does not have discretion to deny or condition a grant of inspection on environmental grounds. Therefore, as the district court correctly found, NEPA's environmental review provisions do not apply here. *See* 40 C.F.R. § 1502.14.

Congress plainly provided in the Act that "[f]or the purpose of preventing the use in commerce of meat and meat food products which are adulterated," FSIS "*shall* cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering, packing, . . . or similar establishment" and that "when so slaughtered the carcasses of said amenable species *shall* be subject to a careful examination and inspection." 21 U.S.C. § 603(a) (emphasis added). Likewise, "[f]or the purpose of preventing the inhumane slaughtering of livestock," FSIS "*shall* cause to be made, by inspectors appointed for that purpose, an examination and inspection of the method

by which amenable species are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under this chapter." *Id.*§ 603(b) (emphasis added). The Act further requires FSIS to make post-mortem inspections and to mark "carcasses and parts thereof" of animals not adulterated as "Inspected and passed" and those that are adulterated to be marked "Inspected and condemned." 21 U.S.C. § 604.

As the district court correctly found, any doubt that the Act plainly limits FSIS's discretion is resolved by the legislative history of the statute. The House and Senate Reports for the 1967 Amendments to the Act both indicate that 21 U.S.C. § 603(a) was amended to replace "the Secretary of Agriculture, at his discretion, *may*" provide inspectors for ante-mortem inspections with "the Secretary *shall*" provide such inspectors. *See* Fed. Exh. 2 at 33; Fed. Exh. 3 at 26. The House Report states that this amendment would "[m]ake ante mortem inspection mandatory rather than permissive." Fed. Exh. 2 at 6; *see also id.* at 26 (same). Front Range's argument that FSIS enjoys discretion in granting inspections is contrary to both the plain language of the Act and its legislative history.

In accordance with the Act, USDA and FSIS have promulgated detailed regulations governing the slaughter of all amenable species, including equines, that are subject to the Act's mandatory inspection requirements. *See* 9 C.F.R. § 300.1 through § 500.7. These regulations focus on ensuring that animals are slaughtered humanely and that the meat products are unadulterated. *See, e.g.*, 9 C.F.R. §305.3

("Inspection shall not be inaugurated if an establishment is not in sanitary condition"). Under the regulations, FSIS may take only one of two actions on an application for a grant of inspection: 1) grant the application if the facility meets the requirements of the Act and its implementing regulations, or 2) deny the application if the facility does not meet the requirements. *See* 9 C.F.R. § 304.2(b).

In its decision granting inspection at the Valley Meat facility, FSIS explained that its action is "purely ministerial," and not discretionary:

> [I]f a commercial horse slaughter plant meets all of the statutory and regulatory requirements for receiving a grant of federal inspection services, FSIS has no discretion or authority under the [Act] to deny the grant on other grounds or to consider and choose among alternative ways to achieve the agency's statutory objectives. Therefore, a grant of federal inspection services under the [Act] is not . . . subject to NEPA requirements.

Pl. Exh. 10, Valley DM at 6. As a result of this limited authority, "FSIS inspectors will not have any authority or control over the day-to-day operations of the [Valley Meat] slaughter plant save to the degree necessary to achieve the agency's mission to protect public health by ensuring that horse meat intended for use as human food is safe to eat and properly labeled." *Id.* FSIS's explanation of its circumscribed authority is grounded in the clear language of the Act.

Front Range suggests that because FSIS "is authorized to grant inspection," Mot. 14, the agency's grants of inspection applications are discretionary and subject to NEPA review. This argument reads the words "is authorized" in isolation while

ignoring what the regulations authorize. Section 304.2(b) provides that the Administrator of FSIS:

> is authorized to grant inspection *upon his determination that the applicant and the establishment are eligible* therefor and to refuse to grant inspection at any establishment *if he determines* that it does not meet the requirements of this part or the regulations in . . . this chapter.

Id. (emphasis added).

Thus, neither the Act nor its implementing regulations authorizes FSIS to deny an application or condition the granting of the application on environmental considerations. As the Supreme Court held in *Public Citizen*, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect," and need not consider such effects "when determining whether to prepare a full EIS due to the environmental impact of an action it could not refuse to perform." 541 U.S. at 770.

That FSIS may exercise some judgment in determining whether an applicant meets statutory criteria does not grant the agency discretion "to add another entirely separate prerequisite to that list." *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 671–72 (2007). FSIS's authority is narrowly circumscribed by the Act, and it is well settled that NEPA does not enlarge that discretion. *See, e.g.*, *S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010).

In sum, Front Range fails to demonstrate in its motion that it is likely to succeed on the merits of this claim.

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

Because NEPA does not apply to FSIS's actions here, that is the end of the inquiry and Front Range cannot succeed on the merits. Nonetheless, even if NEPA did apply to FSIS's grants of inspection for Valley Meat, Rains, and Responsible Transportation, Front Range still would have no likelihood of success on its NEPA claims. Front Range argues that "NEPA review is required anytime a mere possibility of significant such effects exists," and asserts — based on layperson declarations regarding past operations at other plants that have no known ties to the facilities that are the subject of this litigation — that significant environmental effects are likely here. *See* Mot. 9–10. These assertions are flawed.

FSIS satisfied any NEPA obligations by invoking the CE in USDA's regulations. The regulations expressly identify FSIS as one of several agency units that "conduct programs and activities that have been found to have no individual or cumulative effect on the human environment," and consequently "are categorically excluded from the preparation of an EA or EIS unless the agency head determines that an action may have a significant environmental effect." 7 CFR § 1b.4(a), (b)(6).

Before invoking the CE, FSIS conducted a thorough assessment to ensure that the CE applied. *See* Pl. Exh. 10, Valley DM at 5–8; Pl. Exh. 16, RT DM at 4–7.

"Once an agency establishes categorical exclusions, its decision to classify a proposed action as falling within a particular categorical exclusion will be set aside only if a court determines that the decision was arbitrary and capricious." *Citizens' Comm.* 297 F.3d at 1023 (citations omitted).

1. The Grants of Inspection Do Not Pose Unique or Unknown Risks

The central premise of Front Range's NEPA argument is that there are "uncertain and unknown" effects from the presence of drug residues in horse flesh. Mot. 11–12.[2] This argument is based on Front Range's misunderstanding of USDA's residue testing program and is at odds with the record.

In the CE assessments for Valley Meat, Rains, and Responsible Transportation, FSIS examined the potential impacts of these facilities on environmental and other resources to ensure that there were no unique or extraordinary circumstances that would render the CE inapplicable. *See* Pl. Exh. 10, Valley DM at 8–13; Pl. Exh. 16, RT DM at 6–10. For instance, FSIS's CE assessment for Valley Meat specifically assessed Front Range's central claim that slaughter operations will cause significant public health risks and environmental impacts because horses are treated with pharmaceuticals and other chemicals that are not intended for use in animals destined for human consumption. *See* Mot. 4–5, 10–11. As an initial matter, FSIS —the expert

[2] Front Range also alleges "significant public controversy" over FSIS's actions. Mot. 11. But Front Range's general opposition to horse slaughter does not, in and of itself, make the inspection grants highly controversial such that preparation of an EIS is required. *See Anderson v. Evans*, 314 F.3d 1006, 1018–19 (9th Cir. 2002). *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1992).

agency in this field — explained that merely because substances marked as not for use in horses intended for human consumption may have been administered to a horse during its lifetime does not mean that those substances remain in the animal at the time of slaughter, since residues "are eliminated from the [animal's system] over time, . . . eventually leaving no detectable residue." Fed. Exh. 4, AR1854.

Furthermore, to address concerns about drug residue in meat from all amenable species, FSIS developed the National Residue Testing Program. Front Range makes the conclusory assertion that FSIS has not presented "any scientific evidence" that the residue sampling "represents the most common substances present in horses." Mot. 11. This is a baseless claim, as FSIS's testing program was developed in coordination with experts from the Food and Drug Administration, Environmental Protection Agency, Agricultural Research Service, and Centers for Disease Control and Prevention. Engeljohn Decl. ¶12; AR199–200. The sampling system is based on prior findings of chemical compounds, veterinary drug inventories, information from investigations, and pesticides. *Id.*; *see also* AR2262 (history of residue testing in horses); AR1825–52 (Decision Memo on Development of Equine Slaughter Inspection Regime).

As explained in the CE assessments, FSIS will screen meat produced at the facility to ensure that it does not contain any such drug residues before it enters the chain of commerce. *See, e.e.*, Pl. Exh. 10, Valley DM at 8. Consumers are protected from harm by FSIS's "zero tolerance" policy. Under that policy, no detectable levels

of substances for which FDA or EPA have not established tolerance levels are permitted. If meat contains such residues, it will be marked "condemned" and sent to a rendering facility, "thereby ensuring that it endangers neither public health and safety nor the local environment." *Id.*

Based on the drug residue screening process and the complex array of federal, State, and local laws regulating Valley Meat's operations, FSIS concluded that "commercial horse slaughter at Valley Meat has no more potential to have a significant impact on public health and safety than did the commercial slaughter of cattle, pigs, sheep, and goats that preceded it." *Id.* AR2476; *see also* AR3289 (reaching the same conclusion for Responsible Transportation); AR0004878 (Rains). This conclusion was not an abuse of discretion. From an environmental impact standpoint, there is nothing unique or extraordinary about the proposed operations at these three facilities. *See, e.g.*, AR3289 (Responsible Transportation); AR4878 (Rains). Indeed, in the event that evidence emerges suggesting a higher incidence of drug residue in equine carcasses than was previously observed prior to the congressional ban on equine slaughter inspection, FSIS has well-defined procedures for progressively and rapidly increasing the frequency of sampling healthy-appearing equines, even up to 100 percent. AR1855–56; Engeljohn Decl. ¶¶ 10, 16.

Front Range's assertions that the CE is inapplicable due to the possibility of environmental contamination are also unsupported. Mot. 5, 10. As the record shows, blood and other inedible byproducts will not be placed in local water systems or

contaminate groundwater. AR2476; AR2509; AR3288–89; AR4877. For example, at the Valley Meat facility, the inedible portions of all animals slaughtered are required to be denatured to prevent possible human use and placed in specially-marked containers identified as inedible product, and sent to an off-site rendering facility for appropriate destruction. Engeljohn Decl. ¶ 24; AR2510; AR2594–95.

2. The Grants of Inspection Do Not Establish a Precedent for Future Actions with Significant Effects

There is likewise no support for Front Range's argument that FSIS's actions are significant and trigger NEPA obligations because they "establish a template for horse slaughter plants." Mot. 12. In evaluating whether an action is "significant" because of precedential impact under 40 C.F.R. § 1508.27(b)(6), agencies look at "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." *Id.* Aside from the three defendant-intervenor facilities, other plants have not actively pursued completion of the grant process after their first submissions to FSIS, which were made more than one year ago. Engeljohn Decl. ¶ 7. At this time, FSIS has no reason to believe that any other facility can feasibly complete a successful grant application for equine slaughter and be ready to slaughter in the near future. *Id.* Nor is there any basis for a conclusion that the three grants at issue here represent a decision in principle about how future applications, if and when they are received, will be treated.

Front Range does not identify any decision in which FSIS adopted a "national program of horse slaughter." FSIS is doing nothing more than implementing its nondiscretionary statutory obligations under the Act for all amenable species, by granting inspections for qualifying facilities on a case-by-case basis.

3. Front Range Does Not Show That the Grants of Inspection Threaten Violation of Federal or State Law

Front Range also claims that a NEPA analysis was required because FSIS's actions threaten violations of other environmental laws or requirements. Mot. 12; *see* 40 C.F.R. § 1508.27(b)(10). But the only evidence in the record regarding these allegations is contained in Front Range's petition, which was accompanied by declarations from laypeople who claimed that operations at three now-closed facilities owned by other entities resulted in environmental harms. The record contains no declarations from experts or other evidence of a comparable nature that support Front Range's allegations that the three facilities at issue in this case will commit violations of environmental laws and regulations. In short, Front Range has not presented any record evidence that calls into question the agencies' expert determinations.

FSIS's well-supported invocation of USDA's CE for its grants of inspection at the Valley Meat, Responsible Transportation, and Rains facilities does not constitute an abuse of discretion. FSIS relied on the technical opinions of its qualified experts to determine that no unique and extraordinary circumstances exist that would indicate

the potential for significant environmental impacts, as discussed above. "[A]n agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378. Because FSIS properly invoked its CE, it was not required to prepare an EA or EIS. Thus, even if NEPA applies to these grants of inspection, Front Range's NEPA claims fail.

II. FRONT RANGE HAS NOT DEMONSTRATED THAT IT WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION

Front Range's discussion of irreparable harm relies almost exclusively on an erroneous interpretation of case law regarding the nature of environmental injury. *See* Mot. 15–16 (citing cases). Contrary to Front Range's assertion, the Supreme Court has rejected a presumption of irreparable injury in environmental cases. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545–46 (1987). The gravity of the environmental harm is instead incorporated into the hardship balancing test, and thus no presumption of harm is necessary. *Id.* at 545.

To be irreparable, "an injury must be certain, great, actual and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (citation and internal quotation marks omitted). Front Range must make a "specific showing that the environmental harm results in irreparable injury to their specific environmental interests." *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002).

Front Range fails to establish any non-speculative, imminent, irreparable injury to its concrete interests. Its allegations of irreparable injury are based on unsubstantiated fears of "contamination" of local waters or of fish living in those waters. *See, e.g.*, Pl. Exh. 20, Trahan Decl. ¶ 8 ("fear" of eating fish from local waters); *id.* ¶ 9 ("worried" about discharges into local waters); Gross Decl. ¶ 13 (same); Seper Decl. ¶ 6 (same). Front Range paints a gory picture of "horse blood in their faucets" and a "meat supply [that] has been contaminated by adulterated horse flesh," Mot. 18–19, but fails to present any scientific evidence of contamination in local waters or in other meat products or any reasonable expectation that such contamination will occur. In contrast, as discussed above, FSIS has set forth detailed regulations and directives for the inspection, testing, handling and labeling of livestock, including equines.

At bottom, Front Range's argument is that slaughtered horses *might* be contaminated, that this contamination *might* reach nearby waters, and that this contamination *might* enter those unidentified lakes and streams at which Front Range's members *might* be recreating. These attenuated, speculative allegations of harm are insufficient to establish irreparable injury. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013). Front Range fails to carry its burden of providing "clear and unequivocal" evidence of irreparable harm, and its motion can be rejected for this reason alone. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009).

III. THE PUBLIC INTEREST WOULD NOT BE SERVED BY AN INJUNCTION PENDING APPEAL

A federal court must deny a preliminary injunction, even where irreparable injury to the movant exists, if the injunction is contrary to the public interest. *See Winter*, 555 U.S. at 22; *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982). Here, an injunction pending appeal is not in the public interest. Through the Act, Congress has mandated that FSIS "shall" conduct inspection of the slaughter and processing of livestock, including horses, to ensure its safety for human consumption. After years of effectively banning domestic slaughter of horses for human consumption through a funding provision foreclosing FSIS inspection of horse slaughter facilities, Congress reversed course and lifted the ban in 2011. Thus, Congress has chosen once again to require FSIS to grant inspections to facilities that meet the requirements of the Act and implementing regulation. When Congress has itself "decided the order of priorities in a given area," a court of equity must follow the "balance that Congress has struck" and lacks discretion to strike a different balance. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001); s*ee also Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515, 551–52 (1937).[3]

* * *

For the foregoing reasons, Front Range's motion should be denied.

---

[3] In light of the fact that Front Range fails to demonstrate a likelihood of success on the merits and fails to show that it will suffer irreparable harm in the absence of an injunction pending appeal, this pleading does not address the balance of harms.

Respectfully submitted,

/s Vivian H.W. Wang

ROBERT G. DREHER
Acting Assistant Attorney General

ANDREW A. SMITH
ALISON GARNER
MARK R. HAAG
VIVIAN H.W. WANG
Attorneys
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 514-3977
vivian.wang@usdoj.gov

OF COUNSEL:
ANDREW R. VARCOE
Office of General Counsel
U.S. Department of Agriculture

November 7, 2013
DJ# 90-1-4-13965

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that the copy of the foregoing response submitted in digital form via the Court's ECF system is an exact copy of the written document filed with the Clerk. I further certify that all required privacy redactions have been made and that this brief has been scanned for viruses with Microsoft Forefront Client Security version 1.161.1618.0, virus definition file dated November 6, 2013, and, according to the program, is free of viruses.

November 7, 2013 /s/ Vivian H.W. Wang

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2013, I electronically filed the foregoing using the Court's CM/ECF system which will send notification of such filing to all parties in this case.

/s/ Vivian H.W. Wang