No. 15-____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re GINA MCCARTHY

GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,

Defendant-Petitioner,

v.

MURRAY ENERGY CORPORATION; MURRAY AMERICAN ENERGY, INC.; THE AMERICAN COAL COMPANY; AMERICAN ENERGY CORPORATION; THE HARRISON COUNTY COAL COMPANY; KENAMERICAN RESOURCES, INC.; THE MARION COUNTY COAL COMPANY; THE MARSHALL COUNTY COAL COMPANY; THE MONONGALIA COUNTY COAL COMPANY; OHIOAMERICAN ENERGY INC.; THE OHIO COUNTY COAL COMPANY; and UTAHAMERICAN ENERGY, INC.,

Plaintiffs-Respondents.

On Petition for a Writ of Mandamus in Case No. 5:14-cv-00039-JPB (N.D.W. Va.)

PETITION FOR A WRIT OF MANDAMUS

RELIEF REQUESTED BY JUNE 19, 2015

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The U.S. Environmental Protection Agency ("EPA") seeks a writ of mandamus to the U.S. District Court for the Northern District of West Virginia in *Murray Energy Corp. v. McCarthy*, No. 5:14-cv-00039-JPB, directing that court to vacate its order of May 29, 2015 ("Discovery Order," Attach. 1), which granted plaintiffs' motion to compel discovery, denied EPA's motion for a protective order, and held the agency's fully-briefed motion for summary judgment in abeyance pending completion of discovery. EPA further requests that this Court direct the district court to disallow discovery in this case. Finally, if this Court should require additional time to consider this petition beyond June 19, 2015, EPA requests an administrative stay of the Discovery Order while the petition is pending.

While "mandamus cannot be used to challenge ordinary discovery orders," *In re Underwriters at Lloyd's*, 666 F.2d 55, 58 (4th Cir. 1981), this is no ordinary discovery order. Plaintiffs Murray Energy Corporation *et al.* ("Murray") sued EPA under the citizen-suit provision of the Clean Air Act, alleging "a failure of the [EPA] Administrator to perform an[ ] act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). Congress strictly limited the judicial role in such cases to deciding whether EPA performed a clear-cut, ministerial duty and, if not, "order[ing] the Administrator to perform such act or duty." *Id.* § 7604(a). The district court disregarded those limitations in this case and ordered broad discovery into EPA activities that have no bearing on Murray's

nondiscretionary-duty suit. This Court should issue the writ because the Discovery Order "'amount[s] to a judicial usurpation of power or a clear abuse of discretion.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009) (citation omitted).

BACKGROUND

Murray's sole claim alleges that EPA failed to perform a nondiscretionary duty under Section 321(a) of the Clean Air Act. That subsection provides, in full:

> **(a) Continuous evaluation of potential loss or shifts of employment**
> The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision[s] of [the Clean Air Act] and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement.

42 U.S.C. § 7621(a). At the same time, however, Congress clarified that Section 321(a) does not authorize EPA to alter its administration of the Clean Air Act:

> **(d) Limitations on construction of this section**
> Nothing in this section shall be construed to require or authorize the Administrator . . . to modify or withdraw any requirement imposed or proposed to be imposed under [the Clean Air Act].

Id. § 7621(d). In the nearly 40 years since the statute was enacted, this is the first time that a litigant has argued that the agency failed to comply with Section 321(a).

EPA moved to dismiss this suit on two grounds. First, the agency maintained that its "continuing evaluation[ ] of potential loss or shifts of employment," 42 U.S.C. § 7621(a), is not the sort of "'clear-cut,'" "'ministerial'" act that falls within

this Court's "narrow[ ]" construction of the Clean Air Act's citizen-suit provision. *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 276 n.3 (4th Cir. 1992) (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987), and *Envtl. Def. Fund v. Thomas*, 870 F.2d 892, 899 (2d Cir. 1989)). EPA further argued that, "to impose a clear-cut nondiscretionary duty," a statute "must 'categorically mandat[e]' that *all* specified action be taken by a date-certain deadline." *Sierra Club*, 828 F.2d at 791 (citation omitted). The district court rejected EPA's position, relying principally on cases where other district courts had interpreted distinct citizen-suit provisions in other statutes. Order Denying Motion to Dismiss (Attach. 2), at 11–13.

EPA then moved to dismiss the case for lack of Article III standing. It argued that Murray's alleged economic harms were not traceable to EPA's alleged failure to conduct employment evaluations or redressable by an order directing the agency to perform them. EPA contested Murray's claim of a procedural injury because an employment evaluation is not a prerequisite to any substantive action. Lastly, EPA disputed Murray's alleged "informational injury" on the ground that Section 321(a) does not confer a clear legal right to information generated under that provision.

The district court rejected those arguments as well (Attach. 3). It deemed Murray's allegation "that the actions of the EPA have had a coercive effect on the power generating industry" an injury-in-fact that "may also be fairly traceable to the failure of the EPA to conduct the evaluations." *Id.* at 11. The court also found

that this alleged injury was redressable because "the [Section 321(a)] inquiry may have the effect of convincing the EPA, Congress, and/or the American public to relax or alter EPA's prior decisions." *Ibid.* The court further held that "[t]he denial of the benefit of the evaluations … is sufficient to support procedural standing," and that Murray "may be entitled to the information which has not been collected or analyzed" by the agency. *Id.* at 16–17.

EPA next moved for summary judgment (Attach. 4) on the ground that it had complied with any duty allegedly imposed by Section 321(a). EPA submitted 53 documents to show its performance under the statute, along with an explanatory affidavit from an agency official.[1] Crucially, EPA stipulated that the documents it submitted to the court were not prepared for the express purpose of complying with Section 321(a), and that the agency "ha[d] completed no other evaluations of the potential employment [effects] of the Act at this time." *Id.* at 18. EPA asked that summary judgment be entered in the agency's favor or, if the district court were to decide that the proffered documents did not demonstrate performance under Section 321(a), that summary judgment be entered in Murray's favor. *Id.* at 18–19; *see also* Reply in Support of Summary Judgment Motion (Attach. 5), at 3–4.

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[1] In EPA's view, the proffered documents evaluate the potential employment effects of the agency's overall administration and enforcement of the Clean Air Act; evaluate potential employment effects of specific regulations; explain the agency's guidance on employment analysis; and detail EPA's ongoing research in this area.

Murray filed an opposition to EPA's summary-judgment motion (Attach. 6), contending that "the [proffered] documents and declaration alone would not entitle EPA to a judgment as a matter of law that EPA has complied with Section 321(a)." *Id.* at 21; *see id.* at 16 ("EPA Has Not Demonstrated that the Administrator Has Performed the Evaluations Required by Section 321(a)."). Nevertheless, Murray asked the district court ***not*** to enter judgment in the company's favor "before the completion of fact and expert discovery." *Id.* at 21; *see also id.* at 20 ("Plaintiffs have not moved for summary judgment, and EPA cannot force the issue by fiat."). Murray asserted that discovery was "necessary to prove [EPA's] failure [to act under Section 321(a)], demonstrate the resulting injury to [Murray], and justify appropriate injunctive relief." *Id.* at 1.

Meanwhile, Murray had propounded extensive and varied discovery on EPA (Attach. 7). For example, the company sought:

- Information about "all actions [EPA] ha[s] taken under the Clean Air Act or applicable implementation plans to affect capital markets." *Id.* at 6.
- "[A]ll Documents Concerning the impact of [EPA's] administration or enforcement of the Clean Air Act on the construction of new coal-fired power plants." *Id.* at 12.
- "[All] Documents Concerning the use of supplemental environmental projects in settlement of Clean Air Act enforcement actions to reduce the consumption of power from coal-fired power plants …." *Id.* at 13.
- Documents related to a 2008 campaign statement by then-Senator Barack Obama. *Ibid.*

Murray also requested the depositions of five agency officials. Its Rule 30(b)(6) Deposition Notice appended 54 topics for discussion and document production, including EPA's "efforts to impact the market for coal" and "investment in coal-fired power plants," and how the agency's current Administrator "prepar[ed] for [her confirmation] hearing." Attach. 8, at A3–A4.

After EPA filed responses and objections to the discovery requests, Murray moved the district court to compel discovery and hold EPA's summary-judgment motion in abeyance even though, in the company's view, "the evidence available … indicates that [EPA] has not conducted the evaluations required of it by Section 321(a)." Attach. 9, at 10. The agency filed a response (Attach. 10) reiterating that discovery could not give rise to a genuine dispute of material fact and detailing its objections to specific requests identified in the motion to compel. EPA also moved for a protective order pending disposition of its summary-judgment motion. In its reply, Murray again urged the district court not to enter judgment (even in the company's favor) without allowing discovery. Attach. 11, at 14.

On May 29, 2015, the district court granted the motion to compel, denied the motion for a protective order, and held the summary-judgment motion in abeyance pending completion of discovery. The court's entire reasoning was as follows:

> This Court finds that the plaintiffs have adequately demonstrated that further discovery is appropriate and necessary. In fact, little meaning ful [*sic*] discovery has occurred, yet a motion for summary judgment has been filed.

Attach. 1, at 3. The court ordered EPA to "comply with all of the plaintiffs' pending discovery requests" and "produce requested witnesses for deposition" in time to complete discovery by July 31, 2015, *ibid.*, even though EPA had already tendered all of the documents on which it would rely to argue that it had performed any duty imposed by Section 321(a). The court also held EPA's summary-judgment motion in abeyance "until the filing of plaintiffs' opposition thereto," notwithstanding that such opposition had already been filed, as had the agency's reply thereto. *Ibid.*

EPA promptly moved for reconsideration, but the district court denied that motion on June 4, 2015, stating only that the Discovery Order "clearly set forth the basis for the ruling and that no further explanation is necessary." Order Denying Motion for Reconsideration or Clarification (Attach. 12), at 2.

STANDARD OF REVIEW

This Court has authority to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a). A petitioner seeking the writ must satisfy three requirements: (1) there must be no other adequate means for the petitioner to obtain the desired relief; (2) the right to the writ must be clear and indisputable; and (3) the writ must be appropriate under the circumstances. *See Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 380–81 (2004). Mandamus may be employed to exercise supervisory authority over a district court to ensure "proper judicial administration in the federal system." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259–60 (1957).

"Judicial administration" includes the conduct of discovery. *In re Pruett*, 133 F.3d 275, 278 (4th Cir. 1997). This Court has issued the writ "to prevent the enforcement of orders allowing excessive discovery or the excessive and improper taking of depositions," *United States v. Hemphill*, 369 F.2d 539, 543 (4th Cir. 1966), in particular "where the complaint rests upon … a tenuous jurisdictional basis." *U.S. Bd. of Parole v. Merhige*, 487 F.2d 25, 29 (4th Cir. 1973).

REASONS FOR GRANTING THE WRIT

I. Mandamus is the only means for EPA to obtain adequate relief.

"As a general rule, a district court's order enforcing a discovery request is not a 'final order' subject to appellate review." *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992). By the time that the district court enters an appealable order, however, the substantial harm to EPA from the Discovery Order will have already occurred. Nor would noncompliance with the order provide adequate relief. *See Hemphill*, 369 F.2d at 543 ("To compel the Secretary of Labor to appear in the District Court in response to the order to show cause why he should not be held in contempt [for refusing to answer interrogatories] would not provide an adequate legal remedy."); *In re Sec. & Exch. Comm'n*, 374 F.3d 184, 188 (2d Cir. 2004) ("[T]here is a marked difference between requiring a private litigant to submit to a contempt order before seeking appellate relief and requiring executive agency officials to do so; the latter case raises the prospect of 'serious repercussions for the

relationship between two coequal branches of government.'" (citation omitted)). Because EPA cannot otherwise obtain adequate relief from the Discovery Order, this Court may issue the writ of mandamus.

II. EPA's entitlement to the writ of mandamus is clear and indisputable.

EPA is plainly entitled to the writ in this case. Congress strictly limited the scope of judicial inquiry in nondiscretionary-duty suits like this one, and the extraordinarily broad discovery compelled by the district court has no reasonable prospect of unearthing evidence relevant to the ultimate disposition of this case.

In contrast to the present suit, which alleges that EPA failed to perform a nondiscretionary duty, the more typical suit alleges that final agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (Administrative Procedure Act); *see also* 42 U.S.C. § 7607(d)(9)(A) (Clean Air Act). Given that "a presumption of regularity attaches to administrative actions," *Central Elec. Power Co-op., Inc. v. Southeastern Power Admin.*, 338 F.3d 333, 337 (4th Cir. 2003), judicial review in those more typical cases is ordinarily limited to the record proffered by the agency. *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1336 (4th Cir. 1995). That said, when a plaintiff alleges arbitrary or capricious agency action, it is at least possible to conceive of unusual circumstances that would "'justify expanding the record or permitting

discovery'" to uncover evidence that could undermine the agency's stated reasons for decision, and thus support the plaintiff's claim *Id.* at 1337 (citation omitted).

In a Clean Air Act nondiscretionary-duty case like this one, however, the reviewing court is limited to deciding whether EPA performed the alleged duty, not whether that performance was inadequate, ineffectual, or an abuse of discretion. *See Sierra Club*, 828 F.2d at 792 (rejecting "the convoluted notion that EPA is under a nondiscretionary duty … not to abuse its discretion"); *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1355 (9th Cir. 1978) (explaining that the provision "'was not designed to permit review of the performance of [EPA's] functions'" (citation omitted)). To prevail on its nondiscretionary-duty claim, it would not be sufficient for Murray to establish that EPA reached arbitrary or unreasonable conclusions regarding the employment-related effects of its administration and enforcement of the Clean Air Act. Rather, the company must prove that the agency did not "conduct continuing evaluations" at all. 42 U.S.C. § 7621(a).

If the 53 documents proffered by EPA are otherwise sufficient to show that the agency conducted those evaluations, it is difficult (if not impossible) to imagine how additional documents would justify a contrary conclusion, much less reveal any "facts essential to justify [Murray's] opposition" to summary judgment. Fed. R. Civ. P. 56(d). If the company wants to argue that *Section 321(a) requires additional evaluations* because the alleged duty attaches to things that the 53 documents do

not address, discovery is not needed to make that legal point. If Murray wants to argue that the 53 documents do not show performance because *they were not prepared for the express purpose of complying with Section 321(a)*, discovery is not needed because EPA has conceded that fact. *See supra*, page 4. If Murray wants to argue that the 53 documents do not show performance because *they do not purport to evaluate potential loss or shifts of employment*, discovery is not needed because that fact would be plain from the face of the documents. Lastly, if Murray wants to argue that the 53 documents do not constitute performance because *they do not adequately evaluate potential loss or shifts of employment*, the company cannot do that here because Congress did not permit the district court to review the adequacy of EPA's performance in a nondiscretionary-duty suit.

Nor is discovery required to "justify appropriate injunctive relief," Attach. 6, at 1, given that the only permissible relief here is an "order [to] the Administrator to perform [the] act or duty." 42 U.S.C. § 7604(a); *see Sierra Club v. Whitman*, 285 F.3d 63, 68 (D.C. Cir. 2002). "It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14–15 (1981). All the more so here, where Congress did not authorize EPA to take or withhold action based on Section 321(a). 42 U.S.C. § 7621(d); H.R. Rep. No. 95-294, at 318 (1977) ("Nor should

[Section 321] be construed to authorize or require the postponement, withdrawal, modification, or nonenforcement of any requirement or proposed regulation under the Clean Air Act."). Moreover, the district court has no power to enjoin or nullify EPA actions reviewable exclusively in the courts of appeals, such as the rulemakings cited in Murray's pleadings and discovery requests. 42 U.S.C. § 7607(b)(1); *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 161 (4th Cir. 1993).

In a nondiscretionary-duty suit, the Clean Air Act allows the district court to "order the Administrator to perform [the] act or duty," 42 U.S.C. § 7604(a), but such an order cannot go beyond the text of the relevant statute. *See T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808, 815–18 (2015) (refusing to dictate the format of a government decision in the face of statutory silence); *cf. Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (explaining that when a court finds agency action "unlawfully withheld" under the Administrative Procedure Act, it orders the agency to act "'without directing *how* it shall act'" (citation omitted)). Section 321(a) does not direct EPA to memorialize its performance or publish its evaluation results,[2] and the district court cannot independently devise or

[2] By contrast, Section 321(b) requires EPA to "investigate" allegations from an "employee … whose employment is … adversely affected or threatened to be adversely affected because of the alleged results of any [Clean Air Act] requirement…." 42 U.S.C. §7621(b). The agency's investigation must culminate in a written notice explaining why a public hearing will not be held, or alternatively, a written report following a hearing on the record and accompanied by findings and recommendations of the Administrator. *Ibid.*; *see also id.* §7621(c) (granting EPA

impose such a requirement. Therefore, assuming that the district court here had jurisdiction, the court could only order EPA to "conduct continuing evaluations of potential loss or shifts of employment." 42 U.S.C. § 7621(a).

Murray's final contention is that discovery would help the company to prove its own injuries. Attach. 6, at 1. But discovery is not a tool for plaintiffs to "uncover facts sufficient to satisfy … pleading requirements." *SG Cowen Sec. Corp. v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 189 F.3d 909, 912 (9th Cir. 1999) (issuing a writ of mandamus to vacate a discovery order). In any event, the company did not show how information uniquely within *EPA's* possession could reveal new harms allegedly suffered by *Murray* or how such harms could possibly affect the outcome of this straightforward, nondiscretionary-duty suit.

III. Issuance of the writ is appropriate under the circumstances.

The district court's very narrow scope of review, coupled with EPA's willingness to win or lose on the documents it proffered to the court, plainly render discovery unnecessary in this case. Rather than grapple with those considerations, the court summarily compelled the agency to produce a broad swath of irrelevant information on such disparate, politically-motivated topics as a campaign statement from then-Senator Obama and the current EPA Administrator's preparation for her confirmation hearing. *See* Attachs. 7 and 8. The district court did not even address

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subpoena authority for these investigations). The plaintiffs here are not employees, nor do they allege that EPA failed to comply with Section 321(b).

the agency's detailed objections to some of Murray's most egregious requests. *See* Attach. 10, at 6–15. The court also ordered the depositions of several EPA officials without identifying "any information in the possession of these officials … that [the plaintiffs] could not obtain from published reports and available agency documents." *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 587 (D.C. Cir. 1985); *see also Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991) ("[A]bsent 'extraordinary circumstances,' a government decision-maker will not be compelled to testify about his mental processes in reaching a decision, 'including the manner and extent of his study of the record and his consultation with subordinates.'" (citation omitted)).

Mandamus is particularly appropriate here because "the complaint rests upon … a tenuous jurisdictional basis." *Merhige*, 487 F.2d at 29; *see also Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) ("The traditional use of the writ … [is] to confine an inferior court to a lawful exercise of its prescribed jurisdiction."). Murray invoked the sovereign-immunity waiver in the nondiscretionary-duty provision of the Clean Air Act, 42 U.S.C. § 7604(a)(2), but this Court interprets that waiver "narrowly" to encompass only "'clear-cut,'" "'ministerial'" duties. *Monongahela*, 980 F.2d at 276 n.3 (citations omitted); *see also Sierra Club*, 828 F.2d at 791 ("In order to impose a clear-cut nondiscretionary duty," Congress "must 'categorically mandat[e]' that *all* specified action be taken by a date-certain

deadline." (citation omitted)). If Section 321(a) imposes a duty at all, that duty is "discretionary with the Administrator." 42 U.S.C. § 7604(a)(2).

Murray has repeatedly resisted the entry of summary judgment in its favor, notwithstanding the company's position that EPA's proffered documents do not demonstrate performance under Section 321(a). It seems that Murray would rather propound discovery than win this case. Although the rules of civil discovery may be liberally construed, they do not condone this sort of fishing expedition. *See, e.g.*, *Hemphill*, 369 F.2d at 542 (issuing a writ of mandamus to vacate a discovery order that "call[ed] for irrelevant information wholly unnecessary to the defense"). By allowing discovery to proceed unhampered in this unique class of suit, the district court usurped judicial power and clearly abused its discretion.

IV. This Court should enter an administrative stay of the Discovery Order if it requires additional time to consider this petition beyond June 19, 2015.

The Discovery Order compels EPA to respond to all of Murray's requests for document production by June 19, 2015. Attach. 1, at 3; *see* N.D.W. Va. Local R. Civ. P. 34.01(c). EPA filed an expedited, unopposed motion to extend that deadline to July 31, 2015, but the district court has not ruled on that motion to date.[3]

In the event that EPA's motion for an extension is denied, and should this Court require additional time beyond June 19, 2015, to consider and rule on this

[3] EPA will promptly notify this Court when the district court rules on the agency's motion for an extension.

petition, the agency respectfully asks that this Court administratively stay the Discovery Order pending disposition of this petition. A stay would relieve EPA from a potentially needless diversion and expenditure of significant resources, not to mention the possibility of contempt proceedings, at a time when this petition remains under consideration by this Court. Murray would not be substantially prejudiced by such a stay because, if EPA's petition were ultimately denied, the only adverse consequence for the company would be a slight pause in discovery in a case where Murray has thus far delayed entry of judgment, even in its own favor.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandamus directing the district court to vacate the Discovery Order and disallow discovery in this case. In the event that the district court does not grant EPA relief from the June 19, 2015, deadline for responding to Murray's document production requests, and this Court requires additional time beyond that date to consider this petition, this Court should enter an administrative stay of the Discovery Order pending resolution of the petition.

Respectfully submitted,

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90-5-2-4-20081
June 12, 2015

TABLE OF ATTACHMENTS

1. Order Granting Plaintiffs' Motion to Compel Discovery, Extend the Deadline for Fact Discovery, and Hold Defendant's Motion for Summary Judgment in Abeyance Pending Completion of Discovery and Denying Defendant's Motion for Entry of Protective Order ("Discovery Order"), Dkt. No. 93 (May 29, 2015)
2. Order Denying Motion to Dismiss the Complaint and Motion to Strike Prayer for Injunctive Relief, Dkt. No. 40 (Sept. 16, 2014)
3. Order Denying Motion to Dismiss and Motion to Stay Discovery, Dkt. No. 71 (Mar. 27, 2015)
4. Memorandum in Support of Defendant's Motion for Summary Judgment, Dkt. No. 76 (Apr. 10, 2015)
5. Reply Memorandum in Support of Defendant's Motion for Summary Judgment, Dkt. No. 90 (May 21, 2015)
6. Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment, Dkt. No. 85 (May 4, 2015)
7. Plaintiffs' First Set of Discovery Requests (served Dec. 2, 2014)
8. Plaintiffs' Notice of 30(b)(6) Deposition of the United States Environmental Protection Agency *Duces Tecum* (served Mar. 31, 2015)
9. Memorandum in Support of Plaintiffs' Motion to Compel Discovery, Extend the Deadline for Fact Discovery, and Hold Defendant's Motion for Summary Judgment in Abeyance Pending Completion of Discovery, Dkt. No. 82 (Apr. 22, 2015)
10. Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery, Extend the Deadline for Fact Discovery, and Hold Defendant's Motion for Summary Judgment in Abeyance Pending Completion of Discovery, Dkt. No. 89 (May 11, 2015)
11. Reply in Support of Plaintiffs' Motion to Compel Discovery, Extend the Deadline for Fact Discovery, and Hold Defendant's Motion for Summary Judgment in Abeyance Pending Completion of Discovery, Dkt. No. 91 (May 21, 2015)
12. Order Denying Motion to Reconsider or for Clarification, Dkt. No. 100 (June 4, 2015)

Attachment 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

MURRAY ENERGY CORPORATION, **MURRAY AMERICAN ENERGY, INC.**, **THE AMERICAN COAL COMPANY**, **AMERICAN ENERGY CORPORATION**, **THE HARRISON COUNTY COAL COMPANY**, **KENAMERICAN RESOURCES, INC.**, **THE MARION COUNTY COAL COMPANY**, **THE MARSHALL COUNTY COAL COMPANY**, **THE MONONGALIA COUNTY COAL COMPANY**, **OHIOAMERICAN ENERGY INC.**, **THE OHIO COUNTY COAL COMPANY**, and **UTAHAMERICAN ENERGY, INC.**,

Plaintiffs,

v.

Civil Action No. 5:14-CV-39
Judge Bailey

GINA McCARTHY, Administrator, United States Environmental Protection Agency, in her official capacity,

Defendant.

ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL DISCOVERY, EXTEND THE DEADLINE FOR FACT DISCOVERY, AND HOLD DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN ABEYANCE PENDING COMPLETION OF DISCOVERY AND DENYING DEFENDANT'S MOTION FOR ENTRY OF PROTECTIVE ORDER

Pending before this Court are Plaintiffs' Motion to Compel Discovery, Extend the Deadline for Fact Discovery, and Hold Defendant's Motion for Summary Judgment in Abeyance Pending Completion of Discovery [Doc. 81] and the United States' Motion for Entry of Protective Order [Doc. 87]. For the reasons stated below, this Court will grant the plaintiffs' motion and deny the motion filed by the EPA.

Attachment 1

This Clean Air Act citizen suit was filed on March 24, 2014, by and on behalf of twelve coal companies seeking to compel the Administrator of the Environmental Protection Agency ("EPA") to comply with her duty to "conduct continuing evaluations of potential loss or shifts of employment which may result from administration or enforcement of the [Clean Air Act] and applicable implementation plans." 42 U.S.C. § 7621(a) [Doc. 1].

On May 23, 2014, the plaintiffs filed an amended complaint [Doc. 23]. After the grant of an extension of time to the defendant, the defendant filed a motion to dismiss and memorandum in support on June 30, 2014 [Docs. 33, 34 & 35]. The plaintiffs responded to the motion to dismiss on July 25, 2014 [Doc. 38] and the EPA replied on August 11, 2014 [Doc. 39]. On September 16, 2014, this Court denied the motion to dismiss [Doc. 40].

After an extension, the EPA filed its answer to the amended complaint on October 6, 2014 [Doc. 49]. On October 9, 2014, the EPA filed a motion to clarify the court's September 16, 2014 Order [Doc. 50], which motion was denied on October 24, 2014 [Doc. 53].

On November 5, 2014, this Court entered its scheduling order [Doc. 55]. On December 12, 2014, the plaintiff filed discovery requests upon the EPA [Doc. 58]. On December 23, the EPA filed a second motion to dismiss [Doc. 59], together with a motion to stay discovery pending resolution of its second motion to dismiss. The plaintiffs filed their response to the motion to dismiss on January 23, 2015, and the EPA filed its reply on February 17, 2015 [Docs. 65 & 70]. On March 27, 2015, this Court denied the second motion to dismiss [Doc. 71].

On April 10, 2015, the EPA filed a motion for summary judgment, together with a memorandum and numerous exhibits [Docs. 75, 76, 77, 78, 79 & 80]. It appears that

Attachment 1

thereafter, having filed its motion for summary judgment, the defendant has refused to meaningfully engage in discovery. Under this Court's scheduling order, discovery was to close on May 1, 2015, with dispositive motions to be filed on September 21, 2015. The plaintiffs have filed the Rule 56(D) Declaration of John D. Lazzaretti, detailing the areas of discovery which plaintiffs contend are appropriate prior to a ruling on the motion for summary judgment [Doc. 82-7].

This Court finds that the plaintiffs have adequately demonstrated that further discovery is appropriate and necessary. In fact, little meaning ful discovery has occurred, yet a motion for summary judgment has been filed.

For the above reasons, Plaintiffs' Motion to Compel Discovery, Extend the Deadline for Fact Discovery, and Hold Defendant's Motion for Summary Judgment in Abeyance Pending Completion of Discovery [Doc. 81] is **GRANTED**. It is hereby **ORDERED** that:

1. Defendant shall comply with all of the plaintiffs' pending discovery requests, including providing full responses to Interrogatories 7, 8, 9, 10, 11, 12, 14, 15, and 16 and Requests for Production 1, 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 27, 30, 31, 32, 33, 34, 35, 36, and 37 of Plaintiffs' First Set of Discovery Requests, filed December 2, 2014 [Doc. 58].

2. Defendant shall produce requested witnesses for deposition and cooperate in the scheduling of depositions so that all requested depositions may be completed by the discovery completion date.

3. The discovery completion deadline is extended to July 31, 2015.

4. Defendant's motion for summary judgment [Doc. 75] will be held in abeyance until the filing of plaintiffs' opposition thereto, which under the existing scheduling order is

Attachment 1

due on or before October 21, 2015.

For the above reasons, the United States' Motion for Entry of Protective Order [Doc. 87] is **DENIED**.

It is so **ORDERED**

The Clerk is directed to transmit copies of this Order to counsel of record herein.

DATED: May 29, 2015.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

Attachment 1

Attachment 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

MURRAY ENERGY CORPORATION, **MURRAY AMERICAN ENERGY, INC.**, **THE AMERICAN COAL COMPANY**, **AMERICAN ENERGY CORPORATION**, **THE HARRISON COUNTY COAL COMPANY**, **KENAMERICAN RESOURCES, INC.**, **THE MARION COUNTY COAL COMPANY**, **THE MARSHALL COUNTY COAL COMPANY**, **THE MONONGALIA COUNTY COAL COMPANY**, **OHIOAMERICAN ENERGY INC.**, **THE OHIO COUNTY COAL COMPANY**, and **UTAHAMERICAN ENERGY, INC.**,

Plaintiffs,

v.

Civil Action No. 5:14-CV-39
Judge Bailey

GINA McCARTHY, Administrator, United States Environmental Protection Agency, in her official capacity,

Defendant.

ORDER DENYING MOTION

Pending before this Court is Defendant's Motion to Dismiss the Complaint and Motion to Strike Prayer for Injunctive Relief [Doc. 34]. In the Motion, the defendant moves to dismiss the Complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and, in the alternative, moves to strike paragraph (c) of the plaintiffs' prayer for relief, requesting injunctive relief, pursuant to Fed. R. Civ. P. 12(f). The Motion has been fully briefed and is ripe for decision.

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This action centers around § 321(a) of the Clean Air Act, 42 U.S.C. § 7621(a). This statutory provision provides:

> The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of [the Clean Air Act] and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement.

42 U.S.C. § 7621(a) (brackets added).

In her Motion, the Administrator argues that this Court is without subject matter jurisdiction to hear this case because the plaintiffs have not articulated a sufficient statutory waiver of the Government's sovereign immunity. This, she contends, is because the statute upon which the plaintiffs rely is discretionary and § 321(a) does not contain a date certain for action by the Administrator.

"As a sovereign, the United States is immune from all suits against it absent an express waiver of its immunity. ***United States v. Sherwood***, 312 U.S. 584, 586 (1941). All waivers of sovereign immunity must be 'strictly construed . . . in favor of the sovereign.' ***Lane v. Pena***, 518 U.S. 187, 192 (1996). For that reason, it is the plaintiff's burden to show that an unequivocal waiver of sovereign immunity exists and that none of the statute's waiver exceptions apply to his particular claim. ***Williams v. United States***, 50 F.3d 299, 304 (4th Cir. 1995). If the plaintiff fails to meet this burden, then the claim must be dismissed. ***Medina v. United States***, 259 F.3d 220, 223 (4th Cir. 2001)." ***Welch v. United***

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States, 409 F.3d 646, 650-51 (4th Cir. 2005).

In this case, the plaintiffs assert jurisdiction under § 304 of the Clean Air Act, 42 U.S.C. § 7604, which provides in pertinent part:

> Except as provided in subsection (b) of this section [notice requirements], any person may commence a civil action on his own behalf - -
>
> * * * * * *
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . .
>
> * * * * * *
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, . . . to order the Administrator to perform such act or duty, as the case may be. . ..

42 U.S.C. § 7604(a).

Accordingly, the "substantive issue in this case is one of statutory construction, specifically whether the [Clean Air Act] imposes a discretionary or non-discretionary duty on the EPA Administrator." ***Monongahela Power Co. v. Reilly***, 980 F.2d 276 (4th Cir. 1993).

There is some confusion as to the appropriate standard to be applied in a case such as this. The Fourth Circuit has indicated that the analysis should be conducted under Rule 12(b)(1):

> [W]e observe that rather than granting summary judgment pursuant to Rule

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56(c), the district court should have dismissed the suit for want of jurisdiction under Rule 12(b)(1) if the United States is not liable for Williams' injury. *See* ***Broussard v. United States****,* 989 F.2d 171, 177 (5th Cir. 1993) (*per curiam*) (noting that the proper practice is to dismiss for want of jurisdiction for purposes of the FTCA under Rule 12(b)(1), not to grant summary judgment under Rule 56(c)); ***Shirey v. United States****,* 582 F.Supp. 1251, 1259 (D. S.C.1984) (explaining that if the court lacks subject matter jurisdiction, the suit must be dismissed). We find distinguishing between the various modes of liability to have procedural ramifications. The plaintiff bears the burden of persuasion if subject matter jurisdiction is challenged under Rule 12(b)(1), *see* ***Kehr Packages, Inc. v. Fidelcor, Inc.****,* 926 F.2d 1406, 1409 (3d Cir.), *cert. denied,* 501 U.S. 1222 (1991), because "[t]he party who sues the United States bears the burden of pointing to ... an unequivocal waiver of immunity," ***Holloman v. Watt****,* 708 F.2d 1399, 1401 (9th Cir. 1983), *cert. denied,* 466 U.S. 958 (1984). In ruling on a Rule 12(b)(1) motion, the court may consider exhibits outside the pleadings. *See* ***Mortensen v. First Federal Sav. & Loan Ass'n****,* 549 F.2d 884, 891 (3d Cir. 1977). Indeed, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." ***Id****.; see also* ***Richland–Lexington Airport Dist. v. Atlas Properties****,* 854 F.Supp. 400, 407 (D. S.C. 1994) (cogently explaining the differences between dismissal procedure under Rule 12(b)(1) and summary judgment under Rule 56(c)). We exercise plenary review over issues raised

> under Rule 12(b)(1). *See* ***Black Hills Aviation, Inc. v. United States***, 34 F.3d 968, 972 (10th Cir. 1994). The differing procedural standards of dismissal under Rule 12(b)(1) and summary judgment under Rule 56(c) are more than academic; dismissal under Rule 12(b)(1) has two consequences: one, the court may consider the evidence beyond the scope of the pleadings to resolve factual disputes concerning jurisdiction; and two, dismissal for jurisdictional defects has no *res judicata* effect. *See* 2A James W. Moore, *Moore's Federal Practice* ¶ 12.07, at 12–49 - 12–50 (2d ed.1994). The district court implicitly recognized these principles in opining that Williams and Meridian can litigate in state court.

Williams v. United States, 50 F.3d 299, 304 (4th Cir. 1995).

On the other hand, the District of Columbia Circuit has more recently held that the analysis should be conducted under Rule 12(b)(6):

> Although we hold that we do not lose jurisdiction over this controversy by reason of mootness, this does not resolve the jurisdictional theory upon which the district court relied in dismissing the case under Rule 12(b)(1) for lack of subject matter jurisdiction. ***Sierra Club***, 724 F.Supp.2d at 42–43. The district court's ruling was based on the proposition that the Administrator's decision was discretionary and therefore not justiciable. Before this court, Sierra Club, which certainly does not concede that the district court should have dismissed the claim at all, argues that the analysis should have been under Rule 12(b)(6) to determine whether the complaint

failed to state a claim upon which relief could be granted rather than under the jurisdictional standards of Rule 12(b)(1). While it does not in the end affect the outcome, we ultimately agree that Rule 12(b)(6) should govern. We hasten to state that we do not fault the district court for basing its dismissal on Rule 12(b)(1) rather than Rule 12(b)(6). The distinction between a claim that is not justiciable because relief cannot be granted upon it and a claim over which the court lacks subject matter jurisdiction is important. But we cannot fault the district court, as this court "ha[s] not always been consistent in maintaining these distinctions." ***Oryszak v. Sullivan***, 576 F.3d 522, 527 (D.C. Cir. 2009) (Ginsburg, J., concurring). Indeed, we have provided authority both that discretionary duty claims fall outside our jurisdiction, and that such claims are nonjusticiable under Rule 12(b)(6). In ***Association of Irritated Residents v. EPA***, we held that agency decisions excluded from judicial review by 5 U.S.C. § 701(a)(2) are outside the court's jurisdiction. 494 F.3d 1027, 1030 (D.C. Cir. 2007) ("In this case, subject matter jurisdiction turns on whether the Agreement constitutes a rulemaking subject to APA review, or an enforcement proceeding initiated at the agency's discretion and not reviewable by this court."). Two years later, in ***Oryszak v. Sullivan***, we came to a different conclusion. Without any reference to ***Association of Irritated Residents***, we stated:

> Because the APA does not apply to agency action committed to agency discretion by law, a plaintiff who challenges such an

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> action cannot state a claim under the APA. Therefore, the court has jurisdiction over his case pursuant to § 1331, but will properly grant a motion to dismiss the complaint for failure to state a claim. ***Oryszak,*** 576 F.3d at 525.

Sierra Club v. Jackson, 648 F.3d 848, 853-54 (D.C. Cir. 2011).

Inasmuch as this Court is a part of the Fourth Circuit, this Court will apply Rule 12(b)(1).

In determining whether this Court has jurisdiction, the EPA's position is not entitled to deference under ***Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.***, 467 U.S. 837 (1984). ***Our Children's Earth Found. v. EPA***, 527 F.3d 842, 846 (9th Cir. 2008), citing ***Fox Television Stations, Inc. v. FCC,*** 280 F.3d 1027, 1038–39 (D.C. Cir. 2002) ("Nor is an agency's interpretation of a statutory provision defining the jurisdiction of the court entitled to our deference under ***Chevron***.) (In turn citing ***Adams Fruit Co. v. Barrett,*** 494 U.S. 638, 650 (1990)).

In determining whether the statute imposes a non-discretionary duty, this Court is mindful that "the term 'nondiscretionary' has been construed narrowly. *See* ***Environmental Defense Fund*** [***v. Thomas***], 870 F.2d [892] at 899 [(2d Cir.), *cert. denied*, 493 U.S. 991 (1989)] ('[T]he district court has jurisdiction under [section 7604] to compel the Administrator to perform purely ministerial acts. . ..'); ***Sierra Club*** [***v. Thomas***], 828 F.2d [783] at 791 [(D.C. Cir. 1987)] ('clear-cut nondiscretionary duty'); ***Kennecott Copper Corp. v. Costle,*** 572 F.2d 1349, 1355 (9th Cir. 1978) (citizen suit provision was intended to 'provide relief only in a narrowly-defined class of situations in which the Administrator

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failed to perform a mandatory function' (quoting ***Wisconsin's Envtl. Decade, Inc. v. Wisconsin Power & Light Co.,*** 395 F.Supp. 313, 321 (W.D. Wis. 1975))); ***Mountain States Legal Found. v. Costle,*** 630 F.2d 754, 766 (10th Cir. 1980) ('specific non-discretionary clear-cut requirements'), *cert. denied,* 450 U.S. 1050 (1981)." ***Monongahela Power Co. v. Reilly***, 980 F.2d 272, 276 n. 3 (4th Cir. 1992).

The first point of reference is, of course, the statute itself. "Although the line between a congressional mandate and an area of agency discretion is not difficult to state, ascertaining that line is not always as easy. When Congress specifies an obligation and uses the word 'shall,' this denomination usually connotes a mandatory command. *See* ***Alabama v. Bozeman,*** 533 U.S. 146, 153 (2001). On the other hand, '[a]bsent some provision requiring EPA to adopt one course of action over the other, we can only conclude that EPA's choice represented an exercise of discretion.' ***Farmers Union Cent. Exch. v. Thomas,*** 881 F.2d 757, 761 (9th Cir. 1989)." ***Our Children's Earth Found. v. U.S.E.P.A.***, 527 F.3d 842, 847 (9th Cir. 2008).

"However, not every decision is so easily categorized. As the Supreme Court teaches, the decision-making process does not necessarily collapse into a single final decision. 'It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.' ***Bennett v. Spear,*** 520 U.S. 154, 172 (1997). In ***Bennett,*** considering a citizen suit provision parallel to that in the CWA, the Supreme Court held, '[s]ince it is the omission of these *required* procedures that petitioners complain of, their ... claim is reviewable.' ***Id.*** at 172 (emphasis added)." ***Id.***

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Because this issue requires this Court to interpret language in a statute, the Court must follow the well-established canons of statutory interpretation. "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." ***Lamie v. U.S. Tr.,*** 540 U.S. 526, 534 (2004) (citations and internal quotation marks omitted). The statute in question, 42 U.S.C. § 7621, provides that the Administrator "shall conduct continuing evaluations . . .."

"The use of 'shall' creates a mandatory obligation on the actor . . . to perform the specified action. *See* ***Allied Pilots Ass'n v. Pension Benefit Guar. Corp.,*** 334 F.3d 93, 98 (D.C. Cir. 2003) (noting 'the well-recognized principle that the word "shall" is ordinarily the language of command') (citation and internal quotation marks omitted); ***United States v. Ins. Co. of N. Am.,*** 83 F.3d 1507, 1510 n. 5 (D.C. Cir. 1996) ('Cases are legion affirming the mandatory character of "shall."') (citing ***United States v. Monsanto,*** 491 U.S. 600, 607 (1989); ***Griggs v. Provident Consumer Discount Co.,*** 459 U.S. 56, 61 (1982) (per curiam); ***Anderson v. Yungkau,*** 329 U.S. 482, 485 (1947); ***Ass'n of Civilian Technicians v. FLRA,*** 22 F.3d 1150, 1153 (D.C. Cir. 1994)." ***Swanson Group Mfg. LLC v. Salazar***, 951 F.Supp.2d 75, 81 (D. D.C. 2013).

In ***Raymond Proffitt Found. v. EPA***, 930 F.Supp. 1088, 1097 (E.D. Pa. 1996), the Court stated "both the Supreme Court and the Third Circuit often have stated that the use of the word 'shall' in statutory language means that the relevant person or entity is under a mandatory duty. ***United States v. Monsanto,*** 491 U.S. 600, 607 (1989) (By using 'shall' in a civil forfeiture statute, 'Congress could not have chosen stronger words to express its

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intent that forfeiture be mandatory in cases where the statute applied. . . .'); ***Pierce v. Underwood***, 487 U.S. 552, 569–70 (1988) (noting that Congress's use of 'shall' in a statute was 'mandatory language'); ***Barrentine v. Arkansas–Best Freight Sys., Inc.***, 450 U.S. 728, 739 n. 15 (1981) (same); ***United States v. Martinez–Zayas***, 857 F.2d 122, 128 (3d Cir. 1988) (stating that Congress clearly and unambiguously expressed its intent by stating that the court 'shall' impose a mandatory sentence and that this created a mandatory legal duty to impose the sentence); ***United States v. Troup***, 821 F.2d 194, 198 (3d Cir. 1987) (stating that Congress's use of the word 'shall' was 'mandatory'); see also ***United States ex rel. Senk v. Brierley***, 471 F.2d 657, 659–60 (3d Cir. 1973).

The Fourth Circuit also construes "shall" as expressing a mandatory duty. "As the Supreme Court remarked in a related context, 'Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied.' ***United States v. Monsanto***, 491 U.S. 600, 607 (1989). 'The word "shall" does not convey discretion. It is not a leeway word, but a word of command.' ***United States v. Fleet***, 498 F.3d 1225, 1229 (11th Cir. 2007) (internal quotation marks omitted). The plain text of the statute thus indicates that forfeiture is not a discretionary element of sentencing. Instead, § 2461 mandates that forfeiture be imposed when the relevant prerequisites are satisfied, as they are here. ***United States v. Newman***, 659 F.3d 1235, 1240 (9th Cir. 2011); *see also* ***United States v. Torres***, 703 F.3d 194, 204 (2d Cir. 2012)." ***United States v. Blackman***, 746 F.3d 137, 143 (4th Cir. 2014). *See* ***In re Rowe***, 750 F.3d 392, 396-397 (4th Cir. 2014) and ***Air Line Pilots Assoc., International v. US Airways Group, Inc.***, 609 F.3d 338, 342 (4th Cir. 2010).

The legislative history of § 321(a) supports the mandatory nature of the provision. As the House Interstate and Foreign Commerce Committee reported: "Under this provision, the Administrator ***is mandated to undertake*** an ongoing evaluation of job losses and employment shifts due to requirements of the act. This evaluation ***is to include*** investigations of threatened plant closures or reductions in employment allegedly due to requirements of the act or any actual closures or reductions which are alleged to have occurred because of such requirements." H.R. REP. NO. 95-294, at 317 (1977) (emphasis added).

The EPA argues that the provision is discretionary inasmuch as it contains no "date-certain deadline," citing *inter alia*, ***Sierra Club v. Thomas***, 828 F.2d 783, 791 (D.C. Cir. 1987) and ***Maine v. Thomas***, 874 F.2d 883, 888 (1st Cir. 1989).

Whether a "date-certain deadline" is necessary to find a non-discretionary duty is open to some questions. As Judge Sanders noted in ***Cross Timbers Concerned Citizens v. Saginaw***, 991 F.Supp. 563 (N.D. Tex. 1997):

> Defendants claim that absent a "date-certain" deadline for an agency obligation under the CWA, the duty is purely discretionary. *See* ***Sierra Club v. Thomas****,* 828 F.2d 783, 791 (D.C. Cir. 1987) ("In order to impose a clear-cut nondiscretionary duty, we believe that a duty of timeliness must categorically mandat[e] that all specified action be taken by a date-certain deadline."). In ***Sierra Club v. Thomas****,* the D.C. Circuit interpreted the Clean Air Act to decide that congressional intent limits citizen suits to those in which the court is able to determine readily whether a violation occurred. *See* ***id****.*

at 791. In the absence of an ascertainable deadline, the D.C. Circuit reasoned, it may be impossible to conclude that Congress accords an action such high priority as to impose upon the agency a "categorical mandate" that deprives it of all discretion over the timing of its work. ***Id.*** Defendants belabor, but quite accurately, that Plaintiff's claim is not related to any duty for which the CWA provides a date-certain deadline.

The Court is inclined to reject Defendants' broad reading of the D.C. Circuit's opinion in ***Sierra Club v. Thomas***. The D.C. Circuit itself has indicated that the question remains open whether a date-certain deadline is required for a mandatory EPA duty to arise under the Clean Water Act. *See* ***National Wildlife Federation v. Browner***, 127 F.3d 1126, 1128 (D.C. Cir. 1997) (declining to decide "whether, as EPA contends, a 'readily ascertainable deadline' for agency action is a necessary jurisdictional basis for a citizen suit under the [Clean Water] Act"). Furthermore, other courts have examined the issue of CWA mandatory duty without referring to a date-related test. *See, e.g.,* ***Browner***, 127 F.3d at 1128; ***Miccosukee Tribe of Indians v. USEPA***, 105 F.3d 599, 602 (11th Cir. 1997) (and cases cited therein). Finally, this Circuit's relevant jurisprudence, though it pre-dates ***Sierra Club v. Thomas***, examines the question from a different standpoint of analysis. *See, e.g.,* ***Sierra Club v. Train***, 557 F.2d at 491.

991 F.Supp. at 568.

In ***Sierra Club v. Johnson***, 2009 WL 2413094, *3 (N.D. Cal. Aug. 5, 2009), the

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court refused to adopt a bright line rule that only duties with date-certain deadlines are nondiscretionary.

This Court does not find the lack of a "date-certain deadline" to be fatal to the plaintiffs' case. The statute states that the "Administrator shall conduct continuing evaluations . . .." While the EPA may have discretion as to the timing of such evaluations, it does not have the discretion to categorically refuse to conduct **any** such evaluations, which is the allegation of the plaintiffs.

In ***Bennett v. Spear***, 520 U.S. 154 (1997), the Supreme Court found that a provision of the Endangered Species Act stating that: "The Secretary *shall* designate critical habitat, and make revisions thereto, ... on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat" was language "of obligation rather than discretion." 520 U.S. at 172 (Emphasis by Supreme Court).

The Court held that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.' ***Ibid.*** It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking. *See* ***SEC v. Chenery Corp.,*** 318 U.S. 80, 94–95 (1943)." ***Id.*** (Emphasis by Supreme Court).

This Court finds that, at this stage of the proceedings, the plaintiff's allegations are sufficient to provide this Court with the jurisdiction to hear this case under § 304 of the

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Clean Air Act. The EPA's motion to dismiss for lack of jurisdiction shall be denied.

The defendant also seeks to have this Court strike the plaintiffs' prayer for injunctive relief. "The standard upon which a motion to strike is measured places a substantial burden on the moving party. 'A motion to strike is a drastic remedy which is disfavored by the courts and infrequently granted.' ***Clark v. Milam,*** 152 F.R.D. 66, 70 (S.D. W.Va. 1993). Generally, such motions are denied 'unless the allegations attacked have no possible relation to the controversy and may prejudice the other party.' ***Steuart Inv. Co. v. Bauer Dredging Constr. Co.,*** 323 F.Supp. 907, 909 (D. Md. 1971). ***Fanase v. Liberty Life Assurance Co. of Boston***, 2011 WL 1706531 (N.D. W.Va. May 5, 2011) (Stamp, J.).

Similarly, in ***Mayne-Harrison v. Dolgencorp, Inc.***, 2010 WL 3717604 (N.D. W.Va. Sept. 17, 2010) (Bailey, J.), this Court held that "[p]ursuant to Rule 12(f) of the Federal Rules of Civil Procedure, a court may 'strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.' Fed.R.Civ.R. 12(f). '[M]otions under 12(f) are viewed with disfavor by the federal courts and are infrequently granted,' and are only granted with the challenged pleading has 'no possible relation or logical connection to the subject matter of the controversy' or 'cause some form of significant prejudice to one or more parties to the action.' 5C Charles A. Wright & Arthur Miller, **Federal Practice & Procedure** §§ 1380.1382 (West 2009); *see also* ***Waste Mgmt. Holdings, Inc. v. Gilmore***, 252 F.3d 316, 347 (4th Cir. 2001).

It is clear that this Court has the authority to grant injunctive relief in this case. The statute provides that "[t]he district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, . . . to order the Administrator to

perform such act or duty, as the case may be. . ..” *See* ***Environmental Defense Fund v. Thomas***, 870 F.2d 892 (2d Cir. 1989).

While there may exist some question as to scope of the injunctive relief which may be awarded by this Court, such a question does not satisfy the standard applicable to a motion to strike. The argument as to the scope of relief is simply premature at this point in the proceedings. Accordingly, the motion to strike will be denied.

For the reasons stated above, Defendant’s Motion to Dismiss the Complaint and Motion to Strike Prayer for Injunctive Relief [**Doc. 34**] is **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: September 16, 2014.

JOHN PRESTON BAILEY
CHIEF UNITED STATES DISTRICT JUDGE

Attachment 2

Attachment 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

MURRAY ENERGY CORPORATION, **MURRAY AMERICAN ENERGY, INC.**, **THE AMERICAN COAL COMPANY**, **AMERICAN ENERGY CORPORATION**, **THE HARRISON COUNTY COAL COMPANY**, **KENAMERICAN RESOURCES, INC.**, **THE MARION COUNTY COAL COMPANY**, **THE MARSHALL COUNTY COAL COMPANY**, **THE MONONGALIA COUNTY COAL COMPANY**, **OHIOAMERICAN ENERGY INC.**, **THE OHIO COUNTY COAL COMPANY**, and **UTAHAMERICAN ENERGY, INC.**,

Plaintiffs,

v.

Civil Action No. 5:14-CV-39
Judge Bailey

GINA McCARTHY, Administrator, United States Environmental Protection Agency, in her official capacity,

Defendant.

MEMORANDUM ORDER DENYING MOTION TO DISMISS AND MOTION TO STAY DISCOVERY

Pending before this Court are The United States' Motion to Dismiss Due to Lack of Article III Standing, filed by the EPA on December 23, 2014 [Doc. 59] and the Motion of the United States to Stay Discovery Pending Resolution of Dispositive Motion and Request for Expedited Proceeding, filed by the EPA on the same date [Doc. 61]. With respect to the Motion to Dismiss, the plaintiffs filed their Plaintiffs' Response in Opposition to Defendant's Second Motion to Dismiss on January 23, 2015 [Doc. 65], and the EPA filed its United

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States' Reply in Support of Motion to Dismiss due to Lack of Article III Standing on February 17, 2015 [Doc. 70]. With respect to the Motion to Stay, the plaintiffs filed their Plaintiffs' Opposition to Defendant's Motion to Stay Discovery on December 31, 2014 [Doc. 62], and the EPA filed the United States' Reply in Support of Motion to Stay Discovery on January 9, 2015 [Doc. 64]. Both Motions are ripe for decision and, for the reasons stated below, will be denied.

Background

This civil action was filed on March 24, 2014, by Murray Energy Corporation and a number of its subsidiary or affiliated companies[1] (hereinafter collectively "Murray") seeking declaratory and injunctive relief for the EPA's alleged failure to perform its duties required under 42 U.S.C. § 7621, which requires the EPA to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of [the Clean Air Act] and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement."

The plaintiffs contend that the EPA's enforcement of the Clean Air Act, combined with the EPA's refusal "to evaluate the impact that its actions are having on the American coal industry and the hundreds of thousands of people it directly or indirectly employs" is irreparably harming the plaintiffs [Amended Complaint, Doc. 31, p. 2].

The plaintiffs filed their Amended Complaint on May 23, 2014 [Doc. 31]. After the

[1] According to the Amended Complaint, the plaintiffs collectively employ over 7,200 and comprise the largest underground coal mining operations in the United States [Doc. 31, ¶ 76].

grant of an extension of time, the EPA filed its Defendant's Motion to Dismiss the Complaint and Motion to Strike Prayer for Injunctive Relief [Doc. 34] on June 30, 2014, asserting that this Court lacked subject matter jurisdiction to hear the case. The plaintiffs filed their Memorandum in Opposition to Defendant's Motion to Dismiss the Complaint and Motion to Strike Prayer for Injunctive Relief [Doc. 38] on July 25, 2014, and the EPA filed its Reply Memorandum in Support of Defendant's Motion to Dismiss the Complaint and Motion to Strike Prayer for Injunctive Relief [Doc. 39] on August 11, 2014.

By Order entered September 16, 2014 [Doc. 40], this Court denied the Motion and found, as a matter of law, that the EPA had a non-discretionary duty to undertake an ongoing evaluation of job losses and that this Court had and has subject matter jurisdiction to hear the case.

On October 9, 2014, the EPA filed its United States' Motion to Clarify the Court's September 16, 2014 Order [Doc. 50]. On October 14, 2014, the plaintiffs filed their Memorandum in Opposition to Defendant's Motion to Clarify [Doc. 51], and on October 17, 2014, the defendant filed its Reply to Plaintiffs' Memorandum in Opposition to Defendant's Motion to Clarify [Doc. 52].

By Order entered October 24, 2014, this Court denied the Motion to Clarify [Doc. 53].

On December 23, 2014, the defendant filed the pending The United States' Motion to Dismiss Due to Lack of Article III Standing [Doc. 59][2], as well as its Motion of the United

[2] This Court is unclear why this Motion was not filed in conjunction with the prior Motion to Dismiss for lack of jurisdiction. However, the issue is not waivable, since a Court has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." ***West Virginia Highlands Conservancy v. Johnson***, 540 F.Supp.2d 125, 133

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States to Stay Discovery Pending Resolution of Dispositive Motion and Request for Expedited Proceeding [Doc. 61]. On December 31, 2014, the plaintiffs filed their Plaintiffs' Opposition to Defendant's Motion to Stay Discovery [Doc. 62]. On January 9, 2015, the EPA filed its United States' Response in Support of Motion to Stay Discovery [Doc. 64]. On January 23, 2015, the plaintiffs filed Plaintiff's Response in Opposition to Defendant's Second Motion to Dismiss [Doc. 65]. Finally, on February 17, 2015, the EPA filed United States' Reply in Support of Motion to Dismiss Due to Lack of Article III Standing.

Discussion

The Court in ***Mut. Funds Inv. Litig. v. AMVESCAP PLC***, 529 F.3d 207 (4th Cir. 2008), spoke to the issue of Article III standing: "Article III standing is a fundamental, jurisdictional requirement that defines and limits a court's power to resolve cases or controversies ... and 'the irreducible constitutional minimum of standing' consists of injury-in-fact, causation, and redressability." (quoting ***Lujan v. Defenders of Wildlife,*** 504 U.S. 555, 560–61 (1992)).

The doctrine of standing requires federal courts to satisfy themselves that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction." ***Summers v. Earth Island Inst.***, 555 U.S. 488, 493 (2009), quoting ***Warth v. Seldin***, 422 U.S. 490, 498–499 (1975).

As the Supreme Court has explained, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." ***Raines v. Byrd***, 521 U.S. 811,

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(D.D.C. 2008), quoting ***Grand Lodge of FOP v. Ashcroft***, 185 F.Supp.2d 9, 13 (D.D.C. 2001). *See* ***Sasser v. EPA***, 990 F.2d 127, 129 (4th Cir. 1993).

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818 (1997). "Article III standing ... enforces the Constitution's case-or-controversy requirement." ***Elk Grove Unified Sch. Dist. v. Newdow,*** 542 U.S. 1, 11 (2004).

As the party invoking federal jurisdiction, the plaintiffs bear the burden of establishing standing. ***Lujan v. Defenders of Wildlife,*** 504 U.S. 555, 561 (1992). If plaintiffs cannot establish constitutional standing, their claims must be dismissed for lack of subject matter jurisdiction. ***Cent. States Se. & Sw. Areas Health and Welfare Fund v. Merck-Medco Managed Care,*** 433 F.3d 181, 198 (2nd Cir. 2005). "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." ***Steel Co. v. Citizens for a Better Env't,*** 523 U.S. 83, 94 (1998) (citations omitted).

"To seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." ***Summers v. Earth Island Inst.***, 555 U.S. 488, 493 (2009), quoting ***Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,*** 528 U.S. 167, 180–181 (2000). *See also* ***Beyond Systems, Inc. v. Kraft Foods, Inc.***, 777 F.3d 712 (4th Cir. 2015). "This requirement assures that 'there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.'" ***Id.***, quoting ***Schlesinger v. Reservists Comm. to Stop the War,*** 418 U.S. 208, 221 (1974). "Where that need does not exist, allowing courts to oversee legislative or executive action 'would significantly alter the allocation of power ... away from a democratic form of government,'" ***United States v.***

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Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

Turning to the application of the law to the facts of this case, the Court must attempt to capsulize the plaintiffs' cause of action. In their Amended Complaint [Doc. 31], the plaintiffs allege:

1. That the plaintiffs combined employ over 7,200 workers and comprise the largest underground coal mining operations in the United States;

2. That the financial livelihood of the plaintiffs is dependent upon a continuing domestic market for coal;

3. That the actions of the EPA have caused a reduced market for coal, which threatens the economic viability of the plaintiffs;

4. That the EPA has failed to comply with the requirement under 18 U.S.C. § 7621, which requires the EPA to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of [the Clean Air Act] and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement;"

5. That if the EPA were to comply with the requirements of 18 U.S.C. § 7621, the information would document the threatened business closures and consequent unemployment, which could be used to convince the EPA, the Congress, and/or the American public that the actions of the EPA have been harmful and must be changed.

In arguing that the plaintiffs lack standing, the EPA has raised the following:

1. The allegation of a reduced market for coal is not fairly traceable to EPA's failure to conduct employment evaluations;

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2. The allegations of a reduced market for coal cannot be redressed by a favorable decision by this Court;

3. The plaintiffs' alleged injuries are not sufficient to establish standing;

4. Plaintiffs fail to establish standing based upon informational injury because 18 U.S.C. § 7621 neither creates a right to information nor implicates fundamental rights;

5. Plaintiffs have failed to allege a concrete, redressable injury caused by the lack of employment evaluations;

6. Plaintiffs do not have procedural standing because § 7621 is not a procedural requisite to any EPA action; and

7. Plaintiffs do not have procedural standing because § 7621 was not designed to protect their interests.

For the reasons stated below, this Court finds that the plaintiffs have established standing to proceed with this action. This Court is aware that "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." ***Summers v. Earth Island Inst.***, 555 U.S. 488, 493-94 (2009) (quoting ***Lujan v. Defenders of Wildlife***, 504 U .S. 555, 562 (1992)).

The fact that the failure to perform employment evaluations may affect a large number of persons or entities is not fatal to the plaintiffs' standing. "At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.' ***Baker v. Carr***, 369

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U.S. 186, 204 (1962). As Justice Kennedy explained in his ***Lujan*** concurrence:

> While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." 504 U.S. at 581 (internal quotation marks omitted)."

Massachusetts v. E.P.A., 549 U.S. 497, 517 (2007).

In ***White Oak Realty, LLC v. U.S. Army Corps of Eng'rs***, 2014 WL 4387317 (E.D. La. September 4, 2014), the Court noted that "economic injury from business competition created as an indirect consequence of agency action can serve as the required 'injury in fact,'" citing ***Envtl. Defense Fund v. Marsh***, 651 F.2d 983, 1003 (5th Cir. 1981), and that "a company's interest in marketing its product free from competition" is a "legally cognizable injur[y]" for purposes of Article III standing, citing ***Lujan***, 504 U.S. at 578.

Based upon the foregoing authority, this Courts finds that the plaintiffs have alleged a sufficient concrete and particularized injury in fact.

In ***Bennett v. Spear***, 520 U.S. 154 (1997), the Court rejected an argument by the Government that the fairly traceable requirement is satisfied only by a proximate cause

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analysis. The ***Bennett*** Court stated that "[t]his wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation. While, as we have said, it does not suffice if the injury complained of is 'th[e] result [of] the *independent* action of some third party not before the court,' ***Defenders of Wildlife***, *supra,* at 560–561 (emphasis added) (quoting ***Simon v. Eastern Ky. Welfare Rights Organization***, 426 U.S. 26, 41–42 (1976)), that does not exclude injury produced by determinative or coercive effect upon the action of someone else." 520 U.S. at 168-69.

Similarly, in ***Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC***, 713 F.3d 187, 195 (4th Cir. 2013), the Fourth Circuit stated "OpenBand's mistake, in other words, is to 'equate[ ] injury "fairly traceable" to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation.' ***Bennett v. Spear***, 520 U.S. 154, 168–69 (1997). But as the Supreme Court has explained, the causation element of standing is satisfied not just where the defendant's conduct is the last link in the causal chain leading to an injury, but also where the plaintiff suffers an injury that is 'produced by [the] determinative or coercive effect' of the defendant's conduct 'upon the action of someone else.' ***Id.*** at 169." 713 F.3d at 197.

In ***Competitive Enterprise Inst. v. NHTSA***, 901 F.2d 107 (D.C. Cir. 1990), the District of Columbia Circuit stated:

> To satisfy the causation and redressability requirements, Consumer Alert must show that its members' restricted opportunity to purchase larger passenger vehicles is fairly traceable to the CAFE standard as set by NHTSA

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and is likely to be ameliorated by a judicial ruling directing the agency to take further account of safety concerns.

We note at the outset that the standing determination must not be confused with our assessment of whether the party could succeed on the merits. *See* ***Women's Equity Action League v. Cavazos***, 879 F.2d 880 (D.C. Cir. 1989); ***Public Citizen v. Federal Trade Comm'n***, 869 F.2d 1541, 1549 (D.C. Cir. 1989). For standing purposes, petitioners need not prove a cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test. ***Duke Power Co. v. Carolina Environmental Study Group***, 438 U.S. 59, 75 n. 20 (1978); *see also* ***Autolog Corp. v. Regan***, 731 F.2d 25, 31 (D.C. Cir. 1984). This is true even in cases where the injury hinges on the reactions of third parties, here the auto manufacturers, to the agency's conduct. *See* ***National Wildlife Federation v. Hodel***, 839 F.2d 694, 705 (D.C. Cir. 1988). In such cases, the alleged injury must be traced back through the actions of the intermediary parties to the challenged government decision. *See* ***Public Citizen***, 869 F.2d at 1547 n. 9. This case falls well within the range of those cases in which the government's action has been found substantially likely to cause the petitioners' injury despite the presence of intermediary parties. *See* ***National Wildlife Federation***, 839 F.2d at 706–16 (environmental organization had standing where challenged mining regulations, as interpreted and applied by the states and mining industry, could cause injury

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> to its members' use and enjoyment of the environment); ***Community Nutrition v. Block***, 698 F.2d 1239, 1248 (D.C. Cir. 1983), *rev'd on other grounds,* 467 U.S. 340 (1984) (within complex structure of dairy market, consumers' contention that if milk handlers were not required to make a compensatory payment they would pass the savings on to consumers was reasonable).

901 F.2d at 113-14.

In this case, the plaintiffs have alleged that the actions of the EPA have had a coercive effect on the power generating industry, essentially forcing them to discontinue the use of coal. This Court finds these allegations sufficient to show that the injuries claimed by the plaintiffs are fairly traceable to the actions of the EPA. While the EPA argues that such would only be traceable to the earlier actions of the EPA rather than the failure of the EPA to conduct employment evaluations, this Court cannot agree. The claimed injuries, while in part traceable to the prior actions of the EPA, may also be fairly traceable to the failure of the EPA to conduct the evaluations. Congress' purpose in enacting the requirement for the evaluations was to provide information which could lead the EPA or Congress to amend the prior EPA actions.

This Court also finds that the injuries are redressable. If this Court were to grant the requested injunctive relief to require the EPA to perform its duty under 18 U.S.C. § 7621, the results of the inquiry may have the effect of convincing the EPA, Congress, and/or the American public to relax or alter EPA's prior decisions.

Finally, this Court finds that the plaintiffs fall within the zone of interests protected

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by the statute. One purpose of 18 U.S.C. § 7621 is to protect industries, employers and employees from the untoward effects of prior EPA actions. As such employers, the plaintiffs clearly fall within that zone. *See* ***Motor Coach Industries, Inc. v. Dole***, 725 F.2d 958, 963 (4th Cir. 1984).

The plaintiffs also assert procedural and informational injury as a basis for their standing. The procedural standing argument is premised upon the fact that the EPA has failed to conduct the employment evaluations. It is clear that an individual can enforce procedural rights, provided that the procedures sought to be enforced are designed to protect his interest. ***Lujan***, 504 U.S. at 573 n. 8.

"There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years." ***Id.*** n. 7.

In ***Massachusetts v. EPA***, 549 U.S. 497 (2007), the Supreme Court stated that "a litigant to whom Congress has accorded a procedural right to protect his concrete interests, —here, the right to challenge agency action unlawfully withheld—can assert that right without meeting all the normal standards for redressability and immediacy. When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that

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the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant. [***Lujan***, at 560-61], *see also* ***Sugar Cane Growers Cooperative of Fla. v. Veneman****,* 289 F.3d 89, 94–95 (D.C. Cir. 2002) ('A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result'). 549 U.S. at 517-18 (interior citations omitted). *See also* ***Pye v. United States***, 269 F.3d 459, 471 (4th Cir. 2001) (where the plaintiffs validly assert a procedural injury, they need not meet the normal standards for redressability and immediacy).

> "The requirements for standing differ where, as here, plaintiffs seek to enforce procedural (rather than substantive) rights. When plaintiffs challenge an action taken without required procedural safeguards, they must establish the agency action threatens their concrete interest. ***Fla. Audubon Soc'y*** [***v. Bentsen***], 94 F.3d [658] at 664 [D.C. Cir. 1996]. It is not enough to assert 'a mere general interest in the alleged procedural violation common to all members of the public.' ***Id.*** Once that threshold is satisfied, the normal standards for immediacy and redressability are relaxed. ***Lujan****,* 504 U.S. at 572 n. 7. Plaintiffs need not demonstrate that but for the procedural violation the agency action would have been different. ***Ctr. for Law & Educ. v. Dep't of Educ.****,* 396 F.3d 1152, 1160 (D.C. Cir. 2005). Nor need they establish that correcting the procedural violation would necessarily alter the final effect of the agency's action on the plaintiffs' interest. ***Id.*** Rather, if the plaintiffs can

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> 'demonstrate a causal relationship between the final agency action and the alleged injuries,' the court will 'assume[ ] the causal relationship between the procedural defect and the final agency action.' ***Id***."

Mendoza v. Perez, 754 F.3d 1002, 1010 (D.C. Cir. 2014).

With regard to redressability, the District of Columbia Circuit has recently stated that:

> Plaintiffs asserting a procedural rights challenge need not show the agency action would have been different had it been consummated in a procedurally valid manner—the courts will assume this portion of the causal link. ***Ctr. for Law & Educ.,*** 396 F.3d at 1160. Rather, plaintiffs simply need to show the agency action affects their concrete interests in a personal way. In other words, the intervenors' argument that the agency action was lawful or correct on the merits—and therefore that it did not injure the plaintiffs—is substantially the same as arguing the omitted procedure would not have affected the agency's decision. This is precisely the argument a defendant *cannot* make in a procedural rights challenge. *Cf.* ***Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,*** 528 U.S. 167, 181 (2000) ("The relevant showing for purposes of Article III standing ... is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry ... is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with a[ ] [discharge] permit.").

Mendoza, 754 F.3d at 1012-13.

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In ***West Virginia Assoc. of Community Health Centers, Inc. v. Heckler***, 734 F.2d 1570 (D.C. Cir. 1984), the District of Columbia Circuit found that the plaintiffs had standing to challenge DHHR's determination of the amount of funding to be allocated to West Virginia. The Court found redressability in the fact that the providers were denied the ability to compete for funding. The Court stated:

> To invoke federal jurisdiction, a party must show at a minimum that the challenged actions have caused it injury that is likely to be redressed by a favorable judicial decision. ***Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.***, 454 U.S. 464, 472 (1982). The Secretary argues that appellants have not satisfied these requirements, inasmuch as they have failed to demonstrate that a judicial decision mandating an increase in West Virginia's PCBG funding would redound to their benefit. In this regard, the Secretary relies principally upon the fact that West Virginia would have complete discretion to award any additional funding it might receive to other CHC's within the State which are not parties to this lawsuit. In response to this line of reasoning, appellants argue that they have been injured by being denied an opportunity to compete for this increased funding, and that to have standing they need not demonstrate that they would actually receive the additional funding. Our examination of applicable law mandates the conclusion that appellants do indeed have standing to sue.

734 F.2d at 1574 (footnotes omitted).

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The rule is the same in the Fourth Circuit. "We note that the plaintiffs need not show that the result of the agency's deliberations will be different if the statutory procedure is followed," ***Pye***, *supra* at 472, citing ***Federal Election Com'n. v. Akins****,* 524 U.S. 11, 25 (1998).

The EPA argues that in order to support procedural standing, the procedure violated must be a prerequisite to a final agency action. While many, if not all, of the cases cited by plaintiffs involve procedures which preceded an agency action, this Court has not found a case which so limits the doctrine. Indeed, had the plaintiffs been denied a right to appeal a final agency action, could the EPA seriously deny that there was a procedural violation? The procedure mandated by 18 U.S.C. § 7621 is designed to prompt a second look at final agency action when one can calculate the damage (or lack thereof) to employment and the economy. The denial of the benefit of the evaluations required by 18 U.S.C. § 7621 is sufficient to support procedural standing.

As noted above, the plaintiffs also assert informational standing. "The Supreme Court consistently has held that a plaintiff suffers an Article III injury when he is denied information that must be disclosed pursuant to a statute, notwithstanding '[t]he fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure.' ***Pub. Citizen v. U.S. Dep't of Justice****,* 491 U.S. 440, 449–50 (1989); *see also* ***Akins****,* 524 U.S. at 21–25 (holding that a group of voters had a concrete injury based upon their inability to receive certain donor and campaign-related information from an organization); ***Havens Realty Corp. v. Coleman****,* 455 U.S. 363, 373–74 (1982) (concluding that deprivation of information about housing availability was sufficient to

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constitute an Article III injury). What each of these cases has in common is that the plaintiffs (1) alleged a right of disclosure; (2) petitioned for access to the concealed information; and (3) were denied the material that they claimed a right to obtain. Their informational interests, though shared by a large segment of the citizenry, became sufficiently concrete to confer Article III standing when they sought and were denied access to the information that they claimed a right to inspect.

This Court finds that the plaintiffs have also established standing under the informational doctrine. The statute requires the EPA to gather certain information and conduct evaluations, which it has refused to do. The plaintiffs may be entitled to the information which has not been collected or analyzed and have requested the same. This is sufficient to support standing.

This Court is unpersuaded by the EPA's argument that had the EPA conducted the employment evaluations, the plaintiffs would not be entitled to the information. The EPA fails to point out any theory by which this information could be secreted from the plaintiffs or any other person. We do not live in a secret society, and the plaintiffs would have the ability to receive the information through the Freedom of Information Act, if not through other means.

For the reasons stated above, this Court finds that the plaintiffs have the requisite standing to proceed with this action. Accordingly, The United States' Motion to Dismiss Due to Lack of Article III Standing, filed by the EPA on December 23, 2014 **[Doc. 59]** is **DENIED**, and the Motion of the United States to Stay Discovery Pending Resolution of Dispositive Motion and Request for Expedited Proceeding, filed by the EPA on the same

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date **[Doc. 61]** is **DENIED AS MOOT**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: March 27, 2015.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

MURRAY ENERGY CORPORATION, et al., Plaintiffs, v. GINA McCARTHY, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, acting in her official capacity, Defendants.	)	**Civil Action No. 5:14-CV-00039** **Judge Bailey**

MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

EPA is entitled to summary judgment because it has conducted "continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans," as required by Section 321(a) of the Clean Air Act ("CAA" or the "Act"), 42 U.S.C § 7621(a). EPA relies upon documents attached as exhibits to the Declaration of James DeMocker, submitted with this motion. Those documents demonstrate that (1) EPA conducts evaluations of the potential loss or shifts of employment that may result from the administration and enforcement of individual regulations and implementation plans; (2) EPA has conducted broad-scale evaluations of the employment impacts of the overall administration and enforcement of the Act, including an evaluation of the impacts of the Act's Title IV Acid Rain Program on employment in the coal industry; and (3) EPA is continuing to evaluate employment impacts, and its methodologies for conducting such evaluations, on an ongoing basis.

As discussed below, the role of this Court is not to assess the sufficiency or adequacy of EPA's evaluations, but rather to determine whether EPA has performed the duty set forth in Section 321(a).[1] EPA submits that the documents attached as exhibits to the DeMocker Declaration demonstrate that EPA has evaluated and is continuing to evaluate the potential loss or shifts of employment that may result from the administration and enforcement of the Act. If the Court disagrees and finds that the documents upon which EPA relies do not satisfy the duty in section 321(a), then the Court should enter judgment against EPA and order EPA to perform the duty. Either way, this case is ripe for final adjudication by the Court.[2]

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[1] EPA reserves its position, as set forth in its Motion to Dismiss filed on June 30, 2014 [ECF Nos. 34, 35], that the duty set forth in Section 321(a) is discretionary and not subject to judicial review under the citizen suit provision of the Act. However, based on this Court's decision on that motion [ECF No. 40], this brief addresses the scope of judicial review for EPA's performance of a non-discretionary duty.

[2] The Scheduling Order entered by this Court on November 5, 2014 [ECF No. 55] provided that "Dispositive motions that are mature for decision may be made at any earlier time. . . . All Counsel are instructed that dispositive motions should be filed as soon as the matter is mature." *Id.* at 5. This case is now ripe for final judgment by this Court: The documents submitted by EPA either constitute performance of the duty in Section 321(a), or they do not.

STATUTORY AND REGULATORY BACKGROUND

A. The Clean Air Act

The CAA, 42 U.S.C. §§ 7401-7671q, is intended to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." *Id*. § 7401(b)(1). Congress gave EPA broad authority to implement the provisions of the Act and accomplish its objectives. The Act requires EPA to establish, review, and revise national ambient air quality standards ("NAAQS") for certain common air pollutants, *id.* §§ 7408-09, and requires states to submit state implementation plans ("SIPs") detailing how the standards will be achieved. *Id.* § 7410(a)(1). If a state fails to submit a SIP, or if EPA disapproves the SIP in whole or in part, the Act requires EPA to issue a federal implementation plan ("FIP") in its place. *Id.* § 7410(c)(1). The Act also requires EPA to set category-wide performance standards for new sources that emit various air pollutants, including hazardous air pollutants. *Id.* §§ 7411-12. Congress also provided EPA with broad administrative, civil, and criminal enforcement authority to assure compliance with the Act and EPA's implementing regulations. *Id.* § 7413.

B. Clean Air Act Section 321

Section 321 of the Act, *id*. § 7621(a), titled "Employment effects," requires EPA to evaluate the potential loss or shifts of employment that may result from the administration or enforcement of the Act, and to investigate specific allegations of adverse employment effects. Subsection (a), the subject of this suit, provides that:

> The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement.

Id. § 7621(a). Subsection (d), titled "Limitations on construction of section," clarifies that: "Nothing in this section shall be construed to require or authorize the Administrator, the States, or political subdivisions thereof, to modify or withdraw any requirement imposed or proposed to be imposed under this chapter." *Id*. § 7621(d).

C. Clean Air Act Citizen Suits

Section 304 of the Act, *id*. § 7604, provides a limited waiver of sovereign immunity for citizen suits that allege, *inter alia*, EPA's failure to perform a non-discretionary duty under the Act or EPA's unreasonable delay in performing a required action. Section 304(a)(2) provides that:

> [A]ny person may commence a civil action on his own behalf –
>
> . . . .
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator[.]

Id. § 7604(a)(2). The citizen-suit provision further states: "The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties . . . to order the Administrator to perform such act or duty[.]" *Id.* § 7604(a).

STANDARD OF REVIEW

A. Rule 56(c) Motion for Summary Judgment

Summary judgment is appropriate if the pleadings, discovery and disclosure materials on file, and other evidence show that "there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once a defendant makes a properly supported motion for summary judgment, the burden shifts to the plaintiff to set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). If it is clear that a plaintiff will be unable to satisfy the legal requirements necessary to establish his case, summary judgment is not only appropriate, but also required. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Laing v. Fed. Express Corp*., 703 F.3d 713, 722 (4th Cir. 2013) (holding that a non-moving party must establish a "genuine, triable issue"); *accord, Rhodes v. E.I. du Pont de Nemours & Co*., 636 F.3d 88, 94 (4th Cir. 2011).

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B. Scope of Review for Failure to Perform a Non-Discretionary Duty

The scope of judicial review in a citizen suit alleging that EPA has failed to perform a non-discretionary duty is "much narrower than the scope of judicial review under the Administrative Procedure Act, which allows judicial review of the substance of an agency's action under a deferential abuse-of-discretion standard." *Frey v. EPA*, 751 F.3d 461, 469-70 (7th Cir. 2014) (interpreting citizen-suit language in the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659, that is identical to the language in Section 304(a)(2) of the CAA), *cert. denied*, 135 S. Ct. 494 (2014); *cf., e.g., Monongahela Power Co. v. Reilly*, 980 F.2d 272, 276 n.3 (4th Cir. 1992) (interpreting Section 304(a)(2) narrowly). Thus, a reviewing court is limited to deciding whether EPA has performed the duty in question, "not claims regarding the substance of the EPA's decisions, which is a matter of discretion for the agency." *Frey*, 751 F.3d at 469-70; *see also Bennett v. Spear*, 520 U.S. 154, 172 (1997) (interpreting identical language in the Endangered Species Act in the same manner); *Scott v. City of Hammond*, 741 F.2d 992, 995 (7th Cir. 1984) (same for the Clean Water Act). *Accord*, *City of Las Vegas v. Clark Cnty.*, 755 F.2d 697, 704 (9th Cir. 1985); *Sun Enters. v. Train*, 532 F.2d 280, 286-88 (2d Cir. 1976); *Pa. Dep't of Envtl. Res. v. EPA*, 618 F.2d 991, 995-96 (3d Cir. 1980).

FACTUAL BACKGROUND

The Declaration of James DeMocker, submitted with EPA's Motion for Summary Judgment as Exhibit A, identifies the documents upon which EPA relies to demonstrate its performance of the duty set forth in Section 321(a). All exhibit references in this Memorandum refer to the exhibits as identified in the DeMocker Declaration.

ARGUMENT

EPA moves that summary judgment be entered based on the record currently before the Court, either in favor of, or against, EPA. Section I explains that EPA is entitled to summary judgment in its favor because it has performed "continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of [the Act] and applicable implementation plans," as required by Section 321(a). Section II explains that, if the

Court concludes that the exhibits presented do not satisfy Section 321(a), then summary judgment should be granted in favor of Plaintiffs, and the Court should order EPA to perform the duty set forth in Section 321(a).

I. EPA Has Performed Continuing Evaluations of Potential Loss or Shifts of Employment That May Result From the Administration and Enforcement of the Act and Applicable Implementation Plans.

Section 321(a) requires EPA to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of [the Act] and applicable implementation plans." 42 U.S.C. § 7621(a). Congress did not define the term "evaluations" as used in Section 321(a), or provide any guidance to EPA regarding the scope, content, timing, or frequency of such evaluations.[3] In the absence of any statutory guidance from Congress, EPA has discretion in deciding how to perform the duty in Section 321(a). This includes the discretion to decide how to conduct the evaluations, what information to include in those evaluations, and when and how often to conduct such evaluations.

Plaintiffs' bare assertion that "EPA has never conducted the evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the Clean Air Act expressly mandated by Section 321(a)" (Am. Compl. [ECF No. 31] at ¶ 72), is demonstrably false. The documents submitted with the DeMocker Declaration clearly show that EPA has conducted evaluations of the employment impacts of the Act. Although Section 321(a) does not require EPA to conduct employment evaluations for individual regulations, EPA has, in its discretion, evaluated potential employment impacts for individual regulations since mid-2010. And, although Section 321(a) does not prescribe any specific level of detail for the employment evaluations, EPA has, in its discretion, conducted detailed quantitative analyses that provide numerical estimates for potential job losses, shifts, and gains where feasible. And, while Section

[3] In contrast to the general language in Section 321(a), Sections 321(b) and (c) set forth detailed procedures EPA must follow when investigating specific employee allegations of adverse employment impacts. 42 U.S.C. § 7621(b), (c). "[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keen Corp. v. United States*, 508 U.S. 200, 208 (1993) (citation omitted).

321(a) does not require EPA to evaluate potential employment impacts for any particular sector of the economy, EPA has, in its discretion, evaluated potential employment impacts on the coal industry. While Plaintiffs may not agree with EPA's policy choices or the conclusions reached by EPA in its employment evaluations, those issues are not before this Court. The only issue before this Court is whether EPA has conducted evaluations as required by Section 321(a).

Section A, below, describes EPA's evaluations of the potential loss or shifts in employment that may result from the administration and enforcement of individual regulations and implementation plans. Section B describes EPA's evaluation of employment impacts that have resulted, or may result, from EPA's overall administration and enforcement of the Act, including an evaluation of the impacts of the Act's Title IV Acid Rain Program on coal industry employment. Finally, Section C describes the ongoing research that EPA is conducting and supporting to refine the analytical methods that the Agency uses to evaluate employment impacts. In sum, the exhibits establish that EPA has conducted, and is continuing to conduct, the evaluations required by Section 321(a), and the Court should grant EPA's motion.

A. EPA Has Evaluated the Employment Impacts That May Result From Its Administration and Enforcement of Specific Regulations and Implementation Plans.

For "significant" rulemakings, EPA prepares a "Regulatory Impact Analysis" ("RIA") that analyzes the benefits and costs of the rule, as well as specific economic impacts. Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), *as amended by* Exec. Order No. 13497, 74 Fed. Reg. 6113 (Feb. 4, 2009) and Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).[4]

[4] "'Significant regulatory action' means any regulatory action that is likely to result in a rule that may:
(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."
Exec. Order No. 12866, 58 Fed. Reg. at 51,738.

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Starting in mid-2010, EPA began including an analysis of the potential employment impacts that may result from the administration and enforcement[5] of the rule in its RIAs. For rules for which an RIA is not required because the rule is not deemed "significant,"[6] EPA often prepares an Economic Impact Assessment ("EIA") that may include an evaluation of potential impacts on employment. *See* 42 U.S.C. § 7617. In addition to the RIAs and EIAs prepared in connection with proposed and final regulations, EPA has also prepared subsequent memoranda that provide further evaluation of potential employment impacts when EPA makes significant changes to those regulations in response to petitions for reconsideration.[7]

Exhibits 1-39 submitted with the DeMocker Declaration demonstrate EPA's regular and continuing efforts to evaluate how the administration and enforcement of specific regulations and implementation plans may impact employment. In fact, for each of the rules imposing substantive requirements on sources that Plaintiffs cite in their Complaint, EPA has prepared one or more RIAs that include a description of the methodologies used to evaluate potential employment impacts and the factors considered in the evaluation. *See* Am. Compl. ¶ 36(a) and Exs. 5-8; Am. Compl. ¶ 36(b) and Exs. 3-4; Am. Compl. ¶ 36(e) and Exs. 22-23.[8] Indeed, some

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[5] While Plaintiffs cite to a number of EPA enforcement actions in their Complaint, *see* Am Compl. ¶ 36(f), Section 321(a) does not require EPA to evaluate potential employment impacts at the time that EPA undertakes individual enforcement initiatives. When EPA conducts an employment analysis as part of an RIA, the analysis necessarily assumes that the rule in question will be enforced. Absent compliance, or enforcement in the absence of compliance, a regulation would have no impacts at all.

[6] The final determination of whether a rule is "significant" is made by the Administrator of the Office of Information and Regulatory Affairs ("OIRA") within the Office of Management and Budget. *Id.* § 6(a)(3)(A) ("Each agency shall provide OIRA . . . with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Executive order . . . . [T]hose not designated as significant will not be subject to review under this section unless . . . the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order."). 58 Fed. Reg. at 51,740-41.

[7] Hereafter, EPA will generally refer to the RIAs, EIAs, and memoranda collectively as just "RIAs."

[8] Plaintiffs also cite two final agency actions designating areas under the 2006 24-hour fine particulate matter ("$PM_{2.5}$") and 2010 sulfur dioxide ("SO_2") NAAQS. *See* Am. Compl. ¶ 36(c) & (d). Those designations merely reflect the status of air quality; they do not impose any obligations on sources in a given area. *See* 42 U.S.C. § 7407(d) (requiring EPA to designate areas of the country as attainment, nonattainment, or unclassifiable based on air quality monitoring data after EPA revises a NAAQS). The Act explicitly exempts designations from the notice-and-comment procedures of the Administrative Procedure Act. *Id.* § 7407(d)(2)(B). Thus, contrary to Plaintiffs' allegations, these actions neither "[s]electively target coal-fired emissions sources for additional regulation" nor [*footnote continued*]

of EPA's most robust evaluations of potential employment impacts are in the RIAs supporting rules that affect the coal industry.

When available data and appropriate methodologies make it feasible, EPA's RIAs include quantified estimates of employment gains, shifts, and losses in both the regulated sector and other affected sectors.[9] For example, the RIA for the Final Mercury and Air Toxics Standards ("MATS"), which is one of the regulations cited by Plaintiffs (*see* Am. Compl. [ECF 31] at ¶ 36(b)), provides a detailed "Employment and Economic Impact Analysis." *See* Ex. 4, at 6-1 to 6-17, 6A-1 to 6A-16. In the RIA, EPA quantified potential employment impacts under three different approaches, and specifically assessed the potential impact on the coal industry. EPA identified a one-time increase of 46,120 job-years due to construction and the installation of pollution-control equipment. *Id*. at 6A-2, tbl. 6A. To evaluate potential employment impacts on the coal-mining sector, EPA used the Integrated Planning Model ("IPM" or "Model")[10] to

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"encourage states to develop state implementation plans that require reductions in the consumption of coal." Am. Compl. ¶ 36(c) & (d). In fact, with the exception of a reference to Coal County, Oklahoma, 74 Fed. Reg. 58,688, 58,756 (Nov. 13, 2009), neither action contains a single mention of the word "coal."

[9] *See* RIA for Proposed Carbon Pollution Guidelines for Existing Power Plants and Emission Standards for Modified and Reconstructed Power Plants (Ex. 1), RIAs for Mercury and Air Toxics Standards, or "MATS" (Exs. 3-4), RIAs and related memoranda for the National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters (Exs. 5-8), RIAs and related memoranda for Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Unit (Exs. 9-12), RIAs for Proposed New Source Performance Standards and Amendments to the National Emissions Standards for Hazardous Air Pollutants for the Oil and Natural Gas Industry (Exs. 13-14), RIA for Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone in 27 States (Ex. 15), RIA for Final Rulemaking for 2017-2025 Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards (Ex. 18), RIAs for Tier 3 Motor Vehicle Emission and Fuel Standards (Exs. 16-17), and RIA for Amendments to the National Emission Standards for Hazardous Air Pollutants and New Source Performance Standards for the Portland Cement Manufacturing Industry (Ex. 21).

[10] The IPM is a detailed model of the U.S. electric power sector. EPA uses the model to project changes in the power sector and related upstream industries from the effect of air emission rules. *See* http://www.epa.gov/powersectormodeling/. IPM includes a detail-rich representation of fuel supply and consumption for the power sector, including coal supply and consumption. EPA's latest report on the assumptions, updates, and enhancements in IPM includes a chapter on coal that details how the coal sector is modeled within IPM, including the bottom-up, mine-by-mine approach used to develop coal supply curves. *See* http://www.epa.gov/airmarkets/documents/ipm/Chapter9.pdf; full table of contents at http://www.epa.gov/airmarkets/programs/ipm/psmodel.html. The chapter also includes detailed discussion of coal transportation, coal supply regions, coal demand regions, coal quality, coal imports, exports, and non-electric sector coal demand.

estimate the effect on coal-mining jobs from changes in overall demand for coal at electric utilities. Using data provided by the Energy Information Agency on regional coal-mining productivity, EPA projected coal-mining employment impacts by region, and estimated a loss of 1,950 job-years in Appalachia, a gain of 1,990 job-years in the Interior region, and a loss of 420 job-years in the West. *Id*. at 6A-10, tbl. 6A-6. EPA also estimated a loss of 60 job-years for waste coal, for a net total loss of 430 job-years in coal mining, and projected the retirement of 4.7 gigawatts of coal-fired generation, leading to an estimated loss of 2,500 job-years in the electric utility sector. *Id.* at app. 6A, tbls. 6A-1 to 6A-6. EPA identified a net effect on utility-sector employment ranging from a loss of 15,000 jobs to a gain of 30,000 jobs, with a central estimate of 8,000 jobs gained. *Id*. at 6-12, tbl. 6-6. Finally, the RIA estimated that MATS would yield annual monetized benefits (in 2007 dollars) of 37 to 90 billion dollars using a 3% discount rate , reflecting, among other things, 4,200 to 11,000 fewer premature mortalities, and annual monetized social costs, approximated by the compliance costs, of 9.6 billion dollars (in 2007 dollars). *Id*. at ES-1.

The RIA for the proposed Carbon Pollution Guidelines for Existing Power Plants and Emission Standards for Modified and Reconstructed Power Plants (Ex. 1), also provides a quantitative analysis of potential employment impacts, including estimates for the electric-power industry and coal and natural-gas sectors. EPA recognized that the administration and enforcement of the rule would result in reductions in the need for additional capacity and fuel supplies, including "the loss of operation and fuel-related jobs arising from the retirement of existing coal generating capacity," *id.* at 6-23, and estimated a loss of 10,900 to 18,000 job-years per year in the coal-mining industry, depending on the year in question and the standards finalized. *Id.* at 6-26 to 6-27. As a result of demand-side energy-efficiency initiatives, however, EPA estimated projected employment increases ranging from 57,000 to 78,800 additional full or part-time employees in 2020, and 76,200 to 112,000 additional employees in 2025. *Id.* at 6-31, tbl. 6-6. The RIA also estimated monetized climate and health benefits between 55 and 89 billion dollars by 2030 (in 2011 dollars). *Id.* at ES-18. The RIA also estimated monetized

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climate and health benefits between 55 and 89 billion dollars by 2030 (in 2011 dollars), *id.* at ES-18, and illustrative compliance costs of 4.5 to 5.5 billion dollars in 2025 and 7.3 to 8.8 billion dollars in 2030 (all in 2011 dollars). *Id.* at ES-8.

In some instances, the RIAs demonstrate that the action under consideration will have no impact on baseline operations or will lead to cost savings.[11] After consideration of the overall economic effects of the regulation at issue, these RIAs conclude that there will be no significant impacts on employment. For example, the RIA for the Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units (referenced by Plaintiffs at Am. Compl. [ECF No. 31] ¶ 36(e)), concluded that "there are no notable macroeconomic or employment impacts expected as a result of this proposed rule." Ex. 22 at 5-37; *see also* Ex. 24 at 4-1 (concluding that "no national-level negative economic impacts are expected" to result from the implementation and enforcement of the Petroleum Refineries New Source Performance Standards).

While many of the RIAs provide a detailed quantitative assessment of the employment impacts that may result from the administration and enforcement of the regulations, a quantitative assessment is not required by Section 321(a). In instances where data limitations or a lack of scientifically defensible methodologies preclude a quantitative assessment, EPA has conducted a qualitative evaluation of potential employment impacts based on relevant peer-reviewed literature.[12] For example, the RIA for the Tier 3 Vehicle Emission and Fuel Standards (Ex. 16) provided a partial quantification of job losses and gains in the motor vehicle

[11] *See* RIA for Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electricity Utility Generating Units (Exs. 22-23), RIA for Carbon Pollution Emission Guidelines Supplemental Proposal for Indian Country and U.S. Territories (Ex. 2), RIA for Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium and Small Heavy-Duty Engines and Vehicles (Ex. 26), and RIA for Petroleum Refineries New Source Performance Standards (Ex. 24).

[12] *See* RIA for Proposed Brick and Structural Clay Products National Emissions Standards for Hazardous Air Pollutants (Ex. 20), EIA for Petroleum Refineries Proposed Amendments to the National Emissions Standards for Hazardous Air Pollutants and New Source Performance Standards (Ex. 25), RIA for Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles (Ex. 26), and RIAs for Proposed and Final Residential Wood Heaters New Source Performance Standards Revision (Exs. 36, 37).

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manufacturing sector, but was unable to quantify the impact on employment in less directly-affected sectors, including the auto parts manufacturing and retail sectors. In the few RIAs where EPA concluded that the available data were insufficient to quantify or estimate potential losses and gains in employment, EPA described the contingencies that limited the evaluation.[13] *See, e.g.*, Ex. 30 at 5-9 to 5-12 (declining to quantify employment impacts for the ferroalloy industry due to a lack of data).

The RIAs associated with two NAAQS revisions demonstrate EPA's evaluation of potential employment impacts that may result from the implementation plans that States will submit to implement those NAAQS.[14] For example, in the RIA for the Proposed Revisions to the NAAQS for Ground-Level Ozone (Ex. 19), EPA evaluated the employment impacts related to the installation and maintenance of nitrogen oxide (NO_X) control equipment in various industries where facilities may be required, through state implementation plans approved pursuant to the revised standard, to install and operate various NO_X control devices. *Id.* at 10-10.

Additionally, EPA has evaluated the potential employment impacts that may result from specific implementation plans. In the RIA for EPA's 2011 Cross-State Air Pollution Rule (Ex. 15), which was comprised in part of FIPs for 27 states, EPA assessed potential employment impacts for three different sectors. *Id.* at 286. EPA estimated impacts to the affected electricity sector at between 1,000 job losses and 3,000 job gains, with a central estimate of 700 jobs gained. *Id.* at 287-91, tbls. 8-3, 8-7. For impacts to the environmental protection sector, EPA estimated that the rule would support or create 2,230 job-years by 2014. *Id.* at 291-99, tbl. 8-7.

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[13] *See* RIA for Proposed Manganese Ferroalloys Risk and Technology Review (Exs. 30-31), RIA for Proposed National Emission Standards for Hazardous Air Pollutants for Mercury Emissions for Mercury Cell Chlor Alkali Plants (Ex. 27), RIAs for Cost and Benefit Changes Since Proposal For Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units (Exs. 28-29), RIAs for Existing Stationary Spark Ignition Reciprocating Internal Combustion National Emission Standards for Hazardous Air Pollutants (Exs. 32-33), and RIAs for Existing Stationary Compression Ignition Engines National Emission Standards for Hazardous Air Pollutants (Exs. 34-35).

[14] *See* RIAs for Revisions to the National Ambient Air Quality Standards for Particulate Matter (Exs. 38-39) and RIA for Proposed Revisions to the National Ambient Air Quality Standard for Ground-Level Ozone (Ex. 19).

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EPA also provided an estimate for non-regulated entities that included an increase of 2,650 job-years from "Changes to Demand in Materials," an increase of 2,320 job-years from ongoing annual retrofit operations, a decrease of 2,710 job-years from "Coal Capacity Retirements," and a net loss of 990 job-years from changes in fuel use, including an accounting for losses of job-years in the coal sector. *Id*. at 295-98, tbl. 8-6, app. D. Appendix D, "Employment Estimates of Direct Labor in Response to the Final Transport Rule in 2014," describes how EPA used IPM to project employment shifts in the coal, natural gas, and natural gas pipeline sectors. *See id.* at 371-90. The RIA also estimated monetized annual health benefits in 2014 of 120 to 280 billion dollars using a 3% discount rate (in 2007 dollars), reflecting, among other things, the prevention of 13,000 to 34,000 premature deaths, and annual monetized social costs of 810 million dollars using a 3% discount rate (also in 2007 dollars). *Id*. at 1-2.

Finally, the RIAs demonstrate EPA's commitment to "continuing" its evaluation of potential employment impacts throughout EPA's rulemaking process, including when significant changes are made after a rule has been finalized. In most instances, a draft evaluation of potential employment impacts is included in the RIA associated with the proposed rule. EPA then revises the evaluation as appropriate in a subsequent RIA supporting the final rule. *See, e.g.*, Exs. 13 and 14 (revising the estimates of potential employment impacts). EPA also revises the evaluation, as appropriate, in the event that reconsideration of the rule is granted or a supplemental rulemaking process is necessary. *See, e.g.*, Exs. 7 and 8, 11 and 12. Thus, EPA continues to refine its estimates as new information and data become available during the rulemaking proceeding.

In sum, the detailed evaluations of employment impacts in the RIAs attached to the DeMocker Declaration as Exhibits 1-39 demonstrate that EPA has not only satisfied, but has gone well beyond, what is required by Section 321(a).

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B. EPA Has Conducted Evaluations of the Overall Impact of the Agency's Administration and Enforcement of the Act on Employment.

In addition to the detailed evaluations of potential employment impacts associated with individual regulatory actions, EPA has also conducted broad-scale evaluations of the impact of the administration and enforcement of the Act on employment, including one study evaluating the impacts of the Act's Title IV Acid Rain Program on employment in the coal industry.

A 2011 EPA "White Paper," titled "Empirical evidence regarding the effects of the Clean Air Act on jobs and economic growth" (Ex. 40), evaluated whether job losses or shifts result from EPA's programmatic administration and enforcement of the Act. Its stated purpose was to evaluate "the connection between environmental regulation — specifically, the Clean Air Act — and employment and economic growth in the United States" based on relevant findings from the economics literature. *Id.* at 1. The White Paper includes a section specifically addressing the "Impacts of the Clean Air Act on Employment," in which EPA examined relevant economic research. *Id.* at 3-4. One study examined the effect of increased environmental spending on four heavily regulated industries (pulp and paper, refining, iron and steel, and plastic) and concluded that such spending "generally does *not* cause a significant change in employment." *Id.* (citation omitted) (emphasis in original). In another section of the White Paper, EPA reviewed data on employment and revenue in the environmental technology and services sector since the early 1970s, following the passage of the Act and other environmental laws. *Id.* at 4-6. Other portions of the White Paper evaluated the overall effect of CAA pollution abatement costs on the U.S. manufacturing sector, *id.* at 7-9, and the effect of CAA implementation on U.S. Gross Domestic Product, *id.* at 3.

EPA has also prepared multi-decade studies that both evaluated the past impacts of EPA's administration and enforcement of the Act and projected future impacts. *See* Exs. 42, 44 (*The Benefits and Costs of the Clean Air Act*). Although these analyses considered a variety of economic topics beyond potential employment impacts, EPA acknowledged and addressed the potential relevance of the impact of job losses and shifts on the nation's economy as part of their preparation. The first of these multi-decade reports evaluated the benefits and costs of the Act

during its first two decades of implementation. *See The Benefits and Costs of the Clean Air Act 1970 to 1990* (Ex. 42). EPA estimated that the total monetized benefits of the CAA, from 1970 to 1990, range from 5.6 to 49.4 trillion dollars (in 1990 dollars) with compliance costs over the same time period of 0.5 trillion dollars (in 1990 dollars). The central estimate of 22.2 trillion dollars in benefits may be a significant underestimate due to the exclusion of large numbers of benefits from the monetized benefit estimate (e.g., all air toxics effects, ecosystem effects, and numerous human health effects). *Id.* at ES-8. The study concluded that the impact of CAA implementation on employment varied by sector, finding that CAA implementation was associated with decreasing employment in some sectors and increasing employment by "similar magnitudes" in other sectors. *Id.* at 9. An analysis prepared as part of the study, *The Clean Air Act and the U.S. Economy: Final Report of Results and Findings* (Ex. 43), also concluded that:

> Twenty sectors experience reductions in the use of labor services. Of these, eight also show output reductions while substitution effects dominate output effects in the remaining twelve. Fourteen sectors show increases in labor input. Here, the output effects dominate so labor input rises while labor output ratios decline.

Id. at 4.12. In November 1999, EPA issued a prospective study estimating the benefits and costs of the CAA Amendments of 1990 through the year 2010. *See The Benefits and Costs of the Clean Air Act: 1990 to 2010* (Ex. 44). EPA estimated that the annual economic value of the human health and environmental benefits of the CAA Amendments, in the year 2010, ranges from 26 to 270 billion dollars (in 1990 dollars) with annualized costs of 26 billion dollars (in 1990 dollars). *Id.* at iii-iv, tbl. ES-1. Two years later, EPA issued a revision to the 1993 Jorgenson analysis (Ex. 43), titled *An Economic Analysis of the Benefits and Costs of the Clean Air Act 1970 to 1990: Revised Report of Results and Findings* (Ex. 45). The report concluded that "[t]he net benefits of the CAA combine the early capital and productivity losses of compliance with the subsequent labor and capital gains associated with fewer deaths and workdays lost. . . . Ultimately, under the CAA, the economy is larger with a larger population, a larger pool of labor and a greater capital stock." *Id.* at 25.

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While EPA's White Paper and studies of the benefits and costs of the Act evaluated employment impacts across all industries, EPA has also specifically evaluated the employment impacts of a significant CAA program on the coal industry. *See Impacts of the Acid Rain Program on Coal Industry Employment* (Ex. 41). The report projected the impact of the Act's Title IV Acid Rain Program on coal-mining employment through 2010. EPA used the IPM model to calculate regional shifts in coal production that could be attributed to Title IV. EPA then used productivity estimates for coal mining in different portions of the country to translate changes in coal demand into changes in coal-industry employment. The report concluded that by 2010, Title IV could result in "a gross loss of 7,700 job slots" with a net loss of "4,100 coal miner job slots because 3,600 new job slots would be created." *See id.* at 1.

C. EPA is Continuing to Evaluate the Employment Impacts That May Result From Its Administration and Enforcement of the Act.

EPA's RIAs demonstrate the Agency's on-going, continuous effort to assess the potential employment impacts of individual regulations, while its official reports, including the White Paper and the *Impacts of the Acid Rain Program on Coal Industry Employment* report, demonstrate the Agency's continuing broad-scale efforts to assess the employment impacts of the Act and its programs. While these evaluations are clearly sufficient to satisfy Section 321(a), other documents and initiatives demonstrate that EPA is going further to support continuous improvement in the methodology used for assessing potential employment impacts resulting from the administration, enforcement, and implementation of the Act. As part of that effort, EPA has issued Agency-wide guidelines for conducting such evaluations, and has conducted, sponsored, or participated in various research projects, studies, seminars, and workshops to assess and improve its analytical capabilities and methodologies.

For example, EPA's *Guidelines for Preparing Economic Analyses* (*Guidelines*) (Ex. 46) provide direction to all EPA economists and analysts who conduct economic analyses, including RIAs prepared during the development of regulations. *Id*. at 1-1 to 1-2. The *Guidelines* are "part of a continuing effort" by EPA to improve its decision-making process and have been revised

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and updated several times to reflect new developments. *Id*. at 1-1. The *Guidelines* include a section on "Impacts on employment," which discusses preferred approaches. *Id*. at 9-8 to 9-9. The *Guidelines* caution that many extant employment analyses rely on simplifying assumptions that "are faulty and should not be used." *Id*. at 9-8. The *Guidelines* clarify that many different employment impacts must be taken into account if an analysis is to present "a complete picture" of the employment effects of an environmental policy. *Id*. The impacts described include a demand effect, cost effect, and factor-shift effect on the regulated industry, as well as employment effects on pollution-control industries and industries that make substitute products. *Id.* at 9-8 to 9-9. The *Guidelines* demonstrate EPA's commitment to rigorous, consistent treatment of employment analysis across the Agency.

EPA has also convened workshops and seminars to advance the science and policy for evaluating employment impacts associated with environmental regulation. EPA's National Center for Environmental Economics ("NCEE"), in consultation with Professor V. Kerry Smith of Arizona State University, convened a scientific workshop with academic experts to examine the theory and advance the available methods for understanding the employment effects of environmental regulation. The purpose of the workshop was to consider additional research needed to improve the practices of policy evaluation in order to take better account of the state of the economy and the employment effects of regulations. Technical papers were presented by academic experts with backgrounds in macroeconomics, labor economics, and environmental economics. The agenda and the papers presented are available on NCEE's website.[15]

In 2012, EPA economists participated in a series of workshops hosted by the University of Pennsylvania law school in order to "understand better which regulations have which specific effects on jobs and what are the conditions under which these effects occur." Excerpt from *Does Regulation Kill Jobs?*, U. Pa. Press, http://www.upenn.edu/pennpress/book/toc/15183.html. The

[15] Description of Workshop: Advancing the Theory and Methods for Understanding Employment Effects of Environmental Regulation, NECC, http://yosemite.epa.gov/ee/epa/eed.nsf/82A1EF3ABDDDBFC085257600006BB562/F118D6A5DCEF3EE685257B570078FA3E?OpenDocument.

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workshop resulted in a published conference volume: *Does Regulation Kill Jobs?*, edited by Cary Coglianese, Adam M. Finkel, and Christopher Carrigan.[16] EPA economists co-authored several chapters of the conference volume. *See* Exs. 48-50; *see also* Exs. 51-52 (additional research papers authored by EPA economists to evaluate the impact of CAA regulations on jobs and employment).

In another effort to advance EPA's ability to evaluate the employment impacts associated with environmental regulation, EPA has formed a panel of experts as part of its Science Advisory Board ("SAB") to advise EPA on how best to model and estimate the economy-wide economic impacts of its regulations. EPA requested public comment on specific questions regarding approaches to analyzing employment effects. *See* "Comment Request; Draft Supporting Materials for the Science Advisory Board Panel on the Role of Economy-Wide Modeling in U.S. EPA Analysis of Air Regulations," 79 Fed. Reg. 6899 (Feb. 5, 2014). Public comments were incorporated and addressed, and the revised charge questions were submitted to the SAB on February 26, 2015 (Ex. 53).[17] The first two meetings of the panel will occur in July and October of 2015. *See* "Notification of a Teleconference and a Face-to-Face Meeting of the Science Advisory Board Economy-Wide Modeling Panel," 80 Fed. Reg. 13,373 (Mar. 13, 2015).

In sum, the dozens of documents submitted with the DeMocker Declaration demonstrate that EPA has conducted continuing evaluations of potential employment impacts that may result from its administration and enforcement of the Act and applicable implementation plans. Accordingly, EPA has satisfied the duty set forth in Section 321(a).

[16] The Preface to this volume is provided at Ex. 47.

[17] The latest information on Economy–Wide Modeling of the Benefits and Costs of Environmental Regulation is available at http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Economywide%20modeling!OpenDocument&TableRow=2.0#2.

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II. Should This Court Conclude That EPA Has Not Satisfied the Duty in Section 321(a), Then the Court Should Enter Judgment Against EPA and Order Performance of that Duty.

As explained above, EPA believes that the documents submitted in support of its Motion for Summary Judgment demonstrate that EPA has performed the duty in Section 321(a) and is therefore entitled to summary judgment in its favor. Moreover, while EPA is continuing to evaluate the potential employment impacts of its forthcoming rules and, as described above, is conducting ongoing research to refine the Agency's analytical methods, EPA has completed no other evaluations of the potential employment of the Act at this time. The Court thus has before it all of the evidence upon which EPA relies to demonstrate its performance of the duty.

There is no genuine issue of material fact that could warrant further discovery or necessitate delaying the resolution of this case. The documents are public records that speak for themselves. This Court can answer the ministerial question of whether EPA has performed the employment evaluations required by Section 321(a) simply by reviewing the documents submitted with the DeMocker Declaration. Either the documents constitute performance of the duty in Section 321(a), or they do not. Should this Court conclude that the documents do not satisfy the duty, then summary judgment should be entered against EPA.

A. Judicial Review in This Case Is Limited to Determining Whether EPA Has Performed the Duty in Section 321(a).

The Court's role in this case is limited to determining whether EPA has conducted the continuing evaluations required under Section 321(a). It is not the role of the Court to examine those evaluations to determine, for example, whether EPA considered appropriate factors, applied appropriate methodologies, or made appropriate findings. Nor is it the role of this Court to determine whether EPA's administration and enforcement of the Act has negatively impacted the coal industry, which appears to be the gravamen of Plaintiffs' complaint. *See, e.g.*, *Frey*, 751 F.3d at 469-70 (holding that the scope of judicial review in a citizen suit alleging that EPA has failed to perform a non-discretionary duty is limited to deciding whether EPA has performed the duty in question, "not claims regarding the substance of the EPA's decisions, which is a matter of discretion for the agency"). As the D.C. Circuit has explained, a district court's limited role in

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non-discretionary suits is consistent with the Act's bifurcation of jurisdiction between the district and circuit courts:

> We long ago rejected, as inconsistent with congressional intent in enacting sections 304 and 307, the convoluted notion that EPA is under a nondiscretionary duty -- for purposes of section 304(a)(2) -- not to abuse its discretion. As is evident, when taken to its logical conclusion, this argument would grant jurisdiction to the district court over all claims alleging abuse of discretion, a result clearly at odds with both review for abuse of discretion in the court of appeals under section 307 and with the undisputably limited nature of review in the district court under section 304(a)(2).

Sierra Club v. Thomas, 828 F.2d 783, 792 (D.C. Cir. 1987).

EPA believes that the documents submitted with the DeMocker Declaration demonstrate EPA's compliance with the requirements of Section 321(a) and support entry of judgment in favor of EPA. However, if the Court concludes that the documents upon which EPA relies do not satisfy the duty in Section 321(a), then the Court should enter judgment for Plaintiffs and order EPA to perform the duty.

B. The Only Remedy Available to Plaintiffs Is a Court Order Compelling EPA to Perform the Duty in Section 321(a).

Paragraph (c) of the Prayer for Relief requests that this Court "[e]njoin[] the Administrator from approving further regulations impacting employment in the coal industry and from continuing its New Source Review enforcement campaign against coal-fired power plants for work done after the expiration of the applicable statute of limitations until EPA has completed its evaluation." Am. Compl. at Prayer For Relief ¶ (c). This request is barred by sovereign immunity, by the jurisdictional requirements for challenging agency actions, and by the plain language of the Act itself.[18]

For the narrow waiver of sovereign immunity established in Section 304(a)(2), only limited injunctive relief is available. *See* 42 U.S.C. § 7604(a)(2). Specifically, courts providing relief under Section 304(a)(2) are limited by its express terms, which specify that, "the district

[18] The Court did not previously reach the issue of the proper scope of injunctive relief, acknowledging that "there may exist some question as to [the] scope of the injunctive relief which may be awarded by this Court." Order [ECF No. 40] at 15. The issue is now ripe for consideration and decision by the Court.

courts shall have jurisdiction . . . to order [EPA] to perform such act or duty, as the case may be[.]" 42 U.S.C. § 7604(a); *see also Sierra Club v. Browner*, 130 F. Supp. 2d 78, 90 (D.D.C. 2001) ("Under [Section 304(a)], the Court can only order EPA to take nondiscretionary actions required by the statute itself . . . . The Act expressly limits the Court's authority in this regard and does not envision other types of relief."), *aff'd sub nom Sierra Club v. Whitman*, 285 F.3d 63 (D.C. Cir. 2002); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (noting that a similar provision under the APA "empowers a court only to compel an agency to perform a ministerial or nondiscretionary act, or to take action upon a matter[.]" (internal quotations and citation omitted)).

"[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Middlesex Cnty. Sewerage Auth v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981) (internal quotations and citation omitted) (refusing to imply any additional remedies not expressly created by a parallel citizen-suit provision in the Clean Water Act). "In the absence of strong indicia of a contrary congressional intent," the Supreme Court continued, "we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id* at 15; *Venkatraman v. REI Systems, Inc.*, 417 F.3d 418, 423 (4th Cir. 2005) (quoting *Middlesex*). The United States District Court for the District of Columbia has thus explained, "Under [Section 7604(a)(2)], the Court can only order EPA to take nondiscretionary actions required by the statute itself. . . . The Act expressly limits the Court's authority in this regard and does not envision other types of relief." *Browner*, 130 F. Supp. 2d at 90, *aff'd sub nom*, 285 F.3d at 68 (affirming "the district court's limited jurisdiction in a citizen suit to order only EPA's performance of non-discretionary duties").

The Act's provision of a single remedy—an order to perform the nondiscretionary duty in question— constitutes a limited waiver of sovereign immunity that precludes courts from imposing any other remedy. Plaintiffs may not resort to equitable principles to avoid the jurisdictional bar of sovereign immunity. *See Beller v. Middendorf*, 632 F.2d 788, 796 (9th Cir.

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1980) ("Unless sovereign immunity has been waived or does not apply, it bars equitable as well as legal remedies against the United States."). Nor can a court graft additional remedies, for which there is no waiver of sovereign immunity, onto those specifically provided by Congress. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) ("[A] court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" (quoting *Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 551 (1937)). Therefore, were this Court to find that EPA has failed to perform the duty in Section 321(a), the only relief to which Plaintiffs would be entitled is an order requiring EPA to do so.

Moreover, the relief requested by Plaintiffs constitutes an improper collateral attack on agency actions over which this Court has no jurisdiction. To the extent Plaintiffs seek to bar the enforcement of final regulations promulgated long ago by EPA, the Act requires all such challenges to be brought in the courts of appeal within 60 days of the rule's promulgation. 42 U.S.C. § 7607(b). Consequently, this is an improper forum for Plaintiffs to request such relief, and the time for filing such challenges has long since passed. And, to the extent Plaintiffs seek to enjoin ongoing administrative rulemaking proceedings, the relief requested constitutes a challenge to non-final agency actions, which is also improper. *Bennett*, 520 U.S. at 178-79 (discussing finality requirements).

Finally, the text of the statute itself precludes the relief sought. Section 321(d) of the Act specifically provides that:

> Nothing in this section shall be construed to require or authorize the Administrator, the States, or political subdivisions thereof, to modify or withdraw any requirement imposed or proposed to be imposed under [the Act].

42 U.S.C. § 7621(d). Thus, EPA's alleged failure to comply with Section 321(a) cannot be the basis for enjoining the implementation or enforcement of existing regulations. Nor can it be the basis for prohibiting proposed regulatory actions or ongoing enforcement proceedings. In the House Committee Report, Congress spoke in even more sweeping terms, explaining, "[n]or should this section be construed to authorize or require the postponement, withdrawal, modification, or nonenforcement of any requirement or proposed regulation under the Clean Air

Act." H.R. Rep. No. 95-294, at 318; *see EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 82 (1980) (describing a parallel statement in the Clean Water Act as constraining the effect of the provision as a whole). The text and history of Section 321(d) thus leave no ambiguity as to Congress's intent: Section 321 cannot be construed to "require or authorize" EPA to alter its administration of the Act. Accordingly, Section 321(d) clearly bars the injunctive relief requested.

CONCLUSION

For the foregoing reasons, EPA requests that summary judgment be entered in its favor on grounds that it has performed the duty required by Section 321(a) of the CAA. Alternatively, if the Court finds that EPA has not satisfied that duty, EPA requests that judgment be entered against it and that the Court order EPA to perform the nondiscretionary duty. In either case, this case should be concluded.

DATED: April 10, 2015

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

MURRAY ENERGY CORPORATION, et al., Plaintiffs, v. GINA McCARTHY, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, acting in her official capacity, Defendants.	)	**Civil Action No. 5:14-CV-00039** **Judge Bailey**

REPLY MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Despite Plaintiffs' efforts to generate disputes of fact where none exist and expand the scope of judicial review, there is only one issue before the Court: whether EPA has or has not "conduct[ed] continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of [the Clean Air Act ("CAA" or "the Act")] and applicable implementation plans." 42 U.S.C. § 7621(a). EPA submits that the documents attached as exhibits to the Declaration of James B. DeMocker ("DeMocker Decl.") [ECF No. 77] filed in support of its Motion for Summary Judgment [ECF No. 75] demonstrate that EPA has conducted such evaluations and is therefore entitled to summary judgment as a matter of law.

Contrary to Plaintiffs' arguments, there are no genuine disputes of material facts because EPA has conceded the facts that Plaintiffs claim are in dispute or has demonstrated that they are immaterial to the narrow issue before the Court. Plaintiffs' arguments that this Court is precluded from entering summary judgment in favor of EPA as a matter of law lack merit because they would require the Court to engage in a substantive review of EPA's evaluations, which is beyond the scope of judicial review in this case.

EPA is entitled to summary judgment. But if this Court should conclude otherwise, then judgment should be entered against EPA. Plaintiffs offer no legitimate basis to object to the entry of summary judgment in their favor. Rather, they ask this Court to condone an unnecessary fishing expedition for discovery on uncontested, immaterial issues, which would needlessly waste the resources of both the Agency and this Court. The request should be rejected.

ARGUMENT

Summary judgment is appropriate in this case because there are no disputes of material fact and the single claim alleged by Plaintiffs can be resolved as a matter of law.

I. There Are No Disputes of Material Fact.

In its Motion for Summary Judgment, EPA relies upon documents attached as exhibits to the DeMocker Declaration [ECF No. 77-80] to demonstrate that EPA has evaluated, and is

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continuing to evaluate, the potential loss or shifts of employment that may result from the administration and enforcement of the Act and applicable implementation plans. 42 U.S.C. § 7621(a). In response, Plaintiffs assert that EPA's claim of performance is "implausible" because EPA has not—and still does not—interpret Section 321(a) to require the Agency to conduct such evaluations, Pltfs.' Opp. at 9 n.1, and that the documents upon which EPA relies cannot possibly be Section 321(a) evaluations because they do not "cite or discuss Section 321(a)," *id.* at 10. Plaintiffs' argument boils down to the bizarre proposition that EPA's evaluations of potential loss or shifts in employment cannot constitute performance of the duty in Section 321(a) unless: (1) EPA believed it was required to perform the evaluations at the time they were conducted; (2) EPA performed the evaluations solely for the express purpose of complying with Section 321(a); and (3) EPA labeled the documents as "Section 321(a)" evaluations. This proposition is based upon facts that are neither in dispute nor material to the issue before the Court.

Plaintiffs contend that EPA's claim that it has performed the evaluations is inconsistent with prior statements made by the Administrator or her staff. *Id.* at 8-9. Plaintiffs point to prior statements by the Administrator and Assistant Administrator that "EPA has not interpreted [Section 321] to require EPA to conduct employment investigations in taking regulatory actions." *See id.* at 9. These statements raise no dispute of fact, however, because EPA concedes that it did not interpret Section 321(a) as requiring the Agency to conduct employment evaluations. Contrary to Plaintiffs' argument, the statements are completely consistent with EPA's position throughout this litigation. In EPA's Memorandum in Support of its Motion to Dismiss Complaint and Motion to Strike Prayer for Injunctive Relief [ECF No. 35], EPA argued that Section 321(a) did not establish a non-discretionary duty. *Id.* at 10-21. Moreover, there can be no dispute of fact for the additional reason that this Court held on September 16, 2014 that

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Section 321(a) establishes a non-discretionary duty as a matter of law. *See* Order [ECF No. 40].[1]

Plaintiffs also argue that EPA's assertion that it has performed the duty in Section 321(a) is inconsistent with its repeated disclaimers that Section 321(a) establishes a non-discretionary duty. Pltfs.' Opp. at 10. However, it is not inconsistent for EPA to perform employment impact evaluations in the exercise of its discretion, even though it does not interpret the Act as requiring the Agency to do so. EPA has consistently maintained that, while it did not interpret Section 321(a) as imposing a non-discretionary duty upon the Agency, it has conducted evaluations of employment impacts in its Regulatory Impact Analyses ("RIAs") in the exercise of its discretion. *See, e.g.*, Senator Vitter, Questions for the Record, Gina McCarthy Confirmation Hearing, Environment and Public Works Committee (Apr. 11, 2013) [ECF No. 85-4] at 17-18:

> EPA does perform detailed regulatory impact analyses (RIA) for each major rule it issues, including cost-benefit analysis, various types of economic impacts analysis, and analysis of any significant small business impacts. Since 2009 EPA has focused increased attention on consideration and (where data and methods permit) assessment of potential employment effects as part of the routine RIAs conducted for each major rule.

See also letter from DeMocker to Kovacs, U.S. Chamber of Commerce [ECF No. 85-1] at 1-2. These statements are consistent with EPA's position as stated in the Memorandum in Support of Motion for Summary Judgment ("Summ. J. Mem.") [ECF No. 76] at 6-8 & n.4 (noting that EPA conducts employment analysis in RIAs for significant rulemakings where data and appropriate methodologies make it feasible).

Finally, Plaintiffs argue that the documents submitted by EPA cannot constitute performance of the duty in Section 321(a) because they "do not identify themselves as evaluations required by Section 321(a)" or otherwise reference Section 321(a). Pltfs.' Opp. at 7, 10. Again, there is no dispute of fact because EPA concedes that none of the documents are labeled as "Section 321(a)" evaluations or were prepared with the specific intent of compliance

[1] EPA recognizes this Court's decision as the law of the case for purposes of this litigation, but reserves its argument that the duty set forth in Section 321(a) is discretionary, for the reasons set forth in its Memorandum [ECF No. 35].

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with Section 321(a). None of these facts are material, however, because neither labels nor agency intent are relevant to the question of whether the documents constitute "evaluations of potential loss or shifts in employment." 42 U.S.C. § 7621(a). Nevertheless, should this Court conclude that the documents cannot constitute performance of the duty in Section 321(a) as a matter of law, either because EPA conducted the evaluations in the exercise of its discretion or did not prepare them with the express purpose of complying with Section 321(a) or label them as "Section 321(a)" evaluations, then this Court should enter judgment against EPA.[2]

II. EPA Is Entitled to Summary Judgment as a Matter of Law.

In addition to their alleged "disputes" of material fact, Plaintiffs have identified three issues of law that they contend preclude the entry of judgment for EPA. Each of the issues identified by Plaintiffs is a legal issue that can, and should, be decided by this Court on summary judgment. As demonstrated below, the law supports entry of judgment in favor of EPA.

A. Employment Evaluations Need Not Be Labeled as "Section 321(a)" Evaluations to Constitute Performance of the Duty in Section 321(a).

Plaintiffs elevate form over substance by arguing that the documents upon which EPA relies "cannot possibly be the evaluations required by Section 321(a) [because] [t]hey do not identify themselves as Section 321(a) evaluations." Pltfs.' Opp. at 15. As explained in the United States' Memorandum in Support of Motion for Entry of Protective Order ("P.O. Mem.") [ECF No. 88] at 11-12, the Act does not require EPA to label its employment evaluations as being performed under the auspices of Section 321(a). *See, e.g., Sierra Club v. Browner*, 130 F. Supp. 2d 78, 91 & 92 n.17 (D.D.C. 2001) (noting that agency letters and statements that did not expressly reference the statutory duty could collectively evidence fulfillment of that duty), *aff'd*,

[2] Because there are no disputes of material fact, the cases cited by Plaintiffs to suggest that further discovery is necessary prior to ruling on the United States' Motion for Summary Judgment are inapposite. *See* Pltfs.' Opp. at 6-7. Furthermore, each case involved claims requiring proof of intent or knowledge, elements which are not material to non-discretionary duty suits. For example, in *Charbonnage de France v. Smith*, the sentence following those quoted by Plaintiffs continues that: "[i]mplicit in these basic rules is a consequence, frequently expressed as a maxim, that summary judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of [the] claim or defense." 597 F.2d 406, 414 (4th Cir. 1979) (citations omitted); *see also Metric/Kvaerner Fayetteville v. Fed. Ins. Co.*, 403 F.3d 188, 197 (4th Cir. 2005) (partially quoting same).

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285 F.3d 63 (D.C. Cir. 2002). Thus, it is immaterial that EPA undertook the evaluations without labeling them as "Section 321(a)" evaluations or stating that their purpose was to comply with Section 321(a).

Plaintiffs nevertheless suggest that the lack of "Section 321(a)" labels in the evaluations "frustrate[s] both judicial review and the fundamental use of EPA's evaluations for public discourse." Pltfs.' Opp. at 14. Plaintiffs' argument is based on a false premise because the evaluations prescribed by Section 321(a) are not subject to judicial review. The judicial review provisions of the Act apply only to rules, orders, determinations, and other "final actions" taken by the Administrator. 42 U.S.C. § 7607(b). The evaluations prescribed by Section 321(a) do not constitute "final" agency action subject to judicial review because they do not satisfy the two-part test established by the Supreme Court in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). First, the evaluations cannot mark the consummation of the Agency's decisionmaking process because they are not decisions. Second, and more importantly, the evaluations do not establish rights or obligations from which legal consequences will flow. Indeed, they establish no rights or obligations at all.[3]

The Fourth Circuit addressed this issue in *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852 (4th Cir. 2002), holding that an EPA report designating secondhand tobacco smoke as a known human carcinogen was not final agency action because there were no legal and direct consequences of the report. *Id.* at 862. In reaching this conclusion, the court relied in large part on a provision in the Radon Act (the statute authorizing the report) that stated: "Nothing in this title shall be construed to authorize the Administrator to carry out any regulatory

[3] The RIAs in which some of EPA's employment evaluations are included are not independently subject to judicial review for the additional reason that review is barred by Executive Order. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011) ("This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."); *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986) (holding that compliance with a prior version of Exec. Order No. 13,563 was not subject to judicial review). While neither the RIAs supporting a rule nor the employment evaluations contained therein are independently subject to judicial review, they are part of the administrative record and could be considered by a court in review of the final rule, which would be a final agency action subject to judicial review.

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program or any activity other than research, development, and related reporting, information dissemination, and coordination activities specified in [this title]." *Id.* at 855-56 (quoting Pub. L. No. 99-499, § 404, 100 Stat. at 1760 (1986) (reprinted in 42 U.S.C. § 7401 note)). The provision at issue in *Flue-Cured Tobacco* is remarkably similar to Section 321(d), which provides that "[n]othing in this section shall be construed to require or authorize the Administrator, the States, or political subdivisions thereof, to modify or withdraw any requirement imposed or proposed to be imposed under this chapter." 42 U.S.C. § 7621(d). Consequently, the evaluations prescribed by Section 321(a) do not constitute final agency action subject to judicial review.

Plaintiffs' argument that the absence of "Section 321(a)" labels in the evaluations "inhibits Congressional oversight" is equally baseless. Pltfs.' Opp. at 15. Section 321(a) does not require EPA to submit its evaluations to Congress and, even if it did, the lack of a label would not inhibit Congress's ability to review the contents of the evaluations. *Compare* 42 U.S.C. § 7621(a), *with id.* § 7412(n)(1)(B) (requiring EPA to "conduct, and transmit to Congress . . . a study of mercury emissions"). In any event, EPA routinely submits its RIAs to Congress pursuant to the Congressional Review Act. *See* 5 U.S.C. § 801(a)(1)(B)(i) (requiring agencies to submit a "complete copy of the cost-benefit analysis of the rule, if any"). Similarly, Plaintiffs' argument that the lack of labels impairs public discourse, Pltfs.' Opp. at 14, is a red herring. No label is required for the public to discuss the content of EPA's evaluations of employment impacts. All of the RIAs, and most of the other documents submitted with the DeMocker Declaration, are available on EPA's website or other public sources, and they can be reviewed and referred to by any person, member of Congress or otherwise.

In sum, the fact that the documents are not labeled as "Section 321(a)" evaluations is not material to the question of whether they are "evaluations of potential loss or shifts of employment." EPA either has evaluated potential employment impacts, or it has not. Should this Court conclude that EPA has not evaluated potential employment impacts simply because it did not label the documents as "Section 321(a)" evaluations, then judgment should be entered against EPA.

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B. Plaintiffs' Efforts to Expand the Scope of Judicial Review of EPA's Evaluations Should Be Rejected.

As explained in the United States' Summ. J. Mem. [ECF No. 76] at 4, 18-19, and again in the United States' P.O. Mem. [ECF No. 88] at 5-6, the scope of judicial review in a non-discretionary duty case is narrow. It is not the role of the Court to determine, for example, whether EPA considered appropriate factors, applied appropriate methodologies, or made appropriate findings. *See, e.g.*, *Frey v. EPA*, 751 F.3d 461, 469-70 (7th Cir. 2014) (holding that the scope of judicial review in a citizen suit alleging that EPA has failed to perform a non-discretionary duty is limited to deciding whether EPA has performed the duty in question, "not claims regarding the substance of the EPA's decisions, which is a matter of discretion for the agency"), *cert. denied*, 135 S. Ct. 494 (2014);[4] *see also Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987) (affirming "the district court's limited jurisdiction in a citizen suit to order only EPA's performance of non-discretionary duties"). Plaintiffs have neither disputed this limited scope of judicial review nor cited any authority to support a broader scope of review.[5] Nonetheless, Plaintiffs' arguments would require this Court to exceed its limited jurisdiction by engaging in a substantive review of EPA's evaluations.

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[4] *See also Envtl. Def. Fund v. Thomas*, 870 F.2d 892, 899 (2d Cir. 1989) ("The district court has jurisdiction under [42 U.S.C. § 7604], to compel the Administrator to perform purely ministerial acts, not to order the Administrator to make particular judgment decisions."); *Envtl. Def. Fund v. Leavitt*, 329 F. Supp. 2d 55, 63 (D.D.C. 2004) (similar); *Sierra Club v. Whitman*, No. 00-2206, 2002 U.S. Dist. LEXIS 29123, at *11-12 (D.D.C. July 19, 2002) (holding that CAA Section 304(a)(2) "precludes [the court] from assessing the substance of the agency's decision" because, although "the Court has jurisdiction to require that EPA make a determination[,] [q]uite plainly, the Court's jurisdiction does not extend to telling EPA what the determination should be") (citation omitted), *aff'd*, 285 F.3d 63 (D.C. Cir. 2002); *N.Y. Pub. Interest Research Grp. v. Whitman*, 214 F. Supp. 2d 1, 3-4 (D.D.C. 2002) (similar); *Sierra Club*, 130 F. Supp. 2d at 90 ("Notably, the CAA does not allow district courts to address the content of EPA's conduct.").

[5] To the extent that Plaintiffs disagree with the limited scope of review, the issue is a purely legal one that can be decided by this Court on summary judgment. *See New York v. EPA*, 50 F. Supp. 2d 141, 143 (N.D.N.Y. 1999) ("The sole issue for review is whether defendants' Report satisfied the nondiscretionary duty under 404(a) of the [CAA]. The central point of disagreement is the scope of the duty imposed . . . . The resolution of this dispute is a legal matter that revolves around the meaning of [the provision]."); *see also id.* at 144 (resolving this legal issue in EPA's favor by applying *Chevron* deference to EPA's reasonable interpretation) (citations omitted).

Section 321(a) does not define the term "evaluations" or provide any guidance to EPA regarding the scope, content, level of detail, timing, or frequency of such evaluations. Consequently, EPA has discretion in deciding how to perform the evaluations and what information to include in the evaluations. The "substance and manner of achieving" compliance with a non-discretionary duty is to be left "entirely to the EPA." *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986-87 (9th Cir. 1994). Not only is the substance and manner of compliance with Section 321(a) left to EPA, but EPA's interpretation of what is required by Section 321(a) is entitled to deference under *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Plaintiffs attempt to make a fine distinction between an "estimate" and an "evaluation," characterizing the documents upon which EPA relies as "mere estimation." Pltfs.' Opp. at 16.[6] But this is a distinction without difference. The Act does not define either term, and the dictionary definitions of the terms reveal that their meanings are overlapping and similar. *Compare Padilla v. Unum Provident*, No. 03-1444 MCA/WDS, 2005 U.S. Dist. LEXIS 46454, at *17 (D.N.M. May 20, 2005) (noting that the dictionary definition of "evaluate" is "to estimate or ascertain the monetary worth of" or "to examine and judge concerning the worth, quality, significance, amount, degree, or condition of") (internal quotation marks and citations omitted), *with Tutor-Saliba Corp. v. Comm'r*, 115 T.C. No. 1, 15 n.5 (2000) (noting that the dictionary definition of "estimate" is "to judge tentatively or approximately the value, worth or significance of; to determine roughly the size, extent, or nature of; or to produce a statement of the approximate cost of") (citation omitted). Plaintiffs' references to other sections of the Act provide no useful guidance in interpreting Section 321(a). *See* Pltfs.' Opp. at 16-17, n.4 (citing 42 U.S.C. §§ 7403, 7412). Rather, they reveal only that Congress limited EPA's discretion in

[6] Plaintiffs' characterization is wrong in any event. While the employment evaluations in some of the RIAs are brief because EPA determined that the rule in question would have little-to-no impact on employment or because EPA lacked the information necessary to conduct a full analysis, other RIAs contain a robust and detailed analysis and clearly constitute "evaluations" under any reasonable interpretation of the word. *See, e.g.*, DeMocker Decl. Exs. 1-18.

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conducting "evaluations" under other sections of the Act by providing lists of specific details or factors that EPA must consider, requirements notably absent from Section 321(a).

Plaintiffs also argue that Section 321(a) requires EPA to conduct retrospective analyses. They assert that Section 321(a) "explicitly requires 'continuing evaluations' that 'include[e] [sic] . . . reductions in employment' that have *already occurred* to determine whether or not they *were caused* by the Administrator's administration and enforcement of the Act." Pltfs.' Opp. at 17 (emphases added). This bold assertion finds no support in the plain language of the Act. On the contrary, Section 321(a) speaks prospectively of "*potential* loss or shifts of employment which *may result* from administration and enforcement of [the Act]." 42 U.S.C. § 7621(a) (emphases added). Similarly, Section 321(a) refers to investigations of "*threatened* plant closures or reductions in employment," but only "where appropriate." *Id.* (emphasis added). Threatened reductions are, by definition, those that have not yet occurred, and the language "where appropriate" indicates that such investigations are, in any event, discretionary.

Plaintiffs further argue that none of the documents submitted by EPA contain an evaluation of "job losses and shifts caused by EPA's war on coal." Pltfs.' Opp. at 2. Plaintiffs' hyperbolic metaphor aside, Section 321(a) does not require EPA to evaluate potential employment impacts for any particular sector of the economy or any particular industry. Nevertheless, EPA has, in its discretion, evaluated potential employment impacts on the coal industry. Indeed, some of EPA's most robust evaluations of potential employment impacts are in the RIAs accompanying rules that affect the coal industry, which were described in detail in the United States' Summ. J. Mem. [ECF No. 76] at 6-12.[7] In fact, one of the documents submitted by EPA, and all but ignored by Plaintiffs in their response, was a broad-scale evaluation of the impact of the Act's Title IV Acid Rain Program on employment in the coal industry. *See*

[7] *See, e.g.*, DeMocker Decl. Ex. 4 (RIA for the Final MATS Rule) at 6-1 to 6-12 & app. A (assessing the potential employment impacts on the coal-mining sector, estimating the effect on coal-mining jobs resulting from changes in overall demand for coal at electric utilities, and projecting coal-mining employment impacts by region); DeMocker Decl. Ex. 1 (RIA for the proposed Clean Power Plant Rule) at 6-23 to 6-27 (offering a quantitative analysis of potential employment impacts, including specific estimates for the electric-power industry and coal and natural-gas sectors).

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DeMocker Decl. Ex. 41 (*Impacts of the Acid Rain Program on Coal Industry Employment*). The report used productivity estimates for coal mining in different portions of the country to translate changes in coal demand into changes in coal-industry employment, concluding that by 2010, Title IV could result in "a gross loss of approximately 7,700 job slots" with a net loss of "4,100 coal miner job slots because 3,600 new job slots would be created." *Id.* at i.

Plaintiffs' assertion that the evaluations emphasize job creation but "hardly if ever estimate job losses, and never investigate . . . 'threatened plant closures or reductions in employment,'" is also incorrect. Pltfs.' Opp. at 11. While EPA's employment evaluations often project an increase in jobs, EPA provides projections of potential job losses and plant closures when supported by the available data and modeling. As just one example, in the RIA for the proposed MATS rule, in addition to projecting 9,000 net job gains in the electric utility sector and an increase of approximately 31,000 one-time job years in the environmental protection sector, EPA recognized a potential decrease of 5,630 job-years, as well as employment shifts from changes in fuel use, including a loss of 2,200 job-years in the coal sector. DeMocker Decl. Ex. 3 at 9-13 to 9-16, tbl. 9-6.[8] In the final MATS rule, EPA evaluated the potential for plant closures, stating that "[e]mployment changes due to incremental coal plant retirements were estimated by first identifying the retiring coal units from EPA's modeling results." DeMocker Decl. Ex. 4 at 6A-8.

Plaintiffs discount other evaluations because they were performed by or with the assistance of contractors. Pltfs.' Opp. at 11-12. Once again, Plaintiffs attempt to graft a requirement into Section 321(a) that does not exist. Section 321(a) does not prohibit EPA from

[8] *See also* DeMocker Decl. Ex. 15 (RIA for Cross-State Air Pollution Rule) at 371-90 (projecting overall job gains in the affected electricity sector and in the environmental protection sector, but recognizing a potential decrease of 2,710 job-years from "Retirements of Generating Units," and a net loss of 990 job-years from changes in fuel use, including an accounting for losses of job years in the coal sector); DeMocker Decl. Ex. 1 (RIA for the proposed Clean Power Plant Rule) at 6-23 to 6-27 (projecting initial increases in power plant employment, but expressly recognizing that the administration and enforcement of the rule would result in reductions in the need for additional capacity and fuel supplies, including "the loss of operating and fuel-related jobs arising from the retirement of existing coal generating capacity," and estimating a loss of 10,900 to 18,000 job-years per year in the coal-mining industry, depending on the year in question and the standards finalized).

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using contractor support to conduct employment evaluations. Indeed, EPA often relies upon contractor support to carry out many of the Agency's duties and responsibilities under the Act. *See* Federal Acquisition Regulation, Part 7.5, which provides that EPA is authorized to use contractors for functions that are not "inherently governmental," including "[s]ervices that involve or relate to the development of regulations." FAR 7.503(d)(4) (2006).

In sum, Plaintiffs' efforts to impose substantive requirements on EPA's performance of the evaluations are inappropriate because the substance of the evaluations is not subject to judicial review. Even if this Court were to engage in a substantive review, EPA has discretion to decide how to conduct its employment evaluations, and EPA's reasonable interpretation of Section 321(a) is entitled to deference under *Chevron* and must be upheld.

C. The Documents Submitted by EPA Evaluate the Potential Employment Impacts of EPA's Enforcement of the Act.

Plaintiffs argue that the documents relied upon by EPA do not evaluate potential loss or shifts of employment that may result from EPA's enforcement of the Act. Pltfs.' Opp. at 2, 18-20. Plaintiffs interpret Section 321(a) as requiring an evaluation of potential job losses and shifts prior to each enforcement action and a retrospective evaluation of actual impacts following each enforcement action. *See id.* at 20 ("EPA has provided no documents either prospectively or retrospectively evaluating the job losses caused by the design and prosecution of EPA's signature enforcement initiative . . . ."). Plaintiffs' argument fails for several reasons.

First, the documents upon which EPA relies in its Motion for Summary Judgment *do* evaluate potential job losses and shifts that may result from EPA's enforcement of its regulations. EPA explained that the employment evaluations in the RIAs are based on the assumption that the regulations will be enforced in the absence of voluntary compliance. Summ. J. Mem. [ECF No. 76] at 7 n.5 ("When EPA conducts an employment analysis as part of an RIA, the analysis necessarily assumes that the rule in question will be enforced. Absent compliance, or enforcement in the absence of compliance, a regulation would have no impacts at all."). Although Plaintiffs attempt to dismiss EPA's explanation as "specious" and "farfetched," Pltfs.'

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Opp. at 18, it is based in sound logic and beyond refute, which is likely why Plaintiffs can do nothing more than cast aspersions with colorful characterizations. When EPA conducts an employment evaluation, EPA attempts to determine the number of facilities that will be impacted by the rule and presumes that those facilities will comply with its requirements, either voluntarily or through an enforcement action. For example, in the RIA for the Cross-State Air Pollution Rule, EPA determined that "roughly 3,700 fossil-fuel-fired units . . . located at nearly 1,100 facilities" would be subject to the rule's requirements. DeMocker Decl. Ex. 15 at 245. To the extent that some of those facilities do not voluntarily comply with the rule and EPA exercises its enforcement authority to compel compliance, the employment impacts that may result from that enforcement action have already been evaluated in the RIA supporting the rule.[9]

Second, contrary to Plaintiffs' assertion, Section 321(a) does not require EPA to evaluate potential employment impacts for *every* enforcement action. Instead, the Act gives EPA discretion to decide when, how often, and in what level of detail to conduct such evaluations. Plaintiffs acknowledge that "EPA's enforcement of the [Act] involves the exercise of enormous amounts of discretion," Pltfs.' Opp. at 19-20, and nothing in Section 321(a) limits that discretion. Plaintiffs are again attempting to graft specific requirements onto the general language of Section 321(a).

Third, the centerpiece of Plaintiffs' argument is that EPA never conducted an evaluation of employment impacts for a 1978 regulation that EPA has recently enforced against certain coal-fired power plants. *See id.* at 19. Yet Plaintiffs' focus on a 37-year old regulation is completely inconsistent with Plaintiffs' own insistence that documents prepared prior to 2009 are irrelevant. Plaintiffs specifically objected to EPA's reliance on evaluations prepared in 1993, 1997, 1999, and 2001 as "irrelevant" because they are "outside the time period [of] this litigation." *Id.* at 12, 13. Moreover, as discussed above, Section 321(a) does not require EPA to

[9] *See also* DeMocker Decl. Ex. 4 (RIA for final MATS rule) at 3-3 ("The rule affects roughly 1,400 EGUs: approximately 1,100 existing coal-fired generating units and 300 oil-fired steam units, should those units combust oil.").

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conduct retrospective analyses to evaluate actual employment impacts. Plaintiffs' enforcement arguments are nothing more than another attack on the substance of EPA's evaluations, which is beyond the scope of judicial review.

III. If EPA Has Not Performed the Duty in Section 321(a), Then Judgment Should Be Entered Against EPA.

The documents submitted in support of EPA's Motion for Summary Judgment demonstrate that the Agency has performed the duty in Section 321(a) and is therefore entitled to summary judgment in its favor. This Court can answer the question of whether EPA has performed the employment evaluations required by Section 321(a) simply by reviewing the documents submitted with the DeMocker Declaration. Either the documents constitute "evaluations of potential loss or shifts of employment," or they do not. Should this Court conclude that the documents do not constitute performance of the duty, then summary judgment should be entered against EPA.

Plaintiffs resist the entry of judgment in their favor, preferring to have the parties engage in a completely unnecessary, extended period of discovery to explore facts that are not in dispute on issues that are not relevant.[10] Plaintiffs improperly rely upon an unpublished opinion[11] to argue that "granting summary judgment prior to completion of discovery is inappropriate." Pltfs.' Mem. at 6 (citing *Phillips v. Gen. Motors Corp.*, 911 F. 2d 724 (4th Cir. 1990)).[12] Moreover, the Fourth Circuit discussed a number of cases adjudicating requests for Rule 56

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[10] Plaintiffs' motives are laid bare in the inconsistency between their argument that the Court should defer ruling on the Motion for Summary Judgment until completion of fact and expert discovery and their argument that the documents submitted by EPA cannot, as a matter of law, constitute compliance with Section 321(a). Pltfs.' Opp. at 2, 7-14. If the latter is the case, then judgment should be entered against EPA and in favor of Plaintiffs because EPA has certified that it has no further evidence to submit in support of its argument that it has performed the evaluations described in Section 321(a).

[11] Local Rule 32.1 for the Court of Appeals for the Fourth Circuit provides that: "Citation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case."

[12] Although Plaintiffs cite to the Federal Reporter, the unpublished opinion is not printed in the Federal Reporter. Rather, the opinion from which Plaintiffs quote is available in Westlaw as 1990 WL 117981.

discovery in that case, stating that "[r]equests for broad additional discovery or 'fishing expeditions' will not suffice." *Phillips*, No. 89-2210, 1990 WL 117981, at *4 (Aug. 16, 1990) (citation omitted). Plaintiffs also cite *Patrick v. PHH Mortg. Corp*., 998 F. Supp. 2d 478, 484 (N.D. W. Va. 2014) as cautioning against summary judgment "before discovery." Pltfs.' Mem. at 6-7. But that case granted summary judgment on a number of claims and cited a case "denying a Rule 56(d) request because it amounted to a 'fishing expedition.'" *Patrick*, 998 F. Supp. 2d at 485, 486-95 (citations omitted). In any event, there has been sufficient discovery in this case to allow for the entry of summary judgment. EPA has provided 53 documents that demonstrate its performance of the duty in Section 321(a) and has certified that it has no further evidence to support its Motion for Summary Judgment.

Plaintiffs argue that "EPA cannot[] . . . move for summary judgment on behalf of Plaintiffs," that "EPA bizarrely requests that this court prematurely enter judgment against EPA if its motion for summary judgment is denied," and that "EPA cannot force the issue by fiat." Pltfs.' Opp. at 2, 20. However, this Court has full authority to enter summary judgment in favor of the non-moving party when there is no genuine issue of material fact and the nonmovant is entitled to judgment as a matter of law. As this Court recently held:

> A court hearing a summary judgment motion has the power to grant summary judgment *sua sponte* in favor of the nonmovant when no genuine issue of material fact exists and the nonmovant is entitled to judgment as a matter of law. . . . In determining whether entry of *sua sponte* summary judgment in favor of a nonmovant is appropriate, the key inquiry is whether the losing party was on notice that he or she had to marshal the evidence necessary to withstand summary judgment.

Pancakes, Biscuits & More, LLC v. Pendleton Cnty. Comm'n, 996 F. Supp. 2d 438, 444 (N.D. W. Va. 2014) (Bailey, J.) (citations omitted). Here, EPA is "on notice that [it] had to marshal the evidence necessary to withstand summary judgment" and has presented all of the evidence upon which it relies to support its Motion for Summary Judgment. *Id*. at 444. Thus, if the Court finds that the documents presented by EPA do not demonstrate performance of the evaluations described in Section 321(a), *sua sponte* entry of summary judgment against EPA and in favor of Plaintiffs would be fully justified and appropriate.

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Plaintiffs not only resist the entry of summary judgment in their favor, but they continue to insist that a ruling on the scope of injunctive relief to which they may be entitled is premature. Pltfs.' Opp. at 20. This is plainly wrong. If the Court rules in favor of EPA on the merits, then the issue of the scope of injunctive relief will be moot. If, however, the Court rules in favor of Plaintiffs on the merits, then the issue will be ripe and should be determined by the Court as a matter of law. The issue has been fully briefed by the parties. *See* Mem. in Supp. of United States' Mot. to Dismiss Compl. and Mot. to Strike Prayer for Injunctive Relief [ECF No. 35] at 22-25; Plaintiffs' Mem. in Opp'n to Mot. to Dismiss Compl. [ECF No. 38] at 21-22; United States Reply Mem. in Supp. of Mot. to Dismiss [ECF No. 39] at 12-15; United States' Summ. J. Mem. [ECF No.76] at 19-22; United States' P.O. Mem. [ECF No. 88] at 13-16.

CONCLUSION

For the foregoing reasons, EPA requests that summary judgment be entered in its favor on grounds that it has performed the evaluations described in Section 321(a) of the Act. Alternatively, if the Court finds that EPA has not performed the evaluations, EPA requests that judgment be entered against it and that the Court order EPA to perform the evaluations. In either event, this case should be concluded.

DATED: May 21, 2015

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

MURRAY ENERGY CORPORATION, et al.,

Plaintiffs,

v. Civil Action No. 5:14-CV-39

Judge Bailey

GINA McCARTHY, Administrator,
United States Environmental Protection Agency,
in her official capacity,

Defendant.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Since 2009, the Administrator has pursued an economic agenda wholly apart from the purpose of the Clean Air Act that seeks to transform the nation's energy system in order to foster new industries and stimulate overall economic growth, sacrificing existing capital and jobs on the theory that these losses will be offset by other gains. In pursuit of her economic agenda, the Administrator has pushed her statutory authority to the brink at the repeated expense of the nation's coal industry. The Administrator ceaselessly touts the purported economic benefits of this unprecedented war on coal through various economic and cost-benefit analyses, including, for example, those incorporated into some regulatory impact analyses. But while she constantly credits her regulatory actions with creating jobs, the Administrator has consistently refused to take responsibility for the job losses and shifts she is causing in the coal industry. Plaintiffs brought this suit to make the Administrator take responsibility.

In response, the Administrator has vigorously denied any duty to evaluate job losses, denied that her failure to conduct these evaluations is harming Plaintiffs, and stonewalled Plaintiffs' efforts to obtain discovery necessary to prove her failure, demonstrate the resulting injury to Plaintiffs, and justify appropriate injunctive relief. Now, the Administrator claims that a handful of documents that have, on their face, nothing to do with Section 321(a), and a questionable declaration from an employee whom the Administrator will not allow Plaintiffs to depose, entitle her to summary judgment and a finding that EPA has, despite its own statements to the contrary, been complying with Section 321(a) all along.

EPA's motion does not come close to satisfying the requirements for summary judgment. EPA's brief leaves unresolved numerous genuine issues of material fact, including how EPA purports to be complying with Section 321(a), how if at all these documents relate to any such effort to comply, and what documents, if any, actually are purported Section 321(a) evaluations, EPA also entirely fails to reconcile its argument that EPA has been continuously evaluating job losses and shifts with its repeated statements over the years that it has no obligation to do so and

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has never done them. As explained in Plaintiffs' motion to compel, it is impossible to properly answer these question before the end of expert discovery, which will not conclude for several months, but EPA is clearly not entitled to summary judgment until they are resolved.

Setting aside the significant factual issues in this case, EPA would not be entitled to judgment as a matter of law based on the limited evidence EPA has offered to the Court. None of the documents purport to be a Section 321(a) evaluation. None of the documents contain an evaluation of job losses and shifts caused by EPA's war on coal. And none of the documents even mentions job losses and shifts caused by EPA's enforcement of the Act.

Finally, EPA argues that, if it is not entitled to summary judgment, the result should be summary judgment for Plaintiffs. To the extent EPA is representing to this Court that it will rely on no other evidence at trial and will not be asserting any of the affirmative defense raised in its Answer Doc. 49, Defendant is free to do so. EPA cannot, however, move for summary judgment on behalf of Plaintiffs. EPA's argument for summary judgment for Plaintiffs is also incorrect, since it relies on the erroneous assumption that this Court has no authority to provide any of the relief requested by Plaintiffs other than a declaration that EPA must comply with the law. EPA has already moved to strike Plaintiffs' other requested relief on the grounds raised in its motion for summary judgment, and this Court has already denied that motion. While it is true this Court's opinion found that the issue of the proper scope of injunctive relief was not yet ripe, EPA has failed to identify any changed circumstance that renders the issue ripe today. The appropriate scope of injunctive relief remains a fact-specific issue and should be addressed only after all of the evidence is before the Court and Plaintiffs.

STATEMENT OF THE CASE

This case was filed over one year ago by twelve coal companies seeking to compel the Administrator to comply with her nondiscretionary duty to conduct continuing evaluations of the "potential loss or shifts of employment which may result from the administration or enforcement of the [Clean Air Act] and applicable implementation plans, including where appropriate,

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investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement." 42 U.S.C. § 7621(a) ("Section 321(a)"). Consistent with the requirements of the Clean Air Act's citizen suit provision (42 U.S.C. § 7604), Plaintiffs notified Defendant of their intent to file suit, advising the Administrator of her nondiscretionary duty to comply with Section 321(a), of Plaintiffs' belief that the Administrator was not complying with this mandatory duty, and the evidence showing this failure to comply. Doc. 82-4. Once 60 days had passed without a response, Plaintiffs filed this suit again highlighting EPA's failure to comply and citing several statement of the administrator and others showing that EPA was in violation of its nondiscretionary duty. Docs. 1 and 31.

EPA moved to dismiss, claiming sovereign immunity, and when this Court denied EPA's motion, EPA moved for clarification. Docs. 34, 35 and 50. After this Court denied both motions, EPA moved to dismiss a second time, claiming that Plaintiffs lacked standing. Docs. 59 and 60. This Court denied that motion too. Doc. 71. Now, after two unsuccessful motions to dismiss and a motion for clarification, in the midst of fact discovery and before expert discovery has even begun, EPA has filed the instant motion for summary judgment, claiming that 53 documents and a declaration describing them demonstrate that the Administrator has performed the continuing evaluations that are required by Section 321(a) of the Clean Air Act. Docs. 75 and 76.

EPA has refused to allow Plaintiffs to conduct any discovery on the documents on which it relies and has refused to make its declarant, or anyone else, available for a deposition while its motion for summary judgment remains pending. Plaintiffs therefore moved to compel discovery and hold briefing on EPA's motion for summary judgment in abeyance under Fed. R. Civ. P. 56(d) pending completion of fact and expert discovery. Docs. 81 and 82. These motions remain pending, with EPA's response due next week.

Plaintiffs continue to request that this Court hold briefing in abeyance pending completion of fact and expert discovery. Since outstanding genuine issues of material fact and EPA's lack of entitlement to judgment as a matter of law preclude summary judgment for EPA, however, Plaintiffs submit this response to the United States' motion for summary judgment to

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emphasize that, even without further discovery, it would be also be proper to deny EPA's motion for summary judgment.

STATEMENT OF THE FACTS

At this stage of the case, not all facts required for resolution of the case are available. None of the facts currently available, however, support EPA's new argument that it has been complying with Section 321(a) all along. That is probably why EPA's memorandum in support of a motion for summary judgment has almost no statement of facts, stating in full that "The Declaration of James DeMocker, submitted with EPA's Motion for Summary Judgment as Exhibit A, identifies the documents upon which EPA relies to demonstrate its performance of the duty set forth in Section 321(a). All exhibit references in this Memorandum refer to the exhibits as identified in the DeMocker Declaration." Doc. 76 at 9. This is hardly helpful, since it establishes only one fact, namely that 53 documents exist, and neither the declaration nor the documents it "identifies" actually contains any discussion of, or reference to, Section 321(a). EPA simply submits the documents and leaves it up to the Court to decide what they mean.

Since EPA identified many of these documents to Plaintiffs in a supplemental disclosure received the day before it filed for summary judgment, and since EPA has refused to cooperate in discovery, Plaintiffs have not had the opportunity to ask any questions about these documents, the origins of these documents, what these documents were designed to do, or how EPA has in fact been using these documents, among other necessary questions. Even for those documents that were previously identified in EPA's initial disclosures, EPA has refused to answer any questions about them other than acknowledging their existence, and has refused to produce any documents that would help place them in context or help explain their meaning and use by the agency, stating repeatedly only that they "demonstrate its performance of the evaluations described in Section 321(a) of the Clean Air Act." Doc. 82-4 at 4–6. EPA has even refused to answer the simple question of whether any of the documents were intended at the time they were created to comply with Section 321(a). *Id.* at 6–7.

EPA has not, or cannot, provide a description of the manner in which the agency is

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purportedly performing Section 321(a) evaluations or who at EPA is charged with aiding her in complying with Section 321(a). Response, Doc. 82-4 at 4–6. EPA has also flatly refused to allow plaintiffs to depose anyone at EPA in order to question them about the documents, refusing to allow plaintiffs to depose even the declarant James DeMocker regarding the documents that EPA claims he has "identifie[d]." Doc. 76 at 9.

Outside of this litigation, EPA has been far more forthcoming regarding the extent to which the agency is complying with Section 321(a). In June of 2013, EPA reported in a letter signed by the declarant, James DeMocker, that the agency was not "able to find any documents pertaining to [a] request" under the Freedom of Information Act requesting "all draft, interim final and final reports and/or evaluations prepared by the U.S. Environmental Protection Agency or its contractor(s) pursuant to section 321 of the Clean Air Act." Letter from James DeMocker, Acting Director, Office of Policy Analysis and Review, United States Environmental Protection Agency, to William Kovacs, United States Chamber of Commerce (June 14, 2013) (P. Ex. 1). And both before and after this Court's determination that Section 321(a) must be complied with, EPA officials have testified to Congress that the agency does not believe that Section 321(a) requires the agency to do anything. Enclosure with Letters from Gina McCarthy, Assistant Administrator, EPA to Representatives Barton and Walden, at 1, 3 (January 12, 2010) (P. Ex. 3) (stating that "EPA has not interpreted CAA section 321 to require EPA to conduct employment investigations in taking regulatory actions," and that such evaluations would have "limited utility"); Questions for the Record, Gina McCarthy Confirmation Hearing, Environment & Public Works Committee, at 17 (April 11, 2013) (P. Ex. 4) ("EPA has not interpreted this provision to require EPA to conduct employment investigations in taking regulatory actions."); Questions for the Record, Janet McCabe Confirmation Hearing, Environment & Public Works Committee, at 28–29 (Oct. 30, 2014) (P. Ex. 2) ("In keeping with congressional intent, EPA has not interpreted this provision to require EPA to conduct employment investigations in taking regulatory actions.").

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STANDARD OF REVIEW

"Summary judgment . . . should be granted only where it is perfectly clear that there is no dispute about either the facts of the controversy or the inferences to be drawn from such facts." *Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4th Cir. 1979). "[E]ven though there may be no dispute about the basic facts, still summary judgment will be inappropriate if the parties disagree on the inferences which may reasonably be drawn from those undisputed facts." *Id.* "It is well settled that summary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *Phoenix Sav. & Loan Inc. v. Aetna Casualty & Surety Co.*, 381 F.2d 245, 249 (4th Cir. 1967); *see also Long v. M&M Transp., LLC*, 44 F. Supp. 3d 636, 642 (N.D.W.V. 2014) ("A court should deny summary judgment 'if the evidence is such that conflicting inferences may be drawn therefrom, or if reasonable men might reach different conclusions.'" (quoting *Phoenix Sav. & Loan, Inc.*, 381 F.2d at 249).

This Court "must assess the evidence as forecast in the documentary materials . . . in the light most favorable to the party opposing the motion." *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). The opposing party is "entitled . . . to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from it drawn in his behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence so considered." *Id.*; *Metric/Kvaerner Fayetteville v. Fed. Ins. Co.*, 403 F.3d 188, 197 (4th Cir. 2005) (quoting same).

The fact that EPA filed its motion for summary judgment in the middle of discovery is also relevant. "As a general rule, granting summary judgment prior to the completion of all discovery is inappropriate." *Phillips v. General Motors Corp.*, 911 F.2d 724 (1990) (emphasis added). Furthermore, a court cannot render summary judgment while the Rule 56(d) motion and the related motion to compel remain pending. *Id.*; *cf. Patrick v. PHH Mort. Corp.*, 998 F. Supp.

2d 478, 484 (N.D. W.Va. 2014) ("Summary judgment before discovery forces the non-moving party into a fencing match without a sword or mask.") (quotation omitted).

LAW AND ARGUMENT

I. Summary Judgment Should Be Denied Because Genuine Issues of Material Fact Remain.

EPA claims that Plaintiffs' allegation that EPA has failed to conduct the evaluations required by Section 321(a) is "demonstrably false," yet EPA's "demonstration" does nothing but raise more questions. Doc. 76 at 5. Nowhere in its declaration or the documents it references does EPA cite or discuss Section 321(a) of the Clean Air Act, explain how EPA has determined to meet its obligations under Section 321(a), or provide any evidence that the Administrator is complying with Section 321(a), let alone explain how EPA's regulatory impact analyses, EPA's compliance with other Clean Air Act provisions, or a single white paper could possibly be the result of the Administrator's performance of evaluations required by Section 321(a) of the Act.

EPA moved for summary judgment based solely on these documents and James DeMocker's declaration briefly summarizing them. But EPA has provided no evidence to support its repeated and crucial factual assertion that these documents "demonstrate that EPA has evaluated and is continuing to evaluate the potential loss or shifts of employment that may result from the administration and enforcement of the [Clean Air] Act." Mem. in Supp., Doc. 76 at 1.

The DeMocker declaration cagily avoids any reference to Section 321(a). The documents it summarizes similarly do not identify themselves as evaluations required by Section 321(a). Indeed, they identify a number of other statutory provisions and executive orders, including Executive Order 13563, the Unfunded Mandates Reform Act (UMRA), and the cost-benefit analysis requirements of 42 U.S.C. § 7612; *see, e.g.*, Exhibit 30, Doc. 78-5 at 5-3 and 5-5 (discussing Executive Order 13563 and UMRA); Exhibit 44, Doc. 79-4 at 1 (discussing Section 812 of the 1990 Amendments to the Clean Air Act, which have been codified in 42 U.S.C. § 7612). Notably, however, the documents do not reference Section 321(a) at all and these omissions are not corrected by any other evidence cited by EPA. Thus, EPA has "failed to fulfill

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its initial burden of demonstrating what is a critical element in this aspect of the case," whether the documents it relies on have any relation to EPA complying with Section 321(a). *Adickes v. Kress & Co.*, 398 U.S. 144, 158 (1970). These "unexplained gaps in the materials submitted" by EPA preclude summary judgment in its favor. *Id.*

Summary judgment is also not appropriate because EPA "fails to make a full disclosure of the facts" relevant to its purported performance of Section 321(a) evaluations. 10A WRIGHT & MILLER § 2726 at 454. EPA was asked by interrogatory to describe the manner in which the agency complies with Section 321(a) if it contends that is performing the evaluations, and EPA refused to provide a description. Doc. 82-4 at 4–6. EPA refused to identify even one document in which the Administrator has provided instructions or directions for the performance of EPA's Section 321(a) duty. Doc. 82-4 at 16. And EPA refused to provide any of EPA's documents discussing or referencing Section 321(a). Doc. 82-4 at 28.

When asked to whom if anyone the Administrator had assigned the responsibility to perform the duty imposed by Section 321(a), EPA responded merely that certain individuals would be "rel[ied] on to authenticate documents and to confirm that the documents demonstrate its performance of the evaluations." Doc. 82-4 at 14. Compounding matters, EPA has since refused to make any of those individuals available for depositions. Motion, Doc. 82 at 4; Emails, Doc. 82-2; Declaration, Doc. 82-3. EPA even refuses to allow Plaintiffs to take a Rule 30(b)(6) deposition or to permit Plaintiffs to depose EPA's declarant, James DeMocker. *Id.*

As for the documents on which EPA now relies, EPA was asked to identify each purported evaluation and to "state whether the evaluation was intended, at the time it was conducted, to comply with Section 321(a) of the Clean Air Act." EPA refused to state whether any of the documents were intended to comply with Section 321(a). Doc. 82-4 at 6–7. All of these withheld facts and the refusal to cooperate in discovery preclude summary judgment in EPA's favor.

A great deal of evidence also contradicts EPA's unsupported factual claim that it has been conducting Section 321(a) evaluations, giving rise to credibility issues and rendering

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summary judgment inappropriate. *See* Advisory Committee Note to 1963 Amendment to 56(e) ("Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate."); 10A WRIGHT & MILLER § 2713.1 at 342 ("When there is an issue whether the testimony of an affiant or deponent would be credible if presented at trial, the court must deny summary judgment and leave that question to be resolved by the fact finder.").

At the outset, circumstantial evidence renders EPA's claim of performance implausible. All available evidence shows EPA has not and still does not believe it is required to conduct any evaluations at all. As explained in the complaint, prior to this litigation EPA consistently denied that Section 321(a) requires EPA to evaluate job losses and shifts.[1] After this Court's denial of EPA's first dispositive motion, Plaintiffs asked EPA by interrogatory when if ever the Administrator has subsequently determined that she must conduct the continuing evaluations, and EPA refused to answer. Doc. 82-4 at 12–13. In response to a request for admission, EPA denied that it is required to conduct evaluations and admitted only that "the Court decided that EPA has a mandatory duty." Doc. 82-4 at 50. And during the pendency of this litigation EPA reiterated to Congress its position that Section 321(a) does not require evaluations of job losses and shifts caused by EPA's administration and enforcement of the Clean Air Act.[2] Why would an agency so strenuously and consistently object to assertions by Members of Congress, this Court, and others that EPA has a job to do if the agency is doing that very job? The most plausible reason that an agency would disclaim a statutory obligation is that the agency is not

[1] *See e.g.*, Enclosure with Letters from Gina McCarthy, Assistant Administrator, EPA to Representatives Barton and Walden, at 1, 3 (January 12, 2010) (P. Ex. 3) (stating that "EPA has not interpreted CAA section 321 to require EPA to conduct employment investigations in taking regulatory actions," and that such evaluations would have "limited utility"); Questions for the Record, Gina McCarthy Confirmation Hearing, *Environment & Public Works Committee*, at 17 (April 11, 2013) (P. Ex. 4) ("EPA has not interpreted this provision to require EPA to conduct employment investigations in taking regulatory actions.").

[2] Questions for the Record, Janet McCabe Confirmation Hearing, *Environment & Public Works Committee*, at 28–29 (Oct. 30, 2014) (P. Ex. 2) ("In keeping with congressional intent, EPA has not interpreted this provision to require EPA to conduct employment investigations in taking regulatory actions.").

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doing the job. When viewed as they must be in the light most favorable to the non-movant, these repeated disclaimers contradict EPA's unsupported factual assertion that the documents are the result of EPA performing its Section 321(a) evaluations.

Direct evidence corroborates the circumstantial evidence showing EPA has not complied. In June of 2013, EPA reported in a letter signed by the declarant, James DeMocker, that the agency was not "able to find any documents pertaining to [a] request" under the Freedom of Information Act requesting "all draft, interim final and final reports and/or evaluations prepared by the U.S. Environmental Protection Agency or its contractor(s) pursuant to section 321 of the Clean Air Act." Letter from James DeMocker, Acting Director, Office of Policy Analysis and Review, United States Environmental Protection Agency, to William Kovacs, United States Chamber of Commerce (June 14, 2013) (P. Ex. 1).

As for the documents themselves, EPA's motion principally relies on several regulatory impact analyses prepared alongside its major rules pursuant to various other statutes and executive orders. These documents are clearly not Section 321(a) evaluations. DeMocker's 2013 letter reporting that EPA had no Section 321(a) evaluations specifically referenced and distinguished the employment discussions in regulatory impact analyses from the Section 321(a) evaluations requested under FOIA. As he explained, while "EPA performs detailed regulatory impact analyses . . . for each major rule," EPA could not "find any" of the evaluations required by Section 321(a). *Id.* (P. Ex. 1). The Administrator, Gine McCarthy and the Acting Assistant Administrator for the Office of Air and Radiation, Janet McCabe, have both made the very same distinction between Section 321(a) evaluations and RIAs. *See* Questions for the Record, Janet McCabe Confirmation Hearing, Environment & Public Works Committee, at 28–29 (Oct. 30, 2014) (P. Ex. 2); Questions for the Record, Gina McCarthy Confirmation Hearing, Environment & Public Works Committee, at 17 (April 11, 2013) (P. Ex. 4). These statements clearly contradict EPA's unsupported assertion that these same analyses demonstrate that EPA's is complying with Section 321(a).

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As discussed above, the 53 documents explicitly identify executive orders and statutes that they satisfy, and none cite or discuss Section 321(a). Most explicitly state that an evaluation of jobs does *not* fall within the scope of the standard analysis. *See, e.g.*, Doc. 77-1 at ES-25, and, while some of EPA's exhibits purport to go beyond the standard economic analysis, they generally include nothing more than projected net employment impacts, not the evaluations of job loss and shits required by Section 321(a). *See, e.g.*, *id.* at 6-1. Primarily, these limited employment discussions speculate that various jobs will be *created* as a result of a new regulation. *See, e.g., id.* They hardly if ever estimate job losses, and never investigate the "threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement," described by Section 321(a) or otherwise provide a "second look at final agency action when one can calculate the damage (or lack thereof) to employment and the economy." Opinion, Doc. 71 at 16.

Apart from the regulatory impact analyses in Exhibits 1–39, EPA relies on only one document prepared by EPA within the time period covered by this litigation, Exhibit 40. The most cursory of examinations of this white paper reveals that it is not a Section 321(a) evaluation. Rather, it is merely an unsigned document that "responds to a request" from two Democratic Congressman "to highlight relevant findings from the economics literature on the connection between environmental regulation . . . and employment and economic growth." Doc. 78-15 at 2. The white paper summarizes various studies — mostly by economists and not EPA — in order to assist EPA's supporters in Congress. Indeed, in the section on "Impacts of the Clean Air Act on Employment", the white paper does nothing more than include excerpts from the conclusions of two non-EPA studies and cite a third non-EPA study in a footnote. *Id.* at 3–4. The other sections of the paper do not evaluate job losses and shifts.[3] The lack of any reference to Section 321(a) and the omission of any evaluation *by EPA* of job losses and shifts contradicts

[3] The other sections of the white paper highlight the purported benefits of regulation and downplay concerns that the costs of environmental regulation will "drive manufacturing overseas." *Id*. at 1–3 (touting improvements for public health and economic growth); *id*. at 4–6 (touting increases in environmental control jobs); *id*. at 7–9 (downplaying concerns over international competitiveness).

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the claim by EPA's counsel that in this white paper EPA "evaluated whether job losses or shifts result from EPA's programmatic administration and enforcement of the Act" and that it "demonstrate[s] [EPA's] performance of the evaluations described in Section 321(a) of the Clean Air Act." Doc. 76 at 4, 13.

The only other documents EPA points to as evaluations were prepared in 1993, 1997, 1999, and 2001 and are therefore irrelevant to whether EPA over a decade and a half later is performing "continuing evaluations" required by Section 321(a). Moreover, the documents themselves refute the claim that they are documents that "demonstrate [EPA's] performance of the evaluations described in Section 321(a) of the Clean Air Act." *Id.* at 4.

Exhibits 42 and 44, identify themselves as reports required by a separate statutory obligation in the Clean Air Act, Section 312, not the Section 321(a) at issue in this litigation. Doc. 79-2 at 13; Doc. 79-4 at 4. Furthermore, as explained in opposition to EPA's first dispositive motion, these reports do not evaluate job losses and shifts. Doc. 38 at 16–17 n.11. Section 312 reports are required to consider the "effects of . . . standard[s] on employment", not the "loss or shifts of employment" that are caused by her administration and enforcement of the Act. 42 U.S.C. § 7612. The Section 312 provision does not cover enforcement policies and it requires only an analysis on net employment, not losses and shifts in employment. And as a factual matter, the Section 312 reports do not estimate job losses at all. The reports ignore "indirect impacts" from the "costs" imposed by the Clean Air Act that "would include changes in employment." Doc. 79-4 at iii; *see also* Doc. 77 at 25–24 (misleadingly describing the statement acknowledging that the Section 312 reports ignore changes in employment as "EPA acknowledg[ing] that changes in employment constitute an indirect impact of compliance").

Exhibit 43 contains an unambiguous disclaimer that flatly refutes the claim that it is an evaluation conducted by the Administrator or EPA: "[T]his report has neither been reviewed nor approved by the U.S. Environmental Protection Agency for publication as an EPA report. The contents do not necessarily reflect the views or policies of the U.S. Environmental Protection Agency . . . ." Doc. 79-3 at 3. Exhibit 45 is an update to this non-EPA report, and while it does

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not include the same disclaimer as its predecessor, it explains that it merely "extends" the "earlier work" and does not anywhere indicate that it was reviewed or approved by EPA prior to its publication or that EPA subsequently adopted this report as its own. Doc. 79-5 at 6. There is therefore an obvious factual dispute as to the relationship between EPA and these two documents. Furthermore, like the Section 312 reports, both studies utilize a computable general equilibrium model which assumes full employment. *See* Doc. 77-18 at 8-22, 8-24 ("Computable general equilibrium (CGE) models . . . lack involuntary unemployment. . . . [T]hese models may not be appropriate for measuring effects of a policy on unemployment . . . . CGE models [are] not useful for looking at changes in overall employment: overall levels are likely to be premised on full employment."); *see also* Letter from Bob Perciasepe, Acting Administrator, EPA to Sen. David Vitter, at 2 (May 1, 2013) (P. Ex. 5) ("The EMPAX-CGE model was neither designed nor peer-reviewed to address whole-economy employment impacts of regulations."). For this same reason, Exhibit 53 Doc. 80-3, which is a transmittal of charge to evaluate EPA's economy-wide modeling, is irrelevant. The discussion in Exhibit 43 regarding employment that is quoted by the DeMocker declaration is, like the rest of the document, divorced entirely from the real world operation of labor markets and is only relevant to a projection of comparative sector growth, not job losses and shifts caused by EPA's actions. Doc. 77 at 25 (quoting Doc. 79-3 at 4.12).

The remaining document outside the time period at issue in this litigation, Exhibit 41, is merely a report issued in 2001 comparing the results of a 1991 regulatory impact analysis with part of a 1996 Clean Air Act Section 312 prospective estimate. Doc. 79-1 at 8, 36. This document is simply not relevant to EPA's failure to evaluate job losses caused by EPA's war on coal since 2009. *Id.* at 8, 36.

EPA provides several additional documents that relate to the methodology that the agency employs when performing economic analyses, and include studies published by various EPA employees in academic journals and books. EPA does not contend that any of these documents constitute the evaluations required by Section 321(a), however. Rather, Mr.

DeMocker's declaration states that Defendants' Exhibits 46–53 "demonstrate EPA's continuing efforts to refine its methodology for evaluation of employment impacts."

Finally, there remains the genuine issue of whether the Administrator has ever actually used the information in these documents to do even a single Section 321(a) evaluation, let alone the continuing evaluation required by Congress. While EPA refuses to permit depositions and answer questions, testimony from the Administrator herself before Congress indicates she has not. House Energy & Commerce Committee Recording, http://www.c-span.org/video/?324543-1/administrator-gina-mccarthy-testimony-epa-fiscal-year-2016-budget (Feb. 25, 2015) (Administrator McCarthy responding to the question of whether a mistake by EPA had ever "led to a job loss" by stating that she "can't answer that question").

EPA asks this Court to grant it summary judgment based on a handful of documents that have, on their face, nothing to do with Section 321(a) and in the absence of any information indicating that EPA has tried to use them to comply with Section 321(a). EPA cannot resolve genuine issues of material fact simply by ignoring them. In light of these genuine issues of material fact, and in particular light of EPA's refusal to cooperate in discovery that could address many of them, EPA's motion for summary judgment should be denied.

II. EPA Has Failed to Show It Is Entitled to Judgment as a Matter of Law.

Even if EPA were able to resolve all of the factual problems with its argument that the analyses, journal articles, and other documents that it attached to its motion for summary judgment demonstrate an attempt at compliance with Section 321(a), several fundamental problems arise that would preclude EPA from judgment as a matter of law. First, EPA failed to timely identify any documents as Section 321(a) evaluations, frustrating both judicial review and the fundamental use of EPA's evaluations for public discourse. Second, the documents cited by EPA fail to fulfill the fundamental requirement of "evaluating" job loss and shifts, providing at best cursory estimates that cannot, as a matter of law, satisfy EPA's statutory obligation. Finally, EPA's documents almost entirely fail to address enforcement, which is a significant element of

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Section 321(a), leaving a gaping hole in EPA's argument even if it could satisfy all other requirements.

A. EPA Has Never Identified Any Section 321(a) Evaluations Such that They Could Be Subjected to Judicial Review or Provided to Congress.

Even today, EPA has never actually identified any Section 321(a) evaluations. At best, EPA has provided a cagy declaration that several documents designed for other purposes "demonstrate its performance of the duty set forth in Section 321(a)." Doc. 76 at 4. The documents themselves cannot possibly be the evaluations required by Section 321(a). They do not identify themselves as Section 321(a) evaluations and EPA has made clear it does not consider them to be Section 321(a) evaluations. *See* Doc. 62-2. EPA has also failed to identify any other documents that may constitute its purported evaluations.

If EPA is attempting to argue that the documents actually *are* Section 321(a) evaluations, there is a significant problem of adequate notice. Without identifying something as constituting EPA's performance with Section 321(a), no one would have a basis for obtaining judicial review to ensure EPA's evaluations meet that provision's requirements. Moreover, many of the documents are prepared pursuant to executive orders that disclaim the availability of judicial review, *see e.g.*, Executive Order 13563 ("This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."); Executive Order 13132 ("This order is intended only to improve the internal management of the executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person."), and so as a practical matter only the few select portions of the analyses that EPA explicitly identifies as performing statutory obligations can be judicially reviewed.

EPA's failure to clearly identify its purported Section 321(a) evaluations also inhibits Congressional oversight. One purpose of Section 321(a) is "to provide information which could lead the EPA or Congress to amend the prior EPA actions." Opinion, Doc. 71 at 11. Having

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failed to identify any document as the Administrator's Section 321(a) evaluation, the Administrator does not "own" the findings on job losses such that they can be used to hold her accountable and aid in obtaining congressional oversight and other relief. Indeed, when the Administrator goes before Congress and claims that she has exercised her authority without undue negative consequences, members of Congress and the public cannot contradict or supplement her claims with her own findings from Section 321(a) evaluations of job losses and shifts because she has not identified them as such. Until she identifies documents or portions of documents as her evaluations of the job losses and shifts she has caused, the Administrator has not complied with Section 321(a). Therefore EPA's failure to identify any documents that actually purport to be Section 321(a) evaluations show that EPA is not entitled to judgment as a matter of law.

B. EPA Has Not Demonstrated that the Administrator Has Performed the Evaluations Required by Section 321(a).

EPA claims some of the regulatory impact analyses include estimates of employment impacts that EPA forecasted would result from new regulations. The nature of these projections and their relevance if any to the subject of Section 321(a) evaluations and this litigation varies, as additional evidence obtained in discovery and from expert testimony for Plaintiffs will show in due course. But it is immediately evident that these limited projections do not entitle EPA to judgment as a matter of law because they do not constitute "evaluations" of job losses, which entails more than mere estimation.

The Clean Air Act distinguishes between a requirement that EPA evaluate and a requirement that EPA estimate.[4] Likewise, for evaluation to mean estimation alone would make

[4] *See* 42 U.S.C. § 7403(e) (requiring Administrator to conduct an "[*e*]*valuation* of risks to ecosystems exposed to air pollutants, including characterization of the causes and effects of chronic and episodic exposures to air pollutants and determination of the reversibility of those effects", an "[*e*]*valuation* of the effects of air pollution on water quality, including assessments of the short-term and long-term ecological effects of acid deposition and other atmospherically derived pollutants on surface water (including wetlands and estuaries) and groundwater", and an "[*e*]*valuation* of the effects of air pollution on forests, materials, crops, biological diversity, soils, and other terrestrial and aquatic systems exposed to air pollutants" while requiring at the same time that the Administrator conduct an "[*e*]*stimation* of the

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no sense in the several other contexts in which the Clean Air Act requires evaluations.[5] As in those other statutory contexts, the evaluations required by Section 321(a) must include more than numerical or qualitative estimates of future job losses and shifts. The extent of the job losses and shifts caused by the administration and enforcement of the Act must be evaluated, not merely estimated, such that the Administrator meaningfully considers them and their devastating consequences for workers and their communities, and none of the documents EPA provides offers anything close to this.

Furthermore, none of the documents EPA claims entitle it to judgment as a matter of law include retrospective examinations of the losses and shifts caused by EPA's five year regulatory onslaught against the coal industry. As this Court recognized, the crux of the Section 321(a) obligation is the requirement that the agency take a "second look" at its actions and their consequences on jobs at the time that EPA "can calculate the damage." Opinion, Doc. 71 at 16. EPA claims that retrospective analysis is not part of the continuing evaluation required by Section 321(a). Doc. 82-4 at 8. But Section 321(a) explicitly requires "continuing evaluations" that "include[e] . . . reductions in employment" that have already occurred to determine whether or not they were or were not caused by the Administrator's administration and enforcement of the Act. 42 U.S.C. § 7621(a). This language requires more than examinations in advance of EPA's regulatory and enforcement activities.

This requirement for retrospective examinations of job losses also makes perfect sense. As EPA's documents repeat over and over that "job effect estimates cannot be estimated with certainty." *See, e.g.*, Exhibit 5, Doc. 77-5 at 4-6. The discussions of employment that

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associated economic costs of ecological damage which have occurred as a result of exposure to air pollutants") (emphasis added).

[5] *See, e.g.*, 42 U.S.C. § 7403(c)(4) (requiring Administrator to submit "periodic reports to the Congress . . . which evaluate . . . the effectiveness of air pollution control regulations and programs using monitoring and modeling data"); 42 U.S.C. § 7403(d)(2)(B) (requiring Administrator to conduct "[a]n evaluation . . . of each of the hazardous air pollutants listed under section 7412(b) . . . to decide, on the basis of available information, their relative priority for preparation of environmental health assessments"); 42 U.S.C. § 7412(m)(1)(D) (requiring Administrator to "evaluate any adverse effects to public health or the environment caused by such deposition (including effects resulting from indirect exposure pathways)").

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occasionally accompany the agencies proposed and final rules are merely highly uncertain prospective estimates, not the "continuing evaluations" of job losses and shifts that are required by Section 321(a) to include retrospective examinations of the consequences. When jobs are lost in industries affected by EPA actions, Section 321(a) imposes an obligation on EPA to determine if the Act and applicable implementation plans played a role. As EPA provided no evidence that it has taken a second look and calculated the damage wrought by its five years of actions detrimental to the coal industry as Section 321(a) requires, EPA is not entitled to judgment as a matter of law.

C. EPA Has Not Provided Documents that Evaluate Enforcement Initiatives that Are the Centerpiece of the Agency's Pressure on the Coal Industry.

The documents EPA claims entitle it to judgment as a matter of law do not evaluate the "loss or shifts of employment" caused by EPA's "enforcement" of the Act. EPA does not even purport to identify an *estimate* of job impacts caused by enforcement, let alone an *evaluation* of them as Section 321(a) requires. EPA's only reference to enforcement is the specious claim that "[w]hen EPA conducts an employment analysis as part of an RIA, the analysis necessarily assumes that the rule in question will be enforced" because "[a]bsent compliance, or enforcement in the absence of compliance, a regulation would have no impacts at all." Doc. 76 at 7 n.5. Such a farfetched interpretation of Section 321(a) can easily be rejected. *See Nat'l. Assoc. of Reg. and Util. Comm'rs. v.DOE*, 680 F.3d 819, 824 (D.C. Cir. 2012) (rejecting a statutory interpretation "whatever the degree of deference afforded" when it would allow the government to "like an ostrich, put his head in the sane"). Such an interpretation would also render Section 321(a)'s distinction between "administration" and "enforcement" superfluous, which EPA may not do. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 485 (2001) ("EPA may not construe the statute in a way that completely nullifies textually applicable provisions . . . .").

It also fails to address some of the most significant impacts of EPA's enforcement decisions, including EPA's use of enforcement discretion and how EPA sets enforcement priorities. As just one example, EPA is actively enforcing a regulation against coal-fired power

plants that predates EPA's preparation of regulatory impact analyses and that as a result was never subjected to such an analysis. The Clean Air Act requires that existing sources obtain pre-construction permits requiring massive investments in controls whenever they are modified, an event which is defined by the Act as "any physical change in, or change in the method of operation . . . which increases the amount of any air pollutant emitted." 42 U.S.C § 7411(a)(4); 42 U.S.C. § 7479(2)(C). In 1978, EPA regulations defined modification for purposes of the pre-construction permit requirement by exempting "Routine maintenance, repair and replacement." *See* 40 C.F.R. § 52.21(b)(2)(iii)(a); 43 Fed. Reg. 26,388, 26,403–04 (1978). This regulation was not accompanied by a regulatory impact analysis. Since that time, EPA has issued guidance documents and determinations that have elaborated on and often materially changed what qualifies for the exemption. None of these guidance documents and determinations has been accompanied by a regulatory impact analysis. Moreover, EPA has specifically admitted that "[a]s part of" the "national enforcement initiative" referred to as "Reducing Air Pollution from the Largest Source" "EPA has addressed New Source Review compliance violations at coal-fired power plants." Doc. 82-4 at 66. This enforcement initiative against power plants that EPA contends underwent modifications was designed and is conducted pursuant to the Administrator's discretion wholly apart from the underlying regulations that define modification and its exemption for routine maintenance, repair and replacement. This enforcement initiative constitutes a selective targeting of certain industries for enforcement and it is imposing substantial pressure on the power industry to shut down coal-fired power plants or switch fuels. And while EPA may have discretion to engage in such targeting, this is precisely the sort of discretion that Section 321(a) is designed to inform and check. The initiative EPA admits it is undertaking at the nation's coal-fired power plants has wrought significant damage to employment and the economy. Even if EPA ever considered these potential impacts when it finalized its new source review regulations, EPA must now conduct an evaluation to take "a second look" and "calculate the damage (or lack thereof) to employment and the economy." Opinion, Doc. 71 at 16. Furthermore, EPA's enforcement of the Clean Air Act involves the

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exercise of enormous amounts of discretion, and none of the documents show that EPA has considered how the exercise of that discretion has or has not led to job losses and shifts. The fact that the key regulations and guidance documents involved in prosecution of an enforcement initiative targeting the coal industry were not accompanied regulatory impact analyses, and the fact that EPA has provided no documents either prospectively or retrospectively evaluating the job losses caused by the design and prosecution of EPA's signature enforcement initiative against the nation's coal-fired power plants, demonstrate that EPA is not entitled to judgment as a matter of law that the Administrator has complied with Section 321(a).

III. EPA's Arguments on the Scope of Available Relief Are Still Premature and Are Not Relevant to EPA's Motion for Summary Judgment.

In denying EPA's motion to strike, this Court found it "clear that this Court has the authority to grant injunctive relief in this case." Doc. 40 at 14. The Court's opinion explained that "there may exist some question as to the scope of the injunctive relief which may be awarded by this Court," but found that "[t]he argument as to the scope of relief" was "simply premature at this point in the proceedings." *Id.* at 15. EPA, however, cites no change in circumstances that renders it appropriate now to decide the scope of injunctive relief that is available, and the arguments EPA raises in support remain premature.

EPA has steadfastly refused to allow meaningful discovery, and Plaintiffs have not had the opportunity to present their case on injunctive relief. In order to claim that this Court can address the scope of relief available to Plaintiffs when denying defendant's motion for summary judgment, EPA bizarrely requests that this court prematurely enter judgment against EPA if its motion for summary judgment is denied, but Plaintiffs have not moved for summary judgment, and EPA cannot force the issue by fiat.

The proper scope of injunctive relief remains a fact-dependent issue, and cannot be resolved until several issues are addressed, including the scope of injuries suffered by Plaintiffs, what degree of oversight will be required to ensure compliance and protect Plaintiffs' from further injury, what other relief will be available, and the likelihood that Plaintiffs' injuries can

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be adequately addressed by that other relief. Until those questions are answered, summary judgment on remedy will not be ripe.

CONCLUSION

Summary judgment on the ultimate issues in this case is not appropriate before the completion of fact and expert discovery. Even if it were, EPA provides nothing but a handful of documents, none of which actually cite or discuss Section 321(a), while refusing to produce any documents that do actually cite or discuss Section 321(a). Meanwhile, the evidence available to Plaintiffs directly contradicts EPA's sudden claim that it is conducting Section 321(a) evaluations, raising credibility issues that require a trial. And even if the undisclosed facts, the contradictory evidence, and the credibility issues had not existed, the documents and the declaration alone would not entitle EPA to a judgment as a matter of law that EPA has complied with Section 321(a) by taking responsibility for job losses she has caused. Accordingly, and for the foregoing reasons, Plaintiffs respectfully request that, if this Court does not grant Plaintiffs' pending motion to hold briefing in abeyance, that this Court deny EPA's motion for summary judgment.

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Dated May 4, 2015

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

MURRAY ENERGY CORPORATION, et al.

Plaintiffs,

v.

GINA McCARTHY, Administrator, United States Environmental Protection Agency, in her official capacity,

Defendant.

Civil Action No. 5:14-CV-39
Judge Bailey

PLAINTIFFS' FIRST SET OF DISCOVERY REQUESTS

Pursuant to the Federal Rules of Civil Procedure and the Local Rules of the Northern District of West Virginia, including Fed. R. Civ. P. 26, 33, 34, and 36, and L.R. Civ. P. 26.02, 33.01, 34.01, and 36.01, Plaintiffs request that Defendant United States Environmental Protection Agency Administrator Gina McCarthy respond to the following Interrogatories, Requests for Production, and Requests for Admission within 30 days of the date of service as provided in Fed. R. Civ. P. 33(b)(2), 34(b)(2)(a), and 36(a)(3).

The information sought must be given, whether secured by You, (as "You" is defined, infra), Your agent, Your representative or attorney, or by any other persons who have made this knowledge known to You or from whom You can get this information.

These Interrogatories, Requests for Production of Documents, and Requests for Admission shall be deemed continuing, and supplemental answers shall be required pursuant to Fed. R. Civ. P. 26(e) as soon as is practicable upon receipt of further or different information.

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Please remember that You have a duty to preserve all material or relevant Documents (as "Document" is defined, infra), including, but not limited to, Documents that are recorded electronically.

I. INSTRUCTIONS

A. Sources of Information. In answering these Interrogatories, Requests for Production, and Requests for Admission, every source of information to which You have access should be consulted, including information in the possession of Your attorneys, investigators, consultants, contractors, and all other persons and entities acting in Your interest or on Your behalf, and regardless of whether the source is within Your immediate possession or control.

B. Partial Responses. In responding to these Interrogatories, Requests for Production, and Requests for Admission, if You cannot respond in full after exercising due diligence to secure the requested information, You must so state and respond to the extent You are able, specifying Your inability to respond to the remainder, producing whatever information You have.

C. Claim of Privilege or Work Product Protection. If objection is made to any of the following Interrogatories, Requests for Production, or Requests for Admission on the basis of any claim of privilege or work product protection, specify in writing the nature of such information along with the nature of the privilege claimed and the holder of the privilege, and provide all applicable information required under L.R. Civ. P. 26.04. If an attorney work product protection is claimed, include the name of the attorney performing the work. If an attorney-client privilege is claimed, include the names of the attorney and the client, as well as every other person, between whom the information passed and any other person with whom such information or Communication (as "Communication" is defined, *infra*) has been shared. If a deliberative process privilege is claimed, include the agency head invoking the privilege and the names of the agency personnel, as well as every other person, between whom the information passed and any other person with whom such information or Communication has been shared.

D. Interpretation. These Interrogatories, Requests for Production, and Requests for Admission are to be interpreted as broadly as possible. Where the context herein makes it appropriate, each singular word shall include its plural, and each plural word shall include its singular. Terms referring to a gender include all genders. Each of the following words includes the meaning of every other word: "each," "every," "all," and "any." The present tense shall be construed to include the past tense, and the past tense shall be construed to include the present tense. "And" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these Interrogatories, Requests for Production, and Requests for Admission any information which might otherwise be construed to

be outside their scope.

II. DEFINITIONS

A. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

B. "Concerning" means referring to, describing, evidencing, or constituting.

C. "Contemporaneously" means at the point in time an action is taken, not after.

D. "Describe in Detail" or "Describing in Detail" shall mean to describe in full and complete detail, including each and every fact or opinion known to You concerning the information requested by the Interrogatory, including all relevant dates and time periods and all data, studies, reports, or other quantitative or qualitative syntheses or analyses Regarding the facts or opinions known to You concerning the information requested by the Interrogatory; the source of Your knowledge of each fact or opinion; the identity of every person having knowledge of each fact or opinion; the identity of each Document relating to each fact or opinion; and the identity of each Communication Regarding each fact or opinion. If the basis depends upon Your interpretation of applicable law, the response should include, without limitation, a clear statement of Your interpretation of the law as it applies to the facts and citation to each and any decision by a court of law upon which You rely to support Your position. If the basis for the answer depends upon an agency policy, the response should include, without limitation, a clear statement of the agency policy and citation to each and any Document and Communication Regarding the policy.

E. "Document" is synonymous in meaning and equal in scope to the usage of this term in Fed. R. Civ. P. 34(a). A draft or non-identical copy is a separate document.

F. "EPA" means the United States Environmental Protection Agency, its branches, agencies, departments, offices, divisions, subdivisions, officers, directors, administrators, managers, employees, agents, and representatives.

G. "Identify" when referring to a person means to give, to the extent known, the person's full name and present or last known address. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

H. "Identify" when referring to documents means to give, to the extent known, the: (i) type of document, (ii) general subject matter, (iii) author(s), addressee(s), and recipient(s), and (iv) date the document was prepared.

I. "Plaintiff," "Defendant," a party's full or abbreviated name, or a pronoun referring to a party, means the party, and where applicable, its officers, directors,

employees, and partners. This definition does not impose a discovery obligation on any person who is not a party to the case.

J. "Person" means any natural person or any business, legal or governmental entity or association.

K. "Regarding" shall mean referring to, relating to, supporting, refuting, alluding to, responding to, connected with, commenting upon, in respect of, about, discussing, showing, describing, reflecting, analyzing, touching upon, constituting, being, or in any way addressing.

L. "You" and "Your" means the Administrator or Acting Administrator of the United States Environmental Protection Agency.

III. INTERROGATORIES

1. If You contend You are continuously evaluating job losses and shifts in employment caused by Your administration of the Clean Air Act, Identify and Describe in Detail this continuous evaluation.

Response:

2. If You contend You are continuously evaluating job losses and shifts in employment caused by Your enforcement of the Clean Air Act, Identify and Describe in Detail this continuous evaluation.

Response:

3. If You contend You are continuously evaluating job losses and shifts in employment caused by Your administration of applicable implementation plans under the Clean Air Act, Identify and Describe in Detail this continuous evaluation.

Response:

4. If You contend You are continuously evaluating job losses and shifts in employment caused by Your enforcement of applicable implementation plans under the Clean Air Act, Identify and Describe in Detail this continuous evaluation.

Response:

5. If You contend You have conducted any evaluations of job losses and shifts in employment caused by Your administration or enforcement of the Clean Air Act and applicable implementation plans, Identify each evaluation and state whether the evaluation was intended, at the time it was conducted, to comply with Section 321(a) of the Clean Air Act.

Attachment 7

Response:

6. Identify how many coal jobs, and how many jobs that support the coal industry, have been lost or shifted in the past five years due to Your administration and enforcement of the Clean Air Act and applicable implementation plans in West Virginia, Ohio, Pennsylvania, Utah, Illinois, Kentucky, and nationally.

Response:

7. At what time, if ever, did You first conclude You are required by Clean Air Act Section 321(a) to conduct continuing evaluations of potential loss or shifts of employment which may result from Your administration or enforcement of the Clean Air Act and applicable implementation plans.

Response:

8. Identify all Persons whose employment responsibilities currently include or have ever included evaluating or assisting You in Your evaluation of job losses and shifts caused by Your administration and enforcement of the Clean Air Act or applicable implementation plans, and specify, for each person, the scope of his or her responsibilities.

Response:

9. Identify all Persons with whom You have discussed Clean Air Act Section 321(a).

Response:

10. Identify and Describe in Detail all requests You, or any agent, employee, or representative of You, have made to Congress or the President for funds to perform the obligations set forth in Clean Air Act Section 321(a).

Response:

11. Identify and Describe in Detail all Communications between You, or any agent, employee, or representative of You, and members of Congress, congressional staff, the President, White House staff, or other federal agencies Regarding Clean Air Act Section 321(a).

Response:

12. Identify and Describe in Detail all Communications or Documents You have issued to EPA staff instructing them to comply with Section 321(a) of the Clean Air Act or advising them how to comply with Section 321(a) of the Clean Air

Act.

Response:

13. Identify and Describe in Detail all investigation You have conducted or are aware of into whether EPA is complying with Section 321(a) of the Clean Air Act.

Response:

14. Identify all actions You have taken under the Clean Air Act or applicable implementation plans to affect the market for coal and, for each action, Describe in Detail the evaluation You did of the job losses and shifts that Your action would cause.

Response:

15. Identify all actions You have taken under the Clean Air Act or applicable implementation plans to affect investment in coal-fired power plants and, for each action, Describe in Detail the evaluation You did of the job losses and shifts that Your action would cause.

Response:

16. Identify all actions You have taken under the Clean Air Act and applicable implementation plans to affect capital markets and, for each action, Describe in Detail the evaluation You did of the job losses and shifts that Your action would cause.

Response:

17. If Your response to Request for Admission Number 11 below is anything other than an unqualified admission, for each evaluation You identified in Your Initial Disclosures as constituting EPA's evaluation of potential loss or shifts of employment, state the number of jobs EPA concluded might be lost, both nationally and in the coal industry specifically, because of EPA's administration of the Clean Air Act.

Response:

18. If Your response to Request for Admission Number 12 below is anything other than an unqualified admission, for each evaluation You identified in Your Initial Disclosures as constituting EPA's evaluation of potential loss or shifts of employment, state the number of jobs EPA concluded might be shifted, both nationally and in the coal industry specifically, because of EPA's administration of the Clean Air Act.

Response:

19. If Your response to Request for Admission Number 13 below is anything other than an unqualified admission, for each evaluation You identified in Your Initial Disclosures as constituting EPA's evaluation of potential loss or shifts of employment, state the number of jobs EPA concluded might be lost, both nationally and in the coal industry specifically, because of EPA's enforcement of the Clean Air Act.

Response:

20. If Your response to Request for Admission Number 14 below is anything other than an unqualified admission, for each evaluation You identified in Your Initial Disclosures as constituting EPA's evaluation of potential loss or shifts of employment, state the number of jobs EPA concluded might be shifted, both nationally and in the coal industry specifically, because of EPA's enforcement of the Clean Air Act.

Response:

21. If Your response to Request for Admission Number 15 below is anything other than an unqualified admission, for each evaluation You identified in Your Initial Disclosures as constituting EPA's evaluation of potential loss or shifts of employment, state the number of jobs EPA concluded might be lost, both nationally and in the coal industry specifically, because of EPA's administration of applicable implementation plans.

Response:

22. If Your response to Request for Admission Number 16 below is anything other than an unqualified admission, for each evaluation You identified in Your Initial Disclosures as constituting EPA's evaluation of potential loss or shifts of employment, state the number of jobs EPA concluded might be shifted, both nationally and in the coal industry specifically, because of EPA's administration of applicable implementation plans.

Response:

23. If Your response to Request for Admission Number 17 below is anything other than an unqualified admission, for each evaluation You identified in Your Initial Disclosures as constituting EPA's evaluation of potential loss or shifts of employment, state the number of jobs EPA concluded might be lost, both nationally and in the coal industry specifically, because of EPA's enforcement of applicable implementation plans.

Response:

24. If Your response to Request for Admission Number 18 below is anything other than an unqualified admission, for each evaluation You identified in Your Initial

Disclosures as constituting EPA's evaluation of potential loss or shifts of employment, state the number of jobs EPA concluded might be shifted, both nationally and in the coal industry specifically, because of EPA's enforcement of applicable implementation plans.

Response:

IV. REQUESTS FOR PRODUCTION

1. Produce all Documents Concerning or Regarding Clean Air Act Section 321(a) authored or received by You or EPA.

Response:

2. Produce all Documents not already produced in response to Request for Production Number 1 above, Concerning EPA actions taken to comply with Clean Air Act Section 321(a).

Response:

3. Produce all Documents supporting or contradicting Your denial in Paragraph 72 of the Answer of the assertion that You have not complied with Your obligations set forth in Clean Air Act Section 321(a).

Response:

4. If You contend You have previously or are currently continuously evaluating job losses and shifts in employment caused by Your administration of the Clean Air Act, produce all Documents supporting or contradicting Your contention.

Response:

5. If You contend that You have previously or are currently continuously evaluating job losses and shifts in employment caused by Your enforcement of the Clean Air Act, produce all Documents supporting or contradicting Your contention.

Response:

6. If You contend that You have previously or are currently continuously evaluating job losses and shifts in employment caused by Your administration of applicable implementation plans under the Clean Air Act, produce all Documents supporting or contradicting Your contention.

Response:

7. If You contend that You have previously or are currently continuously evaluating job losses and shifts in employment caused by Your enforcement of applicable implementation plans under the Clean Air Act, produce all Documents supporting or contradicting Your contention.

Response:

8. Produce all Communications between You and members of Congress Concerning Section 321(a) of the Clean Air Act.

Response:

9. Produce all Communications between You and White House staff Concerning Section 321(a) of the Clean Air Act.

Response:

10. Produce all Communications between You and other federal agencies Concerning Section 321(a) of the Clean Air Act.

Response:

11. Produce all Documents Regarding Your Communications with Congress, White House staff, or other federal agencies Concerning Section 321(a) of the Clean Air Act.

Response:

12. Produce all Documents Regarding Your statement to Representative Joe Barton and Representative Greg Walden that "EPA has not interpreted this provision to require EPA to conduct employment investigations in taking regulatory actions.," including all drafts of Your response.[1]

Response:

13. Produce all Documents Regarding Your statement to Senator David Vitter that "EPA has not interpreted this provision to require EPA to conduct employment investigations in taking regulatory actions."[2]

[1] Enclosure with Letters from Gina McCarthy, Assistant Administrator, EPA to Representatives Barton and Walden, at 1, 3 (January 12, 2010).

[2] Senator David Vitter, Questions for the Record, Gina McCarthy Confirmation Hearing, Environment and Public Works Committee, at 17–18 (April 11, 2013) (available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9a1465d3-1490-4788-95d0-7d178b3dc320 (last visited February 13, 2014)).

Attachment 7

Response:

14. Produce all Documents Regarding Your statement to Senator David Vitter that "EPA has found no records indicating that any Administration since 1977 has interpreted section 321 to require job impacts analysis for rulemaking actions."[3]

Response:

15. Produce all Documents Regarding Your statement to Senator David Vitter that "The agency could not find any records of any requests for section 321 investigation of job losses alleged to be related to regulation-induced plant closure."[4]

Response:

16. Produce all drafts of responses You prepared to the questions asked at Your April 11, 2013 confirmation hearing before the Environment and Public Works Committee.

Response:

17. Produce all notes from Your April 11, 2013 confirmation hearing before the Environment and Public Works Committee.

Response:

18. Produce all Documents You used to prepare for Your April 11, 2013 confirmation hearing before the Environment and Public Works Committee.

Response:

19. Produce all Freedom of Information Act requests You have received Concerning Clean Air Act Section 321(a) and all responses You have sent.

Response:

20. Produce all Documents Concerning how EPA evaluates job losses caused by its administration of the Clean Air Act.

Response:

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[3] *Id.*
[4] *Id.*

21. Produce all Documents Concerning how EPA evaluates job losses caused by its enforcement of the Clean Air Act.

Response:

22. Produce all Documents Concerning how EPA evaluates job losses caused by its administration of applicable implementation plans.

Response:

23. Produce all Documents Concerning how EPA evaluates job losses caused by its enforcement of applicable implementation plans.

Response:

24. Produce all Documents Concerning how EPA evaluates job shifts caused by its administration of the Clean Air Act.

Response:

25. Produce all Documents Concerning how EPA evaluates job shifts caused by its enforcement of the Clean Air Act.

Response:

26. Produce all Documents Concerning how EPA evaluates job shifts caused by its administration of applicable implementation plans.

Response:

27. Produce all Documents Concerning how EPA evaluates job shifts caused by its enforcement of applicable implementation plans.

Response:

28. Produce all evaluations EPA has done of the job losses or shifts in employment caused by its past administration or enforcement of the Clean Air Act or applicable implementation plans.

Response:

29. Produce all evaluations You have conducted of job losses and shifts in the coal

industry caused by Your administration and enforcement of the Clean Air Act and applicable implementation plans.

Response:

30. Produce all Documents Regarding Your statement on November 19, 2013 that EPA "regulate[s] to drive markets."[5]

Response:

31. Produce all Documents Concerning Your effort to use regulations under the Clean Air Act to affect the market for coal and all evaluations You conducted of the potential job losses and shifts in employment in the coal industry that these efforts might cause.

Response:

32. Produce all Documents Concerning EPA's use of its enforcement authority under the Clean Air Act or applicable implementation plans to facilitate, encourage, or accelerate a transition away from use of coal-fired power plants to generate electricity in the United States and all evaluations You conducted of the potential job losses and shifts in employment in the coal industry that these efforts might cause.

Response:

33. Produce all Documents in Your possession or control Concerning legislation proposed by Congress at any time from 2007 to the present that would require EPA to evaluate, estimate, or consider the employment impacts of its administration or enforcement of the Clean Air Act or applicable implementation plans.

Response:

34. Produce all Documents Concerning the impact of Your administration or enforcement of the Clean Air Act on the construction of new coal-fired power plants.

Response:

35. Produce all Documents Concerning the impacts of EPA's publication of a

[5] Remarks of Gina McCarthy, Administrator, United States Environmental Protection Agency, at the Center for American Progress Making Progress Conference (Nov. 19, 2014).

proposed emission guideline for carbon dioxide emissions from power plants on decisions whether to retire coal-fired power plants in 2015, including, but not limited to, decisions made in connection with the April 16, 2015, deadline for compliance with the national emission standard for power plants and all evaluations You conducted of the potential job losses and shifts in employment in the coal industry that EPA's publication might cause.

Response:

36. Produce all Documents Concerning the use of supplemental environmental projects in settlement of Clean Air Act enforcement actions to reduce the consumption of power from coal-fired power plants and all evaluations You conducted of the potential job losses and shifts in employment in the coal industry that these efforts might cause.

Response:

37. Produce all Documents authored or received by You or EPA Concerning or Regarding then-Senator Obama's statement: "If somebody wants to build a coal power plant, they can, it's just that it will bankrupt them because they're going to be charged a huge sum for all that greenhouse gas that's being emitted."[6]

Response:

V. REQUESTS FOR ADMISSION

1. Admit You are required by Clean Air Act Section 321(a) to conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the Clean Air Act and applicable implementation plans.

Response:

2. Admit You are not conducting continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the Clean Air Act and applicable implementation plans.

Response:

3. Admit You have never conducted an evaluation of potential job losses which may result from Your administration of the Clean Air Act.

Response:

[6] 2008 San Francisco Chronicle Interview.

4. Admit You have never conducted an evaluation of potential job shifts which may result from Your administration of the Clean Air Act.

Response:

5. Admit You have never conducted an evaluation of potential job losses which may result from Your enforcement of the Clean Air Act.

Response:

6. Admit You have never conducted an evaluation of potential job shits which may result from Your enforcement of the Clean Air Act.

Response:

7. Admit You have never conducted an evaluation of potential job losses which may result from Your administration of applicable implementation plans.

Response:

8. Admit You have never conducted an evaluation of potential job shifts which may result from Your administration of applicable implementation plans.

Response:

9. Admit You have never conducted an evaluation of potential job losses which may result from Your enforcement of applicable implementation plans.

Response:

10. Admit You have never conducted an evaluation of potential job shifts which may result from Your enforcement of applicable implementation plans.

Response:

11. Admit none of the documents You identified in Your initial disclosures as constituting EPA's evaluation of potential loss or shifts of employment actually evaluates the job losses which may result from EPA's administration of the Clean Air Act.

Response:

12. Admit none of the documents You identified in Your initial disclosures as constituting EPA's evaluation of potential loss or shifts of employment actually evaluates the job shifts which may result from EPA's administration of the Clean Air Act.

Response:

13. Admit none of the documents You identified in Your initial disclosures as constituting EPA's evaluation of potential loss or shifts of employment actually evaluates the job losses which may result from EPA's enforcement of the Clean Air Act.

Response:

14. Admit none of the documents You identified in Your initial disclosures as constituting EPA's evaluation of potential loss or shifts of employment actually evaluates the job shifts which may result from EPA's enforcement of the Clean Air Act.

Response:

15. Admit none of the documents You identified in Your initial disclosures as constituting EPA's evaluation of potential loss or shifts of employment actually evaluates the job losses which may result from EPA's administration of applicable implementation plans.

Response:

16. Admit none of the documents You identified in Your initial disclosures as constituting EPA's evaluation of potential loss or shifts of employment actually evaluates the job shifts which may result from EPA's administration of applicable implementation plans.

Response:

17. Admit none of the documents You identified in Your initial disclosures as constituting EPA's evaluation of potential loss or shifts of employment actually evaluates the job losses which may result from EPA's enforcement of applicable implementation plans.

Response:

18. Admit none of the documents You identified in Your initial disclosures as constituting EPA's evaluation of potential loss or shifts of employment actually evaluates the job shifts which may result from EPA's enforcement of applicable implementation plans.

Response:

19. Admit Your administration and enforcement of the Clean Air Act has caused coal-burning facilities to switch from coal to other fuels.

Response:

20. Admit Your administration and enforcement of the Clean Air Act has caused existing coal-burning facilities to shut down.

Response:

21. Admit that Your administration and enforcement of the Clean Air Act has made it more expensive to construct new coal-fired facilities.

Response:

22. Admit that Your administration and enforcement of the Clean Air Act in the past five years has reduced the domestic market for coal.

Response:

23. Admit You have deliberately sought to use Your authority under the Clean Air Act to reduce the consumption of coal in the United States.

Response:

24. Admit that the National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers: Final Rule, 76 Fed. Reg. 15554 (March 21, 2011), imposes more onerous requirements on coal-fired boilers than boilers that burn other types of fuel.

Response:

25. Admit that the National Emission Standards for Hazardous Air Pollutants From Coal-and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (February 16, 2012) offered switching from coal to natural gas as an offramp to regulation.

Response:

26. Admit You have used Your authority under the Clean Air Act to encourage states to develop implementation plans that would reduce the consumption of coal.

Response:

27. Admit that the proposed New Source Performance Standards for Greenhouse Gas Emissions for New Stationary Sources, Electric Utility Generating Units, 77 Fed. Reg. 22,392 (Proposed Rule April 13, 2012), if finalized as proposed, will reduce the consumption of coal in the United States.

Response:

28. Admit that the proposed New Source Performance Standards for Greenhouse Gas Emissions for New Stationary Sources, Electric Utility Generating Units, 77 Fed. Reg. 22,392 (Proposed Rule April 13, 2012), has already, even without being finalized, caused existing coal-fired facilities to shut down.

Response:

29. Admit You have targeted existing coal-fired electric steam generating units for enforcement under the Clean Air Act's New Source Review program.

Response:

30. Admit EPA has encouraged the use of supplemental environmental projects in enforcement matters under the Clean Air Act to reduce the demand for power from coal-fired power plants.

Response:

Dated December 2, 2014

/s/ Jacob A. Manning
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J. Van Carson (Ohio Bar # 0001324)
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Attachment 7

Attachment 8

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

MURRAY ENERGY CORPORATION, et al.,	)	
Plaintiffs,	)	**CASE NO. 5:14-cv-00039-JPB**
v.	)	**Judge Bailey**
GINA MCCARTHY in her official capacity as Administrator of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendant.		

NOTICE OF 30(B)(6) DEPOSITION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *DUCES TECUM*

PLEASE TAKE NOTICE that, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, Plaintiff Murray Energy Corporation ("Murray") will take the deposition upon oral examination of the United States Environmental Protection Agency ("EPA") in the above-captioned action. Such deposition shall be held at the offices of Dinsmore & Shohl at Bennett Square, 2100 Market St., Wheeling, West Virginia 26003. The deposition will commence at 9:00 a.m. (EST) on April 17, 2015, will be taken before a notary public or other officer duly authorized to administer oaths and take testimony, and will be recorded by stenographic means for all purposes permitted under the Federal Rules of Civil Procedure. The deposition will continue from day to day until completed.

Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, You shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on Your behalf, who are most knowledgeable about the subjects listed on the attached Exhibit A.

Attachment 8

Under Rules 30(b)(2) and 34 of the Federal Rules of Civil Procedure, You shall produce at deposition all documents in Your possession and control related to the subject areas listed on Exhibit A to the extent those documents have not yet been produced by You in this Case. Documents shall be produced as they are kept in the usual course of business and in the form or forms in which they are ordinarily maintained or in a reasonably usable form or forms.

The terms used in this Notice and the attached Exhibit A utilize the following Definitions and Instructions:

A. "You," "Your," and "EPA" means the United States Environmental Protection Agency, its branches, agencies, departments, offices, divisions, subdivisions, officers, directors, managers, employees, agents, and representatives, including, but not limited to, the Office of the Administrator, Headquarters Offices, and Regional Offices..

B. "United States" shall mean Plaintiff the United States of America, its branches, agencies, departments, offices, divisions, subdivisions, officers, directors, managers, employees, agents, and representatives, including, but not limited to, U.S. EPA.

C. "Case" or "this Case" means the present action, *Murray Energy Corporation, Inc., et al. v. Gina McCarthy in her official capacity as Administrator of the United States Environmental Protection Agency*, Case No. 5:14-cv-00039-JPB, filed in the Northern District of West Virginia.

D. "Communications" shall mean oral and written communications of all kinds, including, but not limited to, letters, telegrams, electronic mail, facsimiles, telexes, exchanges of written or recorded information, face-to-face meetings, and telephone conversations.

E. "Complaint" shall mean the complaint filed in this Case (Docket Number 1) and any amendments thereto.

F. "Congress" means the current or any former United States Congress, House of Congress, member of Congress, or congressional staff member.

G. "Date" shall mean the exact day, month, and year, if ascertainable, or if not, the best approximation thereof, including in relationship to other events.

H. "Documents" means the originals and all non-identical copies of all writings of every kind thereof in Your possession, custody, or control, including, but not limited to, drafts and all final versions of letters, bulletins, dockets, telegrams, memoranda, reports, studies, legal pleadings, speeches, notes, charts, lists, orders, tabulations, minutes, records of meetings, telephone records, electronic mail, data processing or computer printouts, metadata, tapes, disks, or retrieval listings, together with programs and program documentation necessary to utilize or retrieve such information, and all other documents within the scope of Rule 34 of the Federal Rules of Civil Procedure.

I. "FOIA" means the Freedom of Information Act, codified at 5 U.S.C. § 552.

J. "Greenhouse Gas Rule" means the proposed rule, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (June 18, 2014).

K. "Identify" or "identity" when referring to an individual, a corporation, or other entity means to set forth the name and, if a corporation or other entity, its state of organization and its principal place of business, or if an individual, the present or last known employer and business address and telephone number (and in the case of any Illinois officer or employee, whether such person is a current or former officer or employee).

L. "Identify" or "identity" when referring to a Document means to state its date, its author, any signatories (if applicable), the type of Document, its title, its substance, its

addressee(s) and all other persons receiving copies, its custodian, and its present or last known location.

M. "Including" means to include without limitation as to the particular items listed.

N. "Job Impacts" means job losses and shifts in employment.

O. "New Source Review Enforcement" means enforcement actions taken under EPA's non-attainment new source review or prevention of significant deterioration programs.

P. "Person" means and includes a natural person, partnership, firm, corporation, or any other kind of business or legal entity, its agents, and employees.

Q. "Relating" or "related" means referring to, alluding to, responding to, concerning, connected with, commenting upon, in respect of, about, evidencing, setting forth, pertaining to, regarding, discussing, showing, describing, reflecting, analyzing, touching upon, constituting, or being.

R. "Section 321(a)" means Section 321(a) of the Clean Air Act as amended and codified in 42 U.S.C. § 7621(a).

S. "United States' Initial Disclosures" means the initial disclosures filed by Defendant in this Case.

T. "Utility MACT Rule" means the final rule, "National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units," 77 Fed. Reg. 9304 (Feb. 16, 2012).

U. "White House" means the current and any former President of the United States or White House staff member.

V. The singular includes the plural and vice versa, and the conjunctive includes the disjunctive and vice versa to give this Notice and the attached Exhibit A the broadest scope. All

words and phrases should be construed as masculine, feminine, or gender neutral to give this Notice and the attached Exhibit A the broadest scope.

Dated: March 31, 2015

Respectfully submitted,

John Lazzaretti
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J. Van Carson (Ohio Bar # 0001324)
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EXHIBIT A

Your designee(s) for this deposition must be prepared to be examined and testify about information known or reasonably available to You regarding the matters listed below.

1. The scope and purpose of Section 321(a).

2. Your past and current interpretations of Section 321(a).

3. Your past and current compliance with Section 321(a).

4. Any documents prepared by You discussing Section 321(a).

5. The process by which You decide the timing, scope, resources to commit, and people responsible for complying with Section 321(a), and Your adherence to that process.

6. Your efforts to continuously evaluate job losses and shifts in employment caused by Your administration of the Clean Air Act.

7. Your efforts to continuously evaluate job losses and shifts in employment caused by Your enforcement of the Clean Air Act.

8. Your efforts to continuously evaluate job losses and shifts in employment caused by Your administration of applicable implementation plans under the Clean Air Act.

9. Your efforts to continuously evaluate job losses and shifts in employment caused by Your enforcement of applicable implementation plans under the Clean Air Act.

10. The steps You have taken to ensure compliance with Section 321(a).

11. The Identity, scope, purpose, and outcome of each evaluation You have conducted to comply with Section 321(a).

12. The actions You have taken or plan to take in response to each evaluation You have conducted under Section 321(a).

13. Any draft evaluations prepared to comply with Section 321(a).

14. The role of the Administrator in complying with Section 321(a).

15. The role of each Headquarters Office in complying with Section 321(a).

16. The role of each Regional Office in complying with Section 321(a).

17. The Identity of all current and former officers, agents, staff, and employees responsible for complying with Section 321(a).

18. The role of each officer, agent, staff member, or employee in complying with Section

321(a).

19. To the extent not covered by Topic 4 above, the communications to and from each officer, agent, staff member, or employee responsible for complying with Section 321(a) Regarding Section 321(a).

20. To the extent not covered by Topic 17, the Identity of each Person with whom You have discussed Section 321(a).

21. Any Communications between the Office of the Administrator and Headquarters or Regional Offices Regarding Section 321(a).

22. Any Communications between Headquarters Offices and Regional Offices Regarding Section 321(a).

23. Your Communications with the public Regarding Section 321(a).

24. Your Communications with Congress Regarding Section 321(a).

25. Your Communications with the White House Regarding Section 321(a).

26. Your Communications with other federal agencies Regarding Section 321(a).

27. Any requests for funds You have made to perform the obligations set forth in Section 321(a).

28. Your current budget for compliance with Section 321(a) and the resources in time and money You have spent on compliance with Section 321(a) over the past five years.

29. The Job Impacts of Your administration and enforcement of the Clean Air Act and applicable implementation plans on the coal industry in Ohio and on jobs that support the coal industry in Ohio.

30. The Job Impacts of Your administration and enforcement of the Clean Air Act and applicable implementation plans on the coal industry in Kentucky and on jobs that support the coal industry in Kentucky.

31. The Job Impacts of Your administration and enforcement of the Clean Air Act and applicable implementation plans on the coal industry in West Virginia and on jobs that support the coal industry in West Virginia.

32. The Job Impacts of Your administration and enforcement of the Clean Air Act and applicable implementation plans on the coal industry in Pennsylvania and on jobs that support the coal industry in Pennsylvania.

33. The Job Impacts of Your administration and enforcement of the Clean Air Act and applicable implementation plans on the coal industry in Utah and on jobs that support the coal industry in Utah.

34. The Job Impacts of Your administration and enforcement of the Clean Air Act and applicable implementation plans on the coal industry in Illinois and on jobs that support the coal industry in Illinois.

35. The Job Impacts of Your administration and enforcement of the Clean Air Act and applicable implementation plans on the coal industry nationally and on jobs that support the coal industry nationally.

36. The Job Impacts of Your Utility MACT Rule.

37. The Job Impacts of Your proposed Greenhouse Gas Rule.

38. The Job Impacts of Your New Source Review Enforcement.

39. The Job impacts of Your use of supplemental environmental projects in Clean Air Act settlement agreements and consent decrees.

40. Each FOIA request received by You Regarding Section 321(a).

41. Your response(s) to each FOIA request Regarding Section 321(a).

42. The regulatory impact analyses listed in Section 2 of the United States' Initial Disclosures.

43. The scope and purpose of Your regulatory impact analyses in general, and their relationship to Section 321(a).

44. The actions You have taken in response to Your regulatory impact analyses in general and the specific actions You have taken in response to the regulatory impact analyses listed in Section 2 of the United States' Initial Disclosures.

45. Your understanding of the nature, extent, causes, and contributing factors to job losses and shifts in the coal industry over the past five years.

46. The education, employment history, current and former job titles, current and former job responsibilities, and current supervisors of each person listed in Section 1 of the United States' Initial Disclosures.

47. The work, if any, each person listed in Section 1 of the United States' Initial Disclosures has done, is dong, or is currently planning or budgeted to do with respect to Section 321(a).

48. Your efforts to impact the market for coal.

49. Your efforts to impact investment in coal-fired power plants.

50. Your efforts to impact capital markets.

51. The confirmation hearing of the current Administrator before the Environment and Public

Works Committee, the Administrator's preparation for the hearing, and the contents of the Administrator's testimony.

52. The Identity, reason for initiating, and outcome of all hearings You have held under Section 321(b).

53. Your interpretation and implementation of Section 321(d).

54. Your document retention, storage, retrieval, and destruction policies, including their application to materials relevant to this Case.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

MURRAY ENERGY CORPORATION, et al. Plaintiffs,	)	
v.	)	**Case No. 5:14-cv-00039-JPB**
GINA MCCARTHY, Administrator, US EPA Defendant.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DISCOVERY, EXTEND THE DEADLINE FOR FACT DISCOVERY, AND HOLD DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN ABEYANCE PENDING COMPLETION OF DISCOVERY

This Clean Air Act citizen suit was filed March 24, 2014 by twelve coal companies (the "Plaintiffs") to compel the Administrator of the Environmental Protection Agency ("Defendant," "the Administrator" or "EPA") to comply with her nondiscretionary duty to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of [the Clean Air Act] and applicable implementation plans." 42 U.S.C. § 7621(a). It seeks a declaration that the Administrator is violating § 321(a) of the Clean Air Act, an order compelling the Administrator to remedy her violation, and an injunction to preserve the *status quo* pending the Administrator's compliance, as well as other appropriate relief. *See* First Amended Complaint, Doc. 31 at 20.

While this case has been pending for over one year, no meaningful discovery has taken place. Defendant filed an initial motion to dismiss on June 30, 2014, which automatically delayed discovery. On December 23, 2014, after this Court denied EPA's initial motion to dismiss and a motion for reconsideration, and less than two weeks before EPA's responses to Plaintiffs' First Set of Discovery Requests were due, Defendant filed a second motion to dismiss

and a motion to stay discovery. Plaintiffs agreed to allow Defendant 10 days after a ruling on its motion to stay discovery to respond to Plaintiffs' First Set of Discovery Requests, and Defendant refused to cooperate in any other discovery while its motion to stay remained pending. This Court denied Defendant's second motion to dismiss and motion to stay discovery on March 27, 2015, which cut the discovery period down to 35 days.

When Plaintiffs emailed Defendant promptly to obtain responses to their written discovery requests and schedule an initial round of depositions, Plaintiffs received no response from Defendant. On April 6, 2015, EPA filed certificates of service for its responses to Plaintiffs' written discovery requests and a supplemental set of initial disclosures, but EPA mailed them without emailing a copy to Plaintiffs. As a result, Plaintiffs did not receive them until April 9, 2015. The next day, April 10, Defendant filed a motion for summary judgment and informed Plaintiffs that the proposed depositions were "unnecessary" in light of the United States' pending motion for summary judgment. EPA has since stated that it will not designate a 30(b)(6) witness, not cooperate in the scheduling of depositions of EPA employees, and will not cooperate in any further fact discovery, while its motion for summary judgment remains pending.

EPA has not sought a stay of discovery, or even a protective order from this Court. EPA has simply unilaterally refused to cooperate in the discovery process. In addition, while Defendant recently responded to some of Plaintiffs' written discovery requests, Defendant has refused to respond to any request that goes beyond Defendant's own narrow view of the case, objecting to all other requests as overbroad and irrelevant, and refused to produce any documents that Defendant is not using in support of its motion for summary judgment.

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Plaintiffs have tried through email correspondence and telephone calls to convince Defendant to cooperate in the discovery process to no avail. In light of Defendant's repeated refusals to cooperate in the discovery process, and the near certainty that there will be no further change without Court intervention, Plaintiffs respectfully request an order compelling EPA to comply with its duties under Fed. R. Civ. P. 30, 33, and 34, including to produce a 30(b)(6) witness, to cooperate in the scheduling of further depositions of EPA employees, and to respond fully to Plaintiffs' written discovery requests.

In light of Defendant's repeated delays, Plaintiffs also respectfully request a 60-day extension of the current May 1, 2015 discovery cut-off. The Local Rules allow Plaintiffs to conduct up to 10 depositions per plaintiff. *See* Local Rule 26.01(c). To date, Plaintiffs have not been able to schedule a single deposition of EPA or any EPA employee. Plaintiffs believe that, with Defendant's cooperation, discovery can be reasonably completed in 60 days, but Defendant's refusal to produce witnesses has rendered the timely completion of discovery impossible.

Finally, in light of Defendant's refusal to cooperate in discovery, Plaintiffs are also not in a position to respond to Defendant's pending motion for summary judgment (Doc. 75). Defendant filed a 32-page affidavit in support of summary judgment with over 1,700 pages of documents on April 10 (Doc. 77). The affiant, Mr. DeMocker, was not disclosed to Plaintiffs until they received the United States' Supplemental Initial Disclosures on Thursday, April 9, one day before the filing of the United States' motion for summary judgment. Plaintiffs promptly requested a deposition of Mr. DeMocker for the week of April 20, which Defendant has refused. Defendant's motion for summary judgment raises a number of issues of material fact, and the affidavit in support raises even more subjects on which Plaintiffs need discovery to justify their

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response to Defendant's motion for summary judgment. Plaintiffs therefore, pursuant to Fed. R. Civ. P. 56(d), respectfully request that this Court hold Defendant's motion for summary judgment in abeyance pending completion of fact and expert discovery, and allow Plaintiffs to respond to Defendant's motion on October 21, 2015, the date set by this Court for responses to dispositive motions in its November 5, 2014 Scheduling Order (Doc. 55).

I. Defendant's Refusal to Cooperate in the Discovery Process Justifies an Order Compelling Discovery

On March 31, 2015, Plaintiffs served a notice of 30(b)(6) deposition on Defendant (attached hereto as Exhibit A) and requested Defendant's cooperation in the scheduling of the depositions of several EPA employees. *See* Email Chain (attached hereto as Exhibit B). Without moving for a protective order, Defendant notified Plaintiffs by email on April 15, 2015 that "we cannot agree that your proposed depositions should proceed during the pendency of the summary judgment motion" and that "we will not produce any Rule 30b6 witness on your proposed date of April 17 nor will we produce any of the individuals you listed in your email during the week of April 20." *Id.*

As discussed in the attached Certificate of Good Faith Conference (attached hereto as Exhibit C), on April 16, 2015, counsel for Plaintiffs conferred telephonically with counsel for Defendant to confirm that EPA would not produce a witness for its 30(b)(6) deposition and that Defendant was refusing and would continue to refuse to cooperate in the scheduling of any further depositions while its motion for summary judgment remains pending.

During that same call, counsel conferred with respect to the United States' Objections and Responses to Plaintiffs' First Set of Discovery Requests (attached hereto as Exhibit D). As explained by counsel for Plaintiffs, Defendant's discovery responses improperly refused to answer several interrogatories and requests for production on the improper ground that they

requested information beyond the single issue of "whether EPA has performed the evaluations described in Section 321(a) of the Clean Air Act."

In response to Interrogatory No. 7, for example, which sought to ascertain when the Administrator first determined there was an obligation to conduct continuing evaluations under Section 321(a)—an issue Defendant continues to contest even in its motion for summary judgment and that clearly undermines Defendant's argument that it has been conducting these evaluations all along—Plaintiffs' verbatim request and Defendant's response are (with emphasis added):

> **Interrogatory No. 7:** At what time, if ever, did You first conclude You are required by Clean Air Act Section 321 (a) to conduct continuing evaluations of potential loss or shifts of employment which may result from Your administration or enforcement of the Clean Air Act and applicable implementation plans.
>
> **Response:** The United States objects on grounds that this interrogatory is overly broad, unduly burdensome, not likely to lead to the discovery of admissible evidence, seeks a legal conclusion, and seeks protected or privileged information. Specifically, this interrogatory is overly broad, unduly burdensome, and not likely to lead to the discovery of admissible evidence because the Court decided on September 16, 2014 that EPA has a mandatory duty to perform the evaluations described in Section 321(a) of the Clean Air Act, [Doc. 40], and, therefore, whether and when EPA reached conclusions regarding the requirements of Section 321(a) is no longer at issue in this Court and is not relevant to whether EPA has performed the evaluations described in Section 321(a) of the Clean Air Act. The United States also objects that, to the extent that this interrogatory seeks

> purely legal information, courts have routinely concluded that such interrogatories are not permissible. Finally, the United States objects to this interrogatory to the extent that it seeks the United States' legal contentions or conclusions, or the substance of attorney-client communications and the mental impressions, conclusions, opinions, or legal theories of attorneys for the United States.[1]

Similar evasive responses were provided to Interrogatories 8, 9, 10, 11, and 12, and Requests for Production 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 30, 33, and 37. Pursuant to Local Rule 37.02, each of these requests and responses is reproduced verbatim in the list attached as Exhibit E to this motion.

In addition, Defendant has effectively refused to answer several interrogatories and requests for production by reinterpreting them as asking only for the information that Defendant wants to produce, each time objecting to the relevancy of the request and then referring to Defendant's Supplemental Initial Disclosures for its "performance of the evaluations described in Section 321(a) of the Clean Air Act." Defendant took this improper approach in response to Interrogatories 14, 15 and 16 and Requests for Production 1, 2, 31, 32, 34, 35, and 36, each of which is reproduced verbatim in the attached Exhibit E.

EPA does not have the authority to unilaterally halt discovery. This Court ordered that fact discovery take place through May 1, 2015. *See* Scheduling Order, Doc. 55 (November 5, 2014). Defendant has already tried once to stay discovery and its motion was denied. *See* Memorandum Order Denying Motion to Dismiss and Motion to Stay Discovery, Doc. 71 (March

[1] As indicated in this example, Defendant also objected to a number of Plaintiffs' discovery requests on work product and privilege grounds. Defendant has never produced a privilege log as required by Fed. R. Civ. P. 26. Counsel for Defendant explained, however, that its objections raised "to the extent" are not asserted as to any particular document, as no documents are relevant to the case, and are asserted as protective only.

27, 2015). EPA cannot now engage in "self-help" to obtain the stay in discovery that this Court already rejected. *See* December 18, 2013 Order of Judge Seibert, Case No. 5:13-cv-119 (explaining that a party may not "hold discovery in abeyance in the absence of an Order by the District Judge staying [the] case.")[2]

EPA also does not have the authority to artificially limit the scope of issues involved in this case, or refuse to produce documents other than those it believes are helpful to its arguments. In *Patrick v. Teays Valley Trs., LLC*, 297 F.R.D. 248, 256 (N.D. W. Va. 2013) this Court explained that parties in a civil action generally enjoy broad discovery, and "the discovery rules are given a broad and liberal treatment." (Internal citations, quotations omitted). Furthermore, unless the court provides otherwise, the scope of discovery is governed by Federal Rule of Civil Procedure 26(b)(1) which states "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." *Id. citing* Fed.R.Civ.P. 26(b)(1).

Murray has sought to obtain information that is relevant to its claim that EPA failed to comply with Section 321(a), additionally, Murray seeks to obtain information relating to the injunctive relief it seeks. Defendant has failed to establish that this information is irrelevant, and has failed to provide any other legitimate objection to producing the requested information. It therefore must be produced. *See e.g. Herbalife Int'l, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 05-CV-41, 2006 U.S. Dist. LEXIS 68744, 17 (N.D.W.Va. Sept. 21, 2006) explaining that if a party believes that a discovery request exceeds the broad scope of allowable discovery, it may object, but "the party resisting discovery has the burden of clarifying, explaining and supporting its objections."

[2] *Available at* <https://ecf.wvnd.uscourts.gov/cgi-bin/show_public_doc?2013cv0119-33>.

EPA's broad boilerplate objections that requests are "vague, ambiguous, overly broad, and unduly burdensome" are also improper. This Court has specifically explained that the "mere recitation of the familiar litany that an interrogatory or document production request is overly broad, burdensome, oppressive and irrelevant will not suffice." *PLX, Inc. v. Prosystems, Inc.*, 220 F.R.D. 291, 293 (N.D.W.Va. 2004) (internal citations, quotations omitted). Similarly, the *Patrick v. Teays Valley Trs.* Court also emphasized that generic and bare-bone objections to discovery requests are "highly disfavored in the Fourth Circuit." *Citing e.g., Hager v. Graham*, 267 F.R.D. 486, 492 (N.D.W.Va. 2010) ("[G]eneral objections to discovery, without more, do not satisfy the burden of the responding party . . . because they cannot be applied with sufficient specificity to enable courts to evaluate their merits.").

Pursuant to Fed. R. Civ. P. 37(a), a party may move for an order compelling a designation under Rule 30(b)(6), a response to an interrogatory, and a response to a request for production. An order compelling discovery is appropriate where "the opposing party fails to respond or where the party's response is evasive or incomplete." *Automated Merch. Sys., Inc. v. Crane Co.*, 2011 U.S. Dist. LEXIS 66020, 12 (N.D. W. Va. June 21, 2011). Since Defendant is refusing to produce witnesses for depositions, and has utterly failed to respond to numerous interrogatories and requests for production, an order compelling discovery under Fed. R. Civ. P. 37 is justified in this case. Plaintiffs therefore respectfully request that this Court order Defendant to: (1) comply with the Fed. R. Civ. P. 30(b)(6) notice of deposition served March 31, 2015; (2) cooperate in the scheduling of depositions of EPA employees; and (3) fully respond to Plaintiffs' First Set of Written Discovery Requests.

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II. Defendant's Recalcitrance Justifies a 60-Day Extension of the Fact Discovery Deadline

To accommodate the continued delays caused by Defendant's refusal to cooperate in discovery, Plaintiffs respectfully request that this Court extend the discovery period established in its Scheduling Order (Doc. 55) by 60 days, to June 30, 2015 to allow for the completion of fact discovery.

EPA has caused significant delay in the discovery process. Defendant has refused to produce a 30(b)(6) witness on any of the topics designated in Plaintiffs' March 31, 2015 notice of deposition. Defendant has identified four EPA employees as having information relevant to this case in its United States' Supplemental Initial Disclosures (attached hereto as Exhibit F), which Plaintiffs received April 9, 2015, has instructed Plaintiffs to contact these potential witnesses through Defendant's counsel, and Defendant's counsel has refused to cooperate in scheduling their depositions. Defendant also refuses to cooperate in the scheduling of any additional depositions including of the Administrator or whoever has been delegated the responsibility for carrying out the Administrator's duties under Section 321(a) of the Clean Air Act, and has refused to produce any documents or respond to any interrogatory that may identify additional deponents or information beyond that which EPA chose to attach to its motion for summary judgment.

Plaintiffs believe that discovery can be completed within 60 days provided Defendant cooperates in the scheduling and production of witnesses and timely responds to Plaintiffs' written discovery requests. In addition to an order compelling discovery, therefore, Plaintiffs respectfully request a 60-day extension of the discovery cut-off, to June 30, 2015, so that Plaintiffs can adequately complete fact discovery.

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Defendant's expert disclosures are not due under the Court's Scheduling Order until August 5, 2015, so this modest extension of the fact discovery cut-off date will not prejudice Defendant.

III. Defendant's Motion for Summary Judgment is Premature and Requires Further Discovery Before Plaintiffs Can Properly Respond

Time and again, Defendant has filed motions that assume facts not in evidence and legal conclusions unsupported by the record. Defendant's April 10, 2015 Motion for Summary Judgment is no different. It makes numerous factual assertions regarding what EPA has done, when EPA has done it, and what EPA is doing and planning to do with respect to Section 321(a) of the Clean Air Act that contradict statements already made by EPA. Defendant includes a 32-page affidavit from a witness EPA did not disclose until two weeks ago and who EPA will not produce for a deposition.

As identified in Plaintiffs' First Amended Complaint and elsewhere, the evidence available to Plaintiffs indicates that the Administrator has not conducted the evaluations required of it by Section 321(a) of the Clean Air Act. This includes statements by the Administrator herself and EPA's own affiant have previously made, to Congress and in an official Freedom of Information Act response. *See* Declaration of John Lazzaretti at ¶¶3, 9 (attached hereto as Exhibit G). While EPA now attempts desperately to imply the contrary, Defendant has produced no documents to date actually contradicting or otherwise explaining the evidence identified by Plaintiffs. In short, Defendant has produced no correspondence, memoranda, or files about EPA's compliance with this statute. *See id.* at ¶¶ 4-7, 10-12.

Defendant also makes sweeping statements about the contents of numerous technical documents that Plaintiffs already identified in the First Amended Complaint as not satisfying EPA's statutory obligation under Section 321(a). *See* First Amended Complaint, Doc. 31 at ¶73;

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see also id. at 66 (quoting the Administrator distinguishing these economic reports from the jobs evaluations required by Section 321(a)); FOIA Response, Doc. 62-2 (same). To date, Plaintiffs have not had the opportunity to conduct any expert discovery to challenge the broad and inaccurate statements in Defendant's motion for summary judgment about what these reports are, what they are intended to do, and what they are not intended to do.

Defendant's motion also attempts to hide a second significant issue. Even after proving that EPA has not, is not, and will not conduct the evaluations required by Section 321(a) of the Clean Air Act, Plaintiffs must also make their case for appropriate relief. Defendant's motion assumes that there is only one form of relief available, and so no discovery is needed. This, however, was the same argument Defendant made in its Motion to Strike (Doc. 34), which this Court has already denied, and the same argument Defendant raised again in its Motion to Clarify, which this Court also denied. *See* Order Denying Motion to Dismiss, Doc. 40 (September 16, 2014); Order Denying Motion to Clarify, Doc. 53 (October 24, 2014).

While Defendant has repeatedly attempted to limit this case to the sole question of "whether EPA has performed the duty set forth in Section 321(a)" (Doc. 76 at 1), Defendant does not have the right to artificially narrow the issues in this case, particularly when its legal positions have already been rejected by this Court as incorrect or premature. To date, Plaintiffs have not had the opportunity to conduct depositions and have not received information in response to their written discovery requests on the issue of remedy. *See* Declaration of John Lazzaretti at ¶¶14-15.

Discovery is essential to Plaintiffs' response to Defendant's motion for summary judgment. Therefore, Plaintiff respectfully requests that this court hold Defendant's motion in abeyance pending discovery.

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Dated April 22, 2015

Respectfully submitted,

/s/ Jacob A. Manning

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA WHEELING DIVISION

MURRAY ENERGY CORPORATION, et al., Plaintiffs, v. GINA McCARTHY, in her official capacity as Administrator of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	Case No. 5:14-cv-00039-JPB Judge Bailey

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY, EXTEND THE DEADLINE FOR FACT DISCOVERY, AND HOLD DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN ABEYANCE PENDING COMPLETION OF DISCOVERY

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INTRODUCTION

In the event that discovery is not barred entirely for the reasons discussed in the United States' May 8, 2015 Motion for Entry of Protective Order ("PO Motion") [ECF No. 87] and accompanying Memorandum in Support ("PO Memorandum") [ECF No. 88], the United States respectfully requests that this Court deny Plaintiffs' Motion to Compel Discovery, Extend the Deadline for Fact Discovery, and Hold Defendant's Motion for Summary Judgment in Abeyance Pending Completion of Discovery ("Plaintiffs' Motion") [ECF No. 81] because the discovery requested would subvert the clear limitations on discovery mandated by Fed. R. Civ. P. 26.[1]

Under the Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). "Relevant information" must be "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); *see also id.* advisory committee's note to 2000 Amendment ("[T]his sentence has been amended to clarify that information *must be relevant to be discoverable*, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence.") (emphasis added). Further discovery limitations are required where "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case . . . and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii). As detailed below, EPA has provided all properly discoverable, relevant information in response to Plaintiffs' interrogatories and requests for production of documents ("RFPs"), and has set forth specific objections to the improper discovery requests. The additional information Plaintiffs seek to compel is wholly irrelevant to the single, narrow claim presented in Plaintiffs' First Amended Complaint ("Am. Compl.") [ECF No. 31] and, therefore, not reasonably calculated to lead to the discovery of admissible evidence. Further, production of the additional information would place an immense burden on the Agency with little or no potential benefit.

[1] Fed. R. Civ. P. 37(a)(5)(B) provides that if this Court denies Plaintiffs' Motion, it may issue any protective order authorized under Rule 26(c).

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Plaintiffs' Motion should also be denied as to the depositions Plaintiffs seek to compel. Plaintiffs have failed to properly notice the depositions as required in this Court's Scheduling Order [ECF No. 55] and by the Local Rules of Civil Procedure. In addition, the depositions seek information that: (1) is not relevant and therefore not reasonably calculated to lead to the discovery of admissible evidence; (2) would be cumulative of the information already identified in the United States' April 6, 2015 Supplemental Initial Disclosures [ECF No. 82-6] and the United States' April 6, 2015 Objections and Responses to Plaintiffs' First Set of Discovery Requests ("EPA's Objections and Responses") [ECF No. 82-4], and provided to Plaintiffs in the Declaration of James B. DeMocker [ECF No. 77-80]; and (3) would place an immense burden on the Agency, with no potential benefit. Nothing in Plaintiffs' Motion justifies further responses to their broad and irrelevant discovery or the burdensome depositions they propose.

Plaintiffs' other requests for relief, an extension of the discovery deadline and an abeyance of briefing on the pending Motion for Summary Judgment [ECF No. 75], should also be denied. As set forth in the PO Memorandum [ECF No. 88], there is no need for any discovery to resolve the narrow legal issues presented in the Motion for Summary Judgment.

ARGUMENT

I. Plaintiffs' Motion to Compel Further Responses to Their First Set of Discovery Requests Should Be Denied.

As demonstrated below, EPA has provided all relevant and discoverable information in response to Plaintiffs' interrogatories and RFPs, and has asserted specific objections to the discovery requests where appropriate. Plaintiffs have failed to meet their burden to overcome EPA's objections, and so their motion should be denied.

A. EPA Has Provided All Relevant and Properly Discoverable Information.

Rule 26(b)(1) limits the scope of discovery to relevant information. Here, relevancy alone is a sufficient basis to deny Plaintiffs' Motion because EPA has produced all relevant and properly discoverable documents and information requested in the Motion to Compel. There is only one claim presented in this case: whether EPA has failed to "conduct continuing evaluations

of potential loss or shifts of employment which may result from the administration or enforcement of [the Clean Air Act ("CAA")] and applicable implementation plans." 42 U.S.C. § 7621(a). Am. Compl. ¶¶ 81-83. The United States has certified that it has provided all documents that demonstrate EPA's performance of this duty, and thus all documents relevant to Plaintiffs' claim, in support of its Motion for Summary Judgment. *See* Declaration of James B. DeMocker [ECF No. 77] ¶ 2. EPA also identified the documents in its Initial and Supplemental Initial Disclosures,[2] and referenced them in many of EPA's Objections and Responses [ECF No, 82-4]. Plaintiffs have failed to explain how any of the other information requested in their broad interrogatories and RFPs is relevant to the question of whether EPA has or has not conducted "continuous evaluations of potential loss or shifts in employment." 42 U.S.C. § 7621(a).

Instead, Plaintiffs rely on inapposite cases for the proposition that broad discovery should be permitted. *See* Pltfs.' Mem. at 6-8. None of these authorities address the scope of discovery in a claim that a federal agency has failed to perform a non-discretionary duty under the citizen-suit provision in 42 U.S.C. § 7604(a)(2), for which discovery is not allowed. *See, e.g.*, *N.Y. Public Interest Research Grp. v. Whitman*, 214 F. Supp. 2d 1, 6 (D.D.C. 2002) ("Because this Court lacks the power under the CAA to grant equitable relief beyond the specific [alleged non-discretionary duty] before it, plaintiffs are not entitled to discovery."). Indeed, the cases cited by Plaintiffs all recognize relevance as a legitimate limit on discovery, and one of the cases resulted in a discovery *limitation* on the basis of relevance. *See O'Hara v. Capouillez*, No. 5:13-cv-119, 2013 U.S. Dist. LEXIS 177511, at *8 (N.D. W. Va. Dec. 18, 2013) (limiting the scope of discovery to the geographic bounds of the claim).

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[2] Plaintiffs complain that EPA mailed its Objections and Responses and Supplemental Initial Disclosures to counsel for Plaintiffs on April 6, 2015, as certified in the certificates of service [ECF Nos. 73, 74], but did not email a copy to counsel for Plaintiffs. Mem. in Supp. of Pltfs.' Mot. to Compel Discovery, Extend the Deadline for Fact Discovery, and Hold Def.'s Mot. for Summary Judgment in Abeyance Pending Completion of Discovery ("Plaintiffs' Memorandum") [ECF No. 82] at 2. However, service by email is not required by the Federal or Local Rules of Civil Procedure, the parties have not agreed to such service, and Plaintiffs have never requested email service. In fact, Plaintiffs themselves certified service of their November 17, 2014 Initial Disclosures by U.S. Mail *only*. Cert. of Serv. [ECF No. 56].

In their Memorandum, Plaintiffs made no effort to explain the possible relevancy of the information to which EPA has objected, other than conclusory assertions such as: "Murray has sought to obtain information that is relevant to its claim that EPA failed to comply with Section 321(a)." Pltfs.' Mem. at 7. Plaintiffs belatedly attempt to address relevancy in their Opposition to the Motion for Summary Judgment by suggesting that EPA has not made "'a full disclosure of the facts' relevant to its purported performance of Section 321(a) evaluations." Pltfs.' Response in Opp'n to the Def.'s Mot. for Summ. J. ("Plaintiffs' SJ Opposition") [ECF No. 85] at 8. Yet, even in their Opposition, Plaintiffs merely summarize the requests with little or no explanation of how the requested information would make it more or less likely that EPA has or has not performed the evaluations described in Section 321(a). *See id.*[3] Moreover, Plaintiffs' view of relevancy for their claim is undermined by their questioning the "relevance *if any*," *see id.* at 16 (emphasis added), of EPA's certified documents that demonstrate its performance of the evaluations in Section 321(a). If the documents identified by EPA are not relevant to Plaintiffs' claim, then nothing is.

Because EPA has produced all information relevant to the single claim presented by Plaintiffs, any additional discovery would be cumulative of information already produced, at best, or not "relevant to the subject matter involved in the action," Fed. R. Civ. P. 26(b)(1), at worst. Either way, Plaintiffs' Motion should be denied.

B. Plaintiffs Have Failed to Satisfy the Requirements of the Local Rules of Civil Procedure or the Burden of Persuasion for a Motion to Compel Discovery.

Plaintiffs' Motion should also be denied because Plaintiffs have failed to meet the requirements for a motion to compel under L.R. Civ. P. 37.02. This Rule requires that "[a] motion to compel disclosure or discovery must be accompanied by a statement setting forth: . . .

[3] Plaintiffs also identify interrogatories that were not the subject of their Motion to Compel. *See id.* (referencing pages 4-7 of EPA's Objections and Responses without noting the numbers of the referenced requests in that page range, which are Interrogatories 1-6). Because Plaintiffs did not raise a challenge to these responses in their Motion to Compel, they waived the opportunity to do so, and cannot cure their waiver by suggesting that EPA did not fully respond in opposition to a motion on the merits of the case.

[t]he *specific* rule, statute or case authority supporting the movant's position *as to each such discovery request* or disclosure requirement." L.R. Civ. P. 37.02(a)(2) (emphases added). As discussed in more detail below, Plaintiffs move to compel further responses to nine interrogatories and twenty-two RFPs, but only attempt to comply with the requirement to provide specific reasons for *a single discovery response*—Interrogatory 7—and even that effort is insufficient. *See* Pltfs.' Mem. at 5-6. For the remaining responses, Plaintiffs merely assert that EPA's responses were "evasive" or argue that EPA took the "improper approach" of referring to documents identified in its Supplemental Initial Disclosures and objecting on the basis of relevance. Ptfs.' Mem. at 6. Plaintiffs have not referred to any "*specific* rule, statute or case authority" to support their challenges to EPA's Objections and Responses, as required by L.R. Civ. P. 37.02(a)(2).

Nor have Plaintiffs met their burden to explain how the requested information is needed to address the question of whether or not EPA has performed the duty set forth in Section 321(a). As explained in *Herbalife Int'l, Inc. v. St. Paul Fire & Marine Corp.*, No. 05-CV-41, 2006 U.S. Dist. LEXIS 68744 (N.D. W. Va. Sept. 21, 2006), one of the cases cited by Plaintiffs (Pltfs.' Mem. at 7):

> When as in this case, discovery is contested, "the party resisting discovery has the burden of clarifying, explaining and supporting its objections." . . . *Once this burden has been met, the burden shifts to the discovering party to show that the information sought is relevant* to the subject matter of the present civil action.

Herbalife Int'l, Inc., 2006 U.S. Dist. LEXIS 68744, at *17-18 (emphasis added) (citation omitted). Plaintiffs attempt to avoid this burden by incorrectly asserting that EPA did not object to Plaintiffs' discovery requests with specificity, suggesting that the objections are "boilerplate". *See* Pltfs.' Mem. at 8. While EPA often asserted general objections at the outset of its responses, the responses go on to explain the specific bases for these objections. As noted in the very case on which Plaintiff rely for their suggestion, (Pltfs.' Mem. at 8), it is clear that the objections are in full compliance with the specificity requirements of Fed. R. Civ. P. 34:

> Rule [34] states that the responding party must specify the grounds for each objection. It does not say that a general objection in addition to the specific grounds is noncompliant. Here, Defendant lists three specific grounds for objecting to the request. Therefore, the Court is able to evaluate the merits of Defendant's objections and determine whether the request was proper. Accordingly, . . . [the general] part of the objection does not render the objection as a whole noncompliant and improper.

See Hager v. Graham, 267 F.R.D. 486, 492-93 (N.D. W. Va. 2010). As demonstrated below, in EPA's Objections and Responses, the United States explained and supported its objections with specificity and so met its burden. Accordingly, "the burden shifts to [Plaintiffs] to show that the information sought is *relevant* to the subject matter of the present civil action." *Herbalife Int'l*, 2006 U.S. Dist. LEXIS 68744, at *17-18 (emphasis added). Plaintiffs' mere identification of the interrogatories and RFPs for which they seek to compel further responses in Exhibit E [ECF No. 82-5] does not meet their burden to explain why EPA's objections are not valid or why the requested information is relevant. Because Plaintiffs have failed to satisfy the Local Rules of Civil Procedure and to meet their burden of persuasion, their Motion should be denied.

C. Plaintiffs' Motion Should Be Denied for Each Challenged Objection or Response.

While Plaintiffs have challenged thirty-one different discovery responses, they have only attempted to explain their basis for challenging EPA's objections to Interrogatory 7. As discussed below, EPA properly objected to Interrogatory 7 and to related RFPs on specific grounds, including relevance. Plaintiffs have made no effort to address EPA's specific objections with the level of detail required by L.R. Civ. P. 37.02(2).

1. Plaintiffs' Motion to Compel Further Response to Interrogatory 7 and RFPs 12-14 Should Be Denied.

Interrogatory 7 asks "[a]t what time, if ever, did You first conclude You are required by Clean Air Act Section 321(a) to conduct continuing evaluations of potential loss or shifts of employment which may result from Your administration or enforcement of the Clean Air Act and applicable implementation plans." EPA's Objections and Responses [ECF No. 82-4] at 12-13. Similarly, RFPs 12 and 13 seek production of documents regarding the Administrator's

statement to members of the House of Representatives that "EPA has not interpreted this provision *to require* EPA to conduct employment investigations in taking regulatory actions," while RFP 14 seeks production of documents regarding the Administrator's statement to Senator David Vitter that "EPA has found no records indicating that any Administration since 1977 has interpreted section 321 *to require* job impacts for rulemaking actions." EPA's Objections and Responses at 34-35 (emphases added) (internal quotations omitted). EPA objected to these requests on grounds of relevancy, and explained in its objections that the question of whether Section 321(a) constitutes a non-discretionary duty is no longer at issue in this case, and therefore, the requested information is not relevant to Plaintiffs' claim. *Id.* at 13, 34-35.

Plaintiffs have not explained how the information sought in these requests is relevant, much less how it is likely to lead to the discovery of admissible evidence. Not only has the issue already been decided, but it was decided by this Court as a matter of law—*without any factual determination*. There is no basis to *re-litigate* a settled issue that did not require any facts to resolve in the first place. Plaintiffs have made no effort to address any of EPA's specific objections with the level of detail required by L.R. Civ. P. 37.02(2). Therefore, Plaintiffs' Motion should be denied for Interrogatory 7 and for RFPs 12-14.

2. Plaintiffs' Motion to Compel Further Responses to Interrogatories 8-12 and RFPs 8-19, 30, 33, and 37 Should Be Denied.

In a single sentence, Plaintiffs challenge EPA's objections to Interrogatories 8-12 and RFPs 8-19, 30, 33, and 37, but make no attempt to explain how the requested information is relevant to any issue before the Court; nor do they attempt to rebut the specific objections proffered by EPA. *See* Pltfs.' Mem. at 6. Plaintiffs also make no effort to address any of EPA's specific objections with the level of detail required by L.R. Civ. P. 37.02(2). Instead, Plaintiffs rest on the conclusory statement that EPA's responses are "evasive." Pltfs.' Mem. at 6. As demonstrated below, EPA provided specific objections, including but not limited to relevancy, vagueness, ambiguity, over-breadth, and undue burden, and explained the basis for each objection.

Interrogatory 8 requests the identity of all persons "whose employment responsibilities currently include or have ever included evaluating or assisting" in evaluations under Section 321(a). EPA's Objections and Responses [ECF No. 82-4] at 13. EPA asserted five separate, specific objections, including that the request is "not likely to lead to the discovery of admissible evidence because the identity of persons involved in EPA's performance of the evaluations described in Section 321(a) is not relevant to whether EPA has performed the evaluations." *Id.* at 13-14. Plaintiffs have not provided any explanation as to how the identities of these individuals would lead to the discovery of admissible evidence. EPA also objected on grounds that Plaintiffs' use of the word "ever" rendered the request overly broad and unduly burdensome. *Id.* at 14. Because Plaintiffs have not addressed any of EPA's specific objections, their Motion should be denied for Interrogatory 8.

Interrogatory 9 requests that EPA identify all persons "with whom [EPA has] discussed" Section 321(a). *Id.* at 14. EPA asserted that the request is "not likely to lead to the discovery of admissible evidence because the identities of persons with whom EPA has 'discussed Clean Air Act Section 321(a)' are not relevant to whether EPA has performed the evaluations." *Id.* at 14-15. Plaintiffs have not provided any explanation as to how the identities of these individuals would lead to the discovery of admissible evidence. EPA also asserted that the lack of a time period rendered this request vague, ambiguous, overly broad, and unduly burdensome, *id.*, especially for a statutory provision enacted in 1977.[4] Because Plaintiffs have not addressed EPA's specific objections, their Motion should be denied for Interrogatory 9.

Interrogatory 10 requests that EPA identify and describe requests that EPA, or persons associated with EPA, "have made to Congress or the President for funds to perform the obligations set forth in" Section 321(a). *Id.* at 15. EPA asserted three specific objections, including that the request is "not likely to lead to the discovery of admissible evidence because

[4] EPA asserted this specific objection to other requests, including in its challenged objections to Interrogatories 10-12 and 14-16, and RFPs 1-2, 8-11, 19, 31-32, 34, and 36.

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requests for 'funds to perform the [evaluations]' are not relevant to whether EPA has performed the evaluations." *Id.* at 15. Plaintiffs have not explained how requests for funding, if any exist, would lead to the discovery of admissible evidence. Because Plaintiffs have not addressed EPA's specific objections, their Motion should be denied for Interrogatory 10.

Interrogatory 11 requests that EPA identify and describe all communications between EPA and Congress, the White House, or federal agencies regarding Section 321(a); RFPs 8-10 request documents regarding all communications with Congress, the White House, and federal agencies concerning Section 321(a); and RFP 11 requests documents regarding such communications. *Id.* at 15, 32-33. For each request, EPA asserted between three to four separate, specific objections, including that the requests are "not likely to lead to the discovery of admissible evidence because the requested communications are not relevant to whether EPA has performed the evaluations." *Id.* at 15-16, 32-34. Plaintiffs have not provided any explanation as to how the requested communications would lead to the discovery of admissible evidence. Because Plaintiffs have not addressed EPA's specific objections, their Motion should be denied for Interrogatory 11 and RFPs 8-11.

Interrogatory 12 requests that EPA identify and describe all communications or documents issued to EPA staff "instructing them to comply with Section 321(a)" or "advising them how to comply." *Id.* at 16. EPA asserted that the request is "not likely to lead to the discovery of admissible evidence because the requested communications are not necessary to determine whether EPA has performed the evaluations." *Id.* Plaintiffs have not provided any explanation as to how the requested communications and documents would lead to the discovery of admissible evidence. Because Plaintiffs have not addressed any of EPA's specific objections, their Motion should be denied for Interrogatory 12.

RFP 15 requests production of documents regarding the Administrator's statement to Senator Vitter that "[t]he agency could not find any records of any requests for section 321 investigation of job losses alleged to be related to regulation-induced plant closure." *Id.* at 36. EPA asserted two specific objections, including that the request is "not likely to lead to the

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discovery of admissible evidence because the requested documents are not relevant to whether EPA has performed the evaluations." *Id.* The plain language of Section 321(a) does not pertain to requests for investigations. Rather, Section 321(b) is the provision related to such requests. *Compare* 42 U.S.C. § 7621(a), *with id.* § 7621(b). Plaintiffs have provided no explanation as to how the RFP would lead to the discovery of admissible evidence. Because Plaintiffs have not addressed EPA's specific objections, their Motion should be denied for RFP 15.

RFPs 16-18 request documents that may have been created or used in relation to the Administrator's April 11, 2013 confirmation hearing before the Senate Environment and Public Works Committee, including drafts of responses, notes, and documents used to prepare for the hearing. EPA's Objections and Responses [ECF No. 82-4] at 36-37. EPA asserted two specific objections, including that the request is "not likely to lead to the discovery of admissible evidence because the requested documents are not relevant to whether EPA has performed the evaluations." *Id.* None of the RFPs are limited to documents concerning Section 321(a), nor were the hearings so limited. Thus, on its face, the RFPs bear little relation to the narrow legal issue in this case. Even if Plaintiffs limited these RFPs to only those documents pertaining to the Administrator's response to inquiries regarding whether EPA has a non-discretionary duty under Section 321(a), this Court's September 16, 2014 Order [ECF No. 40] resolved that issue for purposes of this litigation, as discussed *supra*. Because Plaintiffs have not addressed EPA's specific objections, their Motion should be denied for RFPs 16-18.

RFP 19 seeks production of all Freedom of Information Act ("FOIA") requests concerning Section 321(a) received by EPA and all responses. EPA's Objections and Responses [ECF No. 82-4] at 37. EPA's objections included that the request is "not likely to lead to the discovery of admissible evidence because the requested documents are not relevant to whether EPA has performed the evaluations." *Id.* Plaintiffs have not provided any explanation as to how the requested FOIA requests and responses would lead to the discovery of admissible evidence. To the extent that Plaintiffs seek FOIA requests and responses regarding whether EPA has a non-discretionary duty under Section 321(a), this Court's September 16, 2014 Order [ECF No. 40]

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resolved that issue for purposes of this litigation, as discussed *supra*. Because Plaintiffs have not addressed EPA's specific objections, their Motion should be denied for RFP 19.

RFP 30 seeks all documents regarding the Administrator's statement on November 19, 2013 that EPA "regulate[s] to drive markets." *Id.* at 45 (alteration in original). EPA objected on the ground that the RFP is "not likely to lead to the discovery of admissible evidence because the requested documents, if any, are not relevant to whether EPA has performed the evaluations." *Id.* at 46. Even if EPA possessed and produced the documents requested, any such documents would bear no relation to the narrow legal issue in this case regarding whether EPA has performed the evaluations described in Section 321(a). Moreover, Plaintiffs did not assert in their Memorandum that this RFP related to their allegations that they have been injured by an alleged reduced market for coal, and therefore, Plaintiffs have waived this argument. *See Moseley v. Branker*, 550 F.3d 312, 325 n.7 (4th Cir. 2008) ("[A]rguments not specifically raised and addressed in opening brief, but raised for the first time in reply, are deemed waived."). Even if Plaintiffs had made this argument in reference to RFP 30, EPA's intentions with regard to its regulations have no bearing on whether EPA's regulations have actually impacted the market for coal or injured Plaintiffs. Because Plaintiffs have not addressed EPA's specific objections, their Motion should be denied for RFP 30.

RFP 33 seeks production of documents concerning "legislation proposed by Congress at any time from 2007 to the present that would require EPA to evaluate, estimate, or consider the employment impacts of its administration or enforcement of the Clean Air Act or applicable implementation plans." EPA's Objections and Responses [ECF No. 82-4] at 47. EPA's objections included that the RFP is "not likely to lead to the discovery of admissible evidence because the requested documents are not relevant to whether EPA has performed the evaluations." *Id.* Further, any such documents would bear no relation to the narrow legal issue in this case concerning whether EPA has performed the evaluations described in Section 321(a). Any legislation proposed but never enacted would not be binding on any party, including EPA, would not require EPA to take any action, and could not be the basis for a citizen suit under

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Section 304(a)(2) to perform a non-discretionary duty. *See* 42 U.S.C. § 7604(a)(2). Because Plaintiffs have not addressed any of EPA's specific objections, their Motion should be denied for RFP 33.

RFP 37 seeks documents concerning a statement made by President Barack Obama when he was a U.S. Senator. EPA's Objections and Responses [ECF No. 82-4] at 50. EPA's objections included grounds that the request is "not likely to lead to the discovery of admissible evidence because the requested documents are not relevant to whether EPA has performed the evaluations." *Id.* Any such documents would bear no relation to the narrow legal issue in this case concerning whether EPA has performed the evaluations described in Section 321(a). The statement of a U.S. senator is not binding on EPA, did not require EPA to take any action, and cannot be the basis for a citizen suit under Section 304(a)(2) to perform a non-discretionary duty. S*ee* 42 U.S.C. § 7604(a)(2). Because Plaintiffs have not addressed EPA's specific objections, their Motion should be denied for RFP 37.

EPA's objections to all of these interrogatories and RFPs are proper because the requests amount to nothing more than a fishing expedition. The information requested is not relevant, and Plaintiffs have not met their burden to demonstrate otherwise.

3. Plaintiffs' Motion to Compel Further Responses to Interrogatories 14-16 and RFPs 1-2, 31-32, and 34-36 Should Be Denied.

Plaintiffs challenge EPA's objections and responses to Interrogatories 14-16 and RFPs 1-2, 31-32, and 34-36,[5] by asserting that EPA improperly reinterpreted those requests to seek only the information that EPA chose to produce. Pltfs.' Mem. at 6. Plaintiffs' assertion is demonstrably false.

[5] Plaintiffs included EPA's Response to RFP 27 in Exhibit E, but they failed to identify this Response as part of their Motion to Compel Discovery, and they have not addressed any of EPA's specific objections with the level of detail required by L.R. Civ. P. 37.02(2). Therefore, Plaintiffs have waived any challenge to EPA's Response to RFP 27. *See Moseley*, 550 F.3d at 325 n.7. In any event, the RFP seeks all documents regarding "how EPA evaluates job shifts caused by its enforcement of applicable implementation plans." EPA provided specific objections and referenced the documents listed in its Supplemental Initial Disclosures, many of which discuss EPA's methodologies. EPA's response is consistent with, and fully supported by, its Motion for Summary Judgment.

Interrogatories 14-16 request EPA to identify and describe its evaluations of "job losses and shifts" that certain EPA actions "would cause," including actions taken "to affect the market for coal," Interrogatory 14, "to affect investment in coal-fired power plants," Interrogatory 15, and "to affect capital markets," Interrogatory 16. EPA's Objections and Responses [ECF No. 82-4] at 17-18. Similarly, RFPs 31-32 and 36 seek production of evaluations of "potential job losses and shifts in employment in the coal industry" that certain EPA efforts "might cause," including actions taken "to affect the market for coal," RFP 31; "EPA's use of its enforcement authority . . . to facilitate, encourage, or accelerate a transition away from use of coal-fired power plants to generate electricity in the United States," RFP 32; and "the use of supplemental environmental projects in settlement of Clean Air Act enforcement actions to reduce the consumption of power from coal-fired power plants," RFP 36. *Id.* at 46, 49. In response to those requests, EPA provided all relevant information by referring to the documents that constitute the Agency's evaluations of employment impacts, while objecting to any other requested information on grounds of relevancy. *Id.* at 17-18, 46-47, and 49-50. EPA's objections, including those based on relevancy, are justified and proper.

Each of EPA's responses included at least three specific objections. Among these are that Plaintiffs' requests make unfounded presumptions regarding whether EPA takes certain actions, EPA's intentions in taking any such actions, and that the presumed intentions are not included or defined in Section 321(a). *Id.* Even if Plaintiffs' presumptions were correct, the interrogatories and RFPs ask EPA to identify, describe in detail, or produce *evaluations* of job losses and shifts for any such actions. EPA identified, described in detail, and produced all such evaluations with its Motion for Summary Judgment and referred to this same set of evaluations in its responses to these interrogatories and RFPs. *Id.* Thus, EPA has provided responsive information regarding any evaluations of job losses and shifts that might be responsive to these discovery requests. Plaintiffs have not provided any explanation to justify their presumptions or the need for the other requested information. Because Plaintiffs have not addressed EPA's

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specific objections, their Motion should be denied for Interrogatories 14-16 and RFPs 31-32 and 36.

RFPs 1 and 2 seek documents concerning Section 321(a) "authored or received by You or EPA" and "EPA actions taken to comply with" Section 321(a). *Id.* at 28-29. EPA asserted four separate, specific objections. Among these are that each request is "not likely to lead to the discovery of admissible evidence because it is not limited to documents relevant to whether EPA has performed the evaluations." *Id.* at 28. Because EPA has produced all of the documents that demonstrate the Agency's performance of the duty in Section 321(a) with its Motion for Summary Judgment, any additional documents that fall within the scope of these requests would be irrelevant to the narrow issue presented in this case. Plaintiffs have not provided any explanation to the contrary. Because Plaintiffs have not addressed EPA's specific objections, their Motion should be denied for RFPs 1 and 2.

RFP 34 seeks documents concerning "the impact of [EPA's] administration and enforcement of the Clean Air Act on the construction of new coal-fired power plants." *Id.* at 48. EPA asserted that the RFP is "unlikely to lead to the discovery of admissible evidence" because Section 321(a) does not require EPA to evaluate "the impact of [its] administration and enforcement of the . . . Act on the construction of new coal-fired power plants." *Id.* Because EPA has produced all of the documents that demonstrate the Agency's performance of the duty in Section 321(a) with its Motion for Summary Judgment, any additional documents that fall within the scope of this request would be irrelevant to the narrow legal issue in this case. *See id.* Plaintiffs have not provided any explanation as to how the requested documents would lead to the discovery of admissible evidence. Because Plaintiffs have not addressed EPA's specific objections, their Motion should be denied for RFP 34.

RFP 35 seeks documents concerning "the impacts of EPA's publication of a proposed emission guideline for carbon dioxide emissions from power plants on decisions whether to retire coal-fired power plants in 2015, including but not limited to, decisions made in connection with the April 16, 2015, deadline for compliance with the national emission standard for power

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plants," as well as evaluations of "potential job losses and shifts in employment in the coal industry that EPA's publication might cause." *Id.* at 48. EPA objected to the specific language of this RFP as vague, ambiguous, and unintelligible. *Id.* at 48-49. Nonetheless, EPA made a good-faith effort to respond to the RFP by interpreting it as seeking EPA's regulatory impact analysis (RIA) and evaluation of employment impacts for the "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," which is publicly available, was included in EPA's Supplemental Initial Disclosures, *see id.*, and was produced with EPA's Motion for Summary Judgment. Thus, EPA has provided documents that are responsive to this RFP, but Plaintiffs have not provided any explanation to justify their need for additional documents. Plaintiffs' Motion should be denied for RFP 35.

For each of the responses to interrogatories and RFPs challenged by Plaintiffs in their Motion, EPA has provided all relevant and properly discoverable information and has asserted specific objections. Plaintiffs have failed to meet their burden to overcome EPA's specific objections as required by L.R. Civ. P. 37.02(2). Therefore, the Motion should be denied as to all of Plaintiffs' First Set of Discovery Requests.

D. The Burden of Additional Discovery Outweighs Its Potential Benefit Based on the Limited Needs of Discovery in This Case.

Even if any of the information requested by Plaintiffs were relevant, the burden to EPA of responding further outweighs any possible benefit based on the limited needs of this case. Rule 26(b)(2)(C) provides that "[o]n motion or on its own, the court must limit . . . the extent of discovery otherwise allowed by these rules or by local rules" where "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, . . . and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii). As noted in a case cited by Plaintiffs (*see* Pltfs.' Mem. at 7 & n.2), the scope of discovery "is not limitless, and the Court has great flexibility to order only the discovery that is reasonable for a case." *O'Hara v. Capouillez*, No. 5:13-cv-119, 2013 U.S. Dist. LEXIS 177511, at *8 (N.D. W. Va. Dec. 18, 2013) (internal citation and quotation omitted); *see also Nicholas v. Wyndham Intern.*,

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Inc., 373 F.3d 537, 543 (4th Cir. 2004) ("Even assuming that . . . information is relevant . . . , the simple fact that requested information is discoverable does not mean that discovery must be had."). EPA demonstrates below that Plaintiffs' past and proposed discovery is not tailored to the particular needs of this case—adjudicating whether or not EPA's existing evaluations of employment impacts demonstrate performance of the duty in Section 321(a).

Moreover, the burden of discovery on EPA outweighs the potential benefit of the requested discovery. As set forth in the December 23, 2014 Motion of the United States to Stay Discovery Pending Resolution of Dispositive Motion ("Stay Motion") [ECF No. 61]:

> It would be inefficient and burdensome to allow discovery to proceed. *See* Hertz Wu Decl., Ex. 2, ¶¶ 6-7. For example, Plaintiffs seek the identity of any person with whom any employee, agent, or representative from EPA discussed CAA Section 321, Ex. 1, ¶ II.F, Interrogatory No. 9, and documents related to EPA's enforcement actions nationwide, Ex. 1, Requests for Production Nos. 32, 36. All told, responding to Plaintiffs' discovery will require an estimated 500 to 1,000 hours and involve approximately 100 different employees and attorneys. *See* Hertz Wu Decl., Ex. 2, ¶ 9.

Stay Motion at 5 (citing the Declaration of Sara Hertz Wu [ECF No. 61-2]). Although the Motion to Dismiss is no longer pending, the estimates of time and resources required to respond to Plaintiffs' discovery requests remain valid. Compliance with such burdensome discovery requests would require an inordinate investment of time and resources to identify documents for privilege and create a privilege log.

Indeed, compliance with the broad discovery requests seeking communications within the Agency and between the Agency and Congress, the White House, and other federal agencies, including requests for details of the Agency's budget process, would constitute an unfounded and unjustified intrusion into EPA's decision-making process during ongoing rulemakings and enforcement proceedings. The requested discovery would interfere with deliberations among high-level agency officials and across multiple branches of government. This extraordinary burden is not justified because this Court's only task in adjudicating the merits of Plaintiffs' claim is to determine whether EPA has performed the non-discretionary duty in Section 321(a), not to assess how the evaluations were performed or who participated in them. *See* United

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States' Mem. in Supp. of Mot. for Summ. J. [ECF No. 76] and cases cited therein at 4, 18-19. Plaintiffs' Motion to Compel Discovery should be denied because the burden or expense of the proposed discovery outweighs any benefit, given the very limited needs of this case.

II. The Motion to Compel Discovery Should Be Denied for All Proposed Depositions.

A. Plaintiffs' Motion to Compel Deposition Testimony Is Untimely and Procedurally Barred.

In its November 5, 2014 Scheduling Order [ECF No. 55], this Court ordered that all discovery be "fully served" by May 1, 2015. Scheduling Order at 3, ¶ 6.[6] Although Plaintiffs have informally proposed depositions of the individuals identified in EPA's April 6, 2015 Supplemental Initial Disclosures [ECF No. 82-6], they have never served a deposition notice on counsel for EPA for any of these individuals or filed the required certificate of service for any such notice with this Court. *See* L.R. Civ. P. 5.01(a) ("Parties *shall* file . . . certificates of service of discovery materials.") (emphasis added). Thus, as of May 1, 2015, and indeed as of today, Plaintiffs have not properly noticed or fully served a single deposition notice for individual witnesses under Rule 30(b)(1) or L.R. Civ. P. 5.01(a), and therefore, under the Court's Scheduling Order, are barred from seeking to compel the depositions of these individuals.

Similarly, while Plaintiffs served their Notice of 30(b)(6) Deposition of the United States Environmental Protection Agency *Duces Tecum* ("Notice") [ECF No. 82-1] by electronic means on some counsel for EPA on March 31, 2015, they have never filed the stand-alone certificate of service with the Court that is required by L.R. Civ. P. 5.01(a). Indeed, their email includes the disclaimer that the Notice was "[t]o get the discussion started" regarding the scheduling of depositions. Email from J. Lazzaretti to P. Jacobi (Mar. 31, 2015) [ECF No. 82-2] at 3. Thus,

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[6] *See id.* ("**Discovery Completion**: All discovery *shall be fully served* and completed by **May 1, 2015**. "Completed discovery" as used in FED. R. CIV. P. 16(b) means that all discovery requests are to be *filed* far enough in advance to be completed *as required by the rules* before the discovery deadline. Objections, motions to compel and all other motions relating to discovery in this civil action should be filed as soon as the problem arises, but are to be filed no later than one week after the discovery completion date. *The Court will not consider any untimely filed discovery related motions*.") (emphases added).

the Notice was not properly served by the deadline in this Court's Scheduling Order. Because Plaintiffs have failed to adhere to the requirements of the Scheduling Order and Local Rules of Civil Procedure, their Motion as to the proposed depositions should be denied.

B. Plaintiffs' Proposed Rule 30(b)(6) Deposition Topics Are Largely Irrelevant and Otherwise Duplicative of Documents Already Produced.

Plaintiffs' Notice [ECF No. 82-1] named EPA as a deponent and identified fifty-four broad subject areas for testimony. The Notice seeks testimony on topics that are irrelevant to the narrow issue before the Court. EPA filed objections to the Notice on May 8, 2015, *see* Cert. of Serv. [ECF No. 86], and has attached a copy of the objections as Exhibit 1.[7] Because the proposed Rule 30(b)(6) topics are similar to Plaintiffs' First Set of Discovery Requests, EPA objects on similar bases, including relevance.[8] *See* Exhibit 1. Thus, based on the similarity between the challenged interrogatories and RFPs in comparison to the Topics in Exhibit A of the Notice, the United States incorporates by reference and restates its arguments in Part I.C *supra*.

In addition, as set forth in the United States' objections to the Notice, many of the topics are duplicative of information provided by EPA with its Motion for Summary Judgment. For example, Topic 6 seeks information regarding EPA's "efforts to continuously evaluate job losses

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[7] The United States served objections to the Notice out of an abundance of caution, and without waiving its arguments that the Notice is invalid, unenforceable, and improperly served under L.R. Civ. P. 5.01(a). Ex. 1 at 1.

[8] *Compare* Interrogatory 8, *with* Notice at Topics 14-18 (regarding the role of EPA employees in "complying with Section 321(a)"); *compare* Interrogatory 9, *with* Topics 4 and 20 (discussions regarding Section 321(a) and related documents); *compare* Interrogatory 10, *with* Topic 27 (requests for funds to perform Section 321(a) evaluations); *compare* Interrogatory 11 and RFPs 8, 9, 10, and 11, *with* Topics 24-26 (communications with Congress, the White House, and federal agencies regarding Section 321(a)); *compare* Interrogatory 12, *with* Topics 19 and 21-22 (internal EPA communications regarding Section 321(a)); *compare* RFPs 15-18, *with* Topic 51 ("The confirmation hearing of the current Administrator before the Environment and Public Works Committee, the Administrator's preparation for the hearing, and the contents of the Administrator's testimony."); *compare* RFP 19, *with* Topics 40-41 (FOIA requests and responses regarding Section 321(a)); *compare* RFP 30, *with* Topic 23 (communications with the public regarding Section 321(a)); *compare* Interrogatories 14-16 and RFPs 31-32 and 36, *with* Topics 48-50 (EPA's efforts to impact the "market for coal," "investment in coal-fired power plants," and "capital markets"); *compare* RFPs 1-2, *with* Topics 3, 6-10 (EPA's compliance with, and performance of the evaluations described in, Section 321(a)); *compare* RFP 35, *with* Topic 37 (job impacts from EPA's "proposed Greenhouse Gas Rule"). In addition, RFP 1 is so broad that it could encompass more than half of the Topics listed in Exhibit A to the Notice.

and shifts in employment caused by [EPA's] administration of the Clean Air Act." This Topic is not only duplicative of Interrogatory 1 and RFPs 2 & 4, *see* EPA's Objections and Responses [ECF No. 82-4] at 4, 29, but also, as noted in the objection to Topic 6:

> [T]his topic is duplicative in light of EPA's identification of all the documents that demonstrate its performance of the evaluations described in Section 321(a) of the Clean Air Act in EPA's April 6, 2015 Supplemental Initial Disclosures [ECF No. 82-6] and April 10, 2015 Declaration of James B. DeMocker in Support of its Motion for Summary Judgment [ECF No. 77-80]. Because all of the documents relevant to Plaintiffs' claim are publicly available or have been made available to Plaintiffs and the Court, this topic is not reasonably calculated to lead to the discovery of admissible evidence under Fed. R. Civ. P. 26(b)(1).

Ex. 1 at 8. Thus, EPA has provided documents that are responsive to this Topic, and Plaintiffs have not justified the need for additional documents or testimony that they believe would be responsive to this or similar Topics 7-11, 29-39, and 42-43. *See* Ex. 1. Plaintiffs were aware that EPA would object to the topics in the Notice on the same or similar bases as for Plaintiffs' First Set of Discovery Requests, *see* Decl. and Cert. of Good Faith of Patrick R. Jacobi at 5 [ECF No. 87-1] at 5, and yet made no attempt to address the topics with the level of detail required by L.R. Civ. P. 37.02(2). Plaintiffs' Motion should be denied for the Notice.

C. The Burden of the Proposed Rule 30(b)(6) Deposition Would Outweigh Any Benefit.

The topics in the Notice are as unreasonably broad as Plaintiffs' First Set of Discovery Requests. The burden of complying with such requests makes a full and complete response impracticable. Under Rule 30(b)(6), EPA must "designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf" about "information known or reasonably available to the organization" regarding those topics described in Exhibit A of the Notice. Fed. R. Civ. P. 30(b)(6). Given the breadth of the topics identified, compliance with the Notice would likely require multiple witnesses. Because a deponent's testimony is not based on personal knowledge, preparing an agency's Rule 30(b)(6) designees requires the agency to gather appropriate documentation of agency-wide "knowledge," and to ensure that the designees are sufficiently familiar with the full contents and meaning of that documentation to testify under oath with respect to matters outside their personal

knowledge. Identifying and preparing witnesses to address the topics identified in the Notice would require an extraordinary amount of time and Agency resources, but would produce little, if any, relevant information. Moreover, the Notice requests production of documents regarding each of the fifty-four broad topics. As noted in the May 11, 2015 Declaration of Sara Hertz Wu, attached hereto as Exhibit 2, a full production to the Notice may involve as many as 100 EPA staff and counsel and consume 500 to 1000 hours, while witness preparation may involve ten or more individual non-counsel EPA employees and require 150 to 250 hours. Ex. 2 at 3, ¶¶ 10-11.

This extraordinary burden is not justified because this Court's only task is to determine whether EPA has performed the duty in Section 321(a), not to assess the sufficiency of the evaluations or the conclusions reached therein. *See* United States' Mem. in Supp. of Mot. for Summ. J. [ECF No. 76] and cases cited therein at 4, 18-19. The proposed depositions will not provide any benefit to Plaintiffs or assist the Court in resolving that issue because EPA has already produced the relevant documents upon which it relies to demonstrate that it has performed the duty in Section 321(a) and has certified that there are no other documents demonstrating performance of the duty. The testimony of EPA witnesses is not necessary to explain these documents because, pursuant to Rule 30(b)(6), a deponent's testimony need not be based on personal knowledge; rather, the testimony would be based on review of the very same documents that have been submitted in support of the Motion for Summary Judgment. This Court is certainly able to review those documents without the aid of such testimony and determine whether they constitute performance of the duty in Section 321(a).

Nor are there any issues of fact to resolve through deposition testimony. As explained in the PO Memorandum [ECF No. 88] at 10-12, EPA has conceded that, until this Court ruled otherwise on September 16, 2014 [ECF No. 40], EPA had always understood Section 321(a) as providing broad discretionary authority to conduct employment evaluations. While EPA maintains that the employment evaluations in the RIAs and other documents submitted in support of its Motion for Summary Judgment constitute performance of the duty in Section 321(a), EPA concedes that it did not prepare those evaluations expressly for that purpose. PO

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Mem. [ECF No. 87] at 10-12. Thus, burdensome depositions of EPA witnesses are not justified to establish that which EPA does not contest. Therefore, this Court should deny Plaintiffs' Motion for all depositions.

III. Plaintiffs' Request for a Sixty-Day Extension of the Discovery Period Should Be Denied.

For all of the reasons stated above, an extension of the discovery period is not warranted. EPA has fully responded to all discovery requests properly served prior to the close of the discovery period established by this Court's Scheduling Order [ECF No. 55]. While Plaintiffs timely filed their Motion, that Motion should be denied for the reasons explained above. Plaintiffs did not properly serve notice of any depositions within the time period allowed by the Scheduling Order, thus there is no basis to extend the discovery period to allow such discovery.

In addition to the untimeliness of Plaintiffs' effort to seek further discovery, no discovery is warranted in the first instance until the legal issues raised in the United States' Motion for Summary Judgment have been resolved, for the reasons explained in the United States' PO Motion. If this Court concludes, after resolution of the purely legal issues presented in the Motion for Summary Judgment, that limited discovery is necessary, the Court can set a schedule for any such discovery at that time.

IV. Plaintiffs' Motion to Hold in Abeyance the Motion for Summary Judgment Should Be Denied.

Plaintiffs have also moved this Court to enter "[a]n order holding briefing on Defendant's pending motion for summary judgment in abeyance until after completion of fact and expert discovery." Pltfs.' Mot. [ECF No. 81] at 2, ¶ 3. Plaintiffs have waived that request for relief by filing their opposition on summary judgment. *See* Pltfs.' SJ Opp'n [ECF No. 85]. Plaintiffs' request to hold summary judgment briefing in abeyance should be denied for two additional reasons, discussed below.

A. No Discovery Is Warranted Prior to Adjudication of the Motion for Summary Judgment.

The United States filed its PO Motion on May 8, 2015 [ECF No. 87], seeking to bar all discovery in this matter until after adjudication of the pending Motion for Summary Judgment; EPA hereby incorporates the PO Motion in support of its opposition to Plaintiffs' request to hold the briefing on the pending Motion for Summary Judgment in abeyance. As demonstrated therein, no discovery is necessary because the Motion for Summary Judgment raises purely legal issues and Plaintiffs have failed to identify a genuine dispute of material fact that would justify discovery prior to resolution of that Motion. Even if this Court allows limited discovery, any such discovery should be deferred until after resolution of the legal issues in the Motion for Summary Judgment, which should result in the end of this case or, at minimum, a narrowing of the scope of any discovery.

B. Plaintiffs' Rule 56(d) Declaration Fails to Show That Adjudication of the Motion for Summary Judgment Should Be Deferred.

Plaintiffs' Rule 56(d) Declaration of John D. Lazzaretti ("Rule 56(d) Declaration") [ECF No. 82-7] is insufficient to justify deferral of this Court's adjudication of the Motion for Summary Judgment. To satisfy Rule 56(d), Plaintiffs must "show[] by affidavit or declaration that, for *specified* reasons, [they] *cannot present* facts essential to justify [their] opposition." Fed. R. Civ. P. 56(d) (emphases added). Because Plaintiffs filed a substantive response in opposition to the Motion for Summary Judgment [ECF No. 85] on May 4, 2015, they cannot claim an inability to respond to the Motion for Summary Judgment. Moreover, because Plaintiffs supported their response to the Motion for Summary Judgment with a number of exhibits upon which they rely to support their argument that EPA has not conducted the evaluations required by Section 321(a), *see* Pltfs.' SJ Opp'n, they cannot claim that they need discovery to justify their opposition. There is no "failure of proof" justifying further discovery. *Payman v. Mirza*, 82 Fed. App'x 826, 827 (4th Cir. 2003) (*per curiam*).

Plaintiffs also have failed to demonstrate that discovery would yield evidence crucial to material issues before the Court. Nor can they. As demonstrated in the PO Memorandum [ECF

No. 88], there are no material facts in dispute that would preclude entry of summary judgment. *See Goodman v. Everett*, 436 Fed. App'x 275 (4th Cir. 2011) (*per curiam*) (holding that plaintiff's Rule 56(d) motion and affidavit "failed to show that discovery would develop evidence crucial to material issues before the court"); *Payman*, 82 Fed. App'x at 827 (holding that the nonmovant must lack "specific material contradicting" the movant's presentation of summary judgment to justify discovery under Rule 56). Indeed, Plaintiffs contend that the documents presented by EPA do not, as a matter of law, demonstrate performance of the evaluations described in Section 321(a). *See* Pltfs.' SJ Opp'n [ECF No. 85] at 14-20.

Instead of showing by "declaration that, for specified reasons, [they] cannot present facts essential to justify [their] opposition," Fed. R. Civ. P. 56(d), Plaintiffs have presented the Court with a fishing-expedition wish list. Plaintiffs' Rule 56(d) Declaration [ECF No. 82-7] begins by stating that discovery is necessary to obtain documents concerning past public statements of the Administrator, "which would shed light on whether they are reconcilable with Defendant's current position or not." *Id.* ¶ 4. Plaintiffs make no effort, however, to explain how such documents are "essential" to their opposition to the narrow legal issue presented in the Motion for Summary Judgment, as required by Rule 56(d). As explained in the PO Memorandum [ECF No. 88], the statements referenced by Plaintiffs do not create a genuine dispute of material fact that warrants discovery because EPA concedes both that the Agency did not interpret Section 321(a) to impose a non-discretionary duty and that the documents upon which the Agency relies to demonstrate satisfaction of that duty were not prepared for the express purpose of compliance with Section 321(a). *Id*. at 10-12. As a result, EPA's past statements are not material to Plaintiffs' claim, and Plaintiffs need no discovery to establish those facts.

The remainder of the Rule 56(d) Declaration similarly fails to explain, with any specificity, why the referenced discovery is essential to Plaintiffs' opposition to the Motion for Summary Judgment. On the contrary, the documents and other evidence listed in the Rule 56(d) Declaration are not relevant to any aspect of Plaintiffs' claim, much less essential to this Court's adjudication of the Motion for Summary Judgment. *See, e.g.*, *The Players, Inc. v. City of New*

York, 371 F. Supp. 2d 522, 531-32, 534, 538 (S.D.N.Y. 2005) (denying plaintiff's Rule 56 discovery application because the purported factual disputes were immaterial). For example, Plaintiffs assert that "correspondence to or from the Administrator regarding Section 321(a) . . . would shed light on whether the Administrator has directly conducted evaluations under Section 321(a), or delegated this responsibility to any employee of EPA." Rule 56(d) Decl. ¶ 5. Such correspondence has no bearing on whether the documents presented by EPA constitute "evaluations of potential loss or shifts of employment," 42 U.S.C. § 7621(a), and EPA has already conceded that neither the Administrator nor any employee of EPA "directly conduct[s] evaluations under Section 321(a)." Consequently, these "facts" are neither material nor at issue. Likewise, the Rule 56(d) Declaration fails to explain the significance or relevancy of "correspondence between EPA and Congress" that allegedly "would shed light on whether EPA has ever sought the appropriation of funding to comply with Section 321(a)," Rule 56(d) Decl. ¶ 6; "FOIA requests and responses concerning Section 321(a)," *id*. ¶ 7; "expert discovery . . . on the technical merits" of EPA's employment evaluations, *id.* ¶ 10; and unnoticed depositions of James DeMocker and "those in charge of supervising [his] activities," *id*. These general statements fall well short of satisfying Rule 56(d). *See Malghan v. Evans*, 118 Fed. App'x 731, 734 (4th Cir. 2004) (rejecting a plaintiff's Rule 56 declaration and motion seeking "to allow him the opportunity to depose Agency officials and secure 'appropriate government documents,'" because the declaration "did not particularly specify legitimate needs and how, if such needs were met, summary judgment would have been precluded," but rather "made only generalized statements regarding the need for more discovery") (citation omitted).

In sum, Plaintiffs have failed to identify a single material fact that, with the aid of discovery, would assist them in responding to the Motion for Summary Judgment or that would assist the Court in resolving whether the documents upon which EPA relies constitute performance of "evaluations of potential loss or shifts of employment." 42 U.S.C. § 7621(a).

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CONCLUSION

For the reasons set forth above, this Court should deny Plaintiffs' Motion, or, in the alternative, defer ruling upon such motion until the United States' Motion for Summary Judgment has been resolved.

DATED: May 11, 2015

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

MURRAY ENERGY CORPORATION, *et al.*,	)	
	)	
Plaintiffs,	)	**Case No. 5:14-cv-00039-JPB**
	)	
v.	)	
	)	
GINA McCARTHY, Administrator, U.S. EPA,	)	
	)	
Defendant.	)	

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DISCOVERY, EXTEND THE DEADLINE FOR FACT DISCOVERY, AND HOLD DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN ABEYANCE PENDING COMPLETION OF DISCOVERY

I. Introduction

EPA is desperately trying to avoid discovery in this case. To date, EPA has:

- Moved to dismiss and strike Plaintiffs' prayer for injunctive relief (Doc. 34);
- Moved to "clarify" the Court's order (essentially moving for reconsideration) (Doc. 50);
- Requested, in the Report of Parties' Planning Meeting (Doc. 54) that no discovery be had and that the case proceed immediately to summary judgment on the specious ground that "[t]he case presents a purely legal issue that may be decided on a motion for summary judgment without any discovery";
- Moved to dismiss again, this time moving to stay discovery as well (Docs. 59 and 61);
- Moved for summary judgment on the basis of 53 documents and a declaration. (Docs. 75 and 76);
- Refused to answer any discovery on these documents, refused to allow a deposition of the declarant, and otherwise objected to all discovery that could not be answered simply by referring to these same 53 documents (Docs. 82-2 and 82-4); and
- Moved for a protective order to stop all discovery pending ruling on its motion for summary judgment (Doc. 87).

From the outset, this case has been about the Administrator's persistent refusals. First EPA claimed it could refuse to comply with the Clean Air Act. We are now past that because of

this Court's ruling. Now the Administrator is refusing further discovery while its motion for summary judgment remains pending. EPA had no right to unilaterally stop discovery. EPA attempts to obfuscate its flat refusal with boilerplate objections to the form of Plaintiffs' requests, but EPA has also refused to engage in any of the discourse expected by the Federal Rules and required for the parties to complete discovery without Court intervention. No matter how many objections EPA has with the way Plaintiffs conduct discovery, the fact remains EPA has affirmatively refused to cooperate in the discovery process. EPA's wholesale refusal removes this case from the normal discovery dispute, in which the parties are focused on the discoverability of a particular document, or the response to a particular question. EPA is simply stonewalling.

Ever since losing its first motion to dismiss, EPA has essentially repeated the same unsupportable argument over and over. EPA asserts it can select a handful of documents, define them as the "record" in this case, move for summary judgment solely on those documents, and unilaterally declare all other issues in the case irrelevant and not subject to discovery. By the time briefing on all currently pending motions is complete, this Court will have nine separate briefs on essentially this same issue. No matter how many times EPA repeats its argument, however, the fact remains that discovery is needed on both whether EPA is complying with Section 321(a) and on the relief that will be needed to redress Plaintiffs' injuries if, as the evidence currently shows, EPA is willing to use every method at its disposal to avoid evaluating the job losses it is causing.

Despite multiple briefs, EPA has never found authority supporting its proposition that it can unilaterally limit discovery or halt discovery just because it has filed a dispositive motion. EPA's refusal to cooperate in discovery is a violation of not only of the Federal Rules of Civil

Procedure but also this Court's Scheduling Order. Plaintiffs therefore respectfully request that their motion to compel be granted, that the Court grant an extension of the fact-discovery period to allow for the timely completion of necessary depositions and possible follow-up written discovery requests, and that further briefing on EPA's motion for summary judgment be held in abeyance pending the completion of all discovery.

II. EPA Is Improperly Withholding Relevant Discoverable Information

Plaintiffs filed this suit to compel the Administrator to conduct the continuing evaluation of job loss and shifts required by Section 321(a) of the Clean Air Act. EPA at first denied having any duty under Section 321(a). EPA now "concedes" (through counsel, as it will not allow any discovery on the issue) that it has never prepared evaluations for the purpose of complying with Section 321(a). Doc. 89 at 20. Nonetheless, EPA asks this Court to conclude that its economic assessments, despite being prepared for other reasons, not mentioning Section 321(a), and not containing evaluations of job loss and shifts, are sufficient to "demonstrate EPA's performance of [its] duty," and render all other discovery in the case irrelevant. *Id.* at 3.[1]

EPA fails to mention that this Court already addressed this argument. After this Court denied EPA's first motion to dismiss, the parties were instructed to meet, discuss all matters required by Fed. R. Civ. P. 16 and 26(f) and LR Civ P 16.01(b), and submit a meeting report and proposed discovery plan. Order, Doc. 41 (Sept. 17, 2014). In the filed Report of Parties' Planning Meeting, EPA maintained, as it does now, that "[t]he case presents a purely legal issue that may be decided on a motion for summary judgment without any discovery"; that EPA

[1] The only other support provided by EPA is a declaration from a single EPA employee who has made contradictory statements in the past, whom Plaintiffs have not been allowed to depose, and from whose declaration even EPA is now distancing itself, characterizing it in EPA's latest brief as "merely authenticat[ing] the documents attached as exhibits to the Motion for Summary Judgment, and, for the Court's convenience, provid[ing] a brief summary of each document." Doc. 88 at 13.

"intends to file a motion for summary judgment, in which EPA will identify, produce, and offer to stipulate to the documents that demonstrate its performance"; and that no matter how the Court rules on EPA's motion, "the case will not require discovery or trial." Doc. 54, at 4.

As Plaintiffs stated at the time, EPA's assessment was wrong. A number of factual issues would need to be resolved through discovery, including: (1) whether the Administrator has ever evaluated the job losses and shifts in employment caused by her administration and enforcement of the Clean Air Act; (2) whether the Administrator interprets § 321(a) of the Clean Air Act as requiring EPA to conduct a continuing evaluation of the job losses and shifts in employment caused by her administration and enforcement of the Clean Air Act; (3) whether the Administrator has conducted or is conducting the continuing evaluation of job losses and shifts in employment required by § 321(a) of the Clean Air Act; (4) the scope of injunctive relief appropriate to remedy the Administrator's failure to comply with § 321(a) of the Clean Air Act; and (5) the (at that time) unidentified and unnamed documents Defendant believed would be relevant to Plaintiffs' claim.[2] *Id.* at 2-3.[3]

This Court did not adopt EPA's proposal. Rather, this Court issued a Scheduling Order setting out six months for fact discovery, the exchange of expert disclosures in July and August, and briefing of dispositive motions in September, October, and November. Scheduling Order, Doc. 55, at 1 (Nov. 5, 2014).

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[2] Since many of these documents go back years, it has never been clear why EPA could not have disclosed them initially.

[3] Plaintiffs also noted at the time that EPA had raised a number of affirmative defenses in its Answer, each of which could give rise to further questions of fact. *Id.* In light of the fact EPA makes no mention of these affirmative defense in its response or motion for protective order, it appears EPA is no longer looking to pursue affirmative defenses that would require any further discovery. *Id.* If this is incorrect, then these would represent yet another issue on which discovery is required despite EPA's protestations that the case presents only a single legal issue.

The Scheduling Order also places no limit on the issues in the case subject to discovery. As a result, Plaintiffs were entitled to "obtain discovery regarding any nonprivileged matter" relevant to its claim, "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Fed. R. Civ. P. 26(b)(1); *see also O'Hara v. Capouillez*, No. 5:13-cv-119, 2013 U.S. Dist. LEXIS 177511 at *3 (N.D. W. Va. Dec. 18, 2013) ("Unless limited by court order, the scope of discovery is governed by Federal Rule of Civil Procedure 26(b)(1).").

EPA argues that "[t]he United States has certified that it has provided all documents that demonstrate EPA's performance of this duty, and thus all documents relevant to Plaintiffs' claim, in support of its Motion for Summary Judgment," Doc. 89 at 3. If EPA is saying that it has produced all documents that support its argument, this "confuses the distinction between relevance as defined and applied between discovery and evidence." *Kidwiler v, Progressive Paloverde Ins. Co.*, 192 F.R.D. 193, 200 (N.D. W. Va. 2000). It is hornbook law that "relevant" information for purpose of discovery is broader than that which is admissible by one side or the other as evidence in support of their claim or defense. *See generally* 6-26 MOORE'S FEDERAL PRACTICE – CIVIL § 26.41 (Matthew Bender 3d ed.) ("MOORE'S").

More importantly, regardless of whether EPA has produced all documents that EPA claims "demonstrate its performance," EPA cannot limit discovery to only those documents helpful to it. EPA must produce all documents that demonstrate (or could lead to the discovery of evidence that demonstrates) that EPA is *not* performing its nondiscretionary duty under Section 321(a) as well. Plaintiffs have a right to "discovery of facts necessary to a fair presentation of the case." *Id.* This includes any information that "has any tendency to make"

any fact asserted by EPA "less probable than it would be without the evidence." Fed. R. Evid. 401; *see also* 6-26 MOORE'S at § 26.41 ("impeachment evidence is almost always relevant, for discovery purposes").

EPA also cannot claim undue burden in cooperating in discovery. A discovery burden is not "undue" simply because EPA does not want to do it. EPA's estimate of 500-1,000 hours to respond to all written discovery and 150-250 hours to prepare a 30(b)(6) deponent in a case involving EPA's continuing refusal to comply with a nondiscretionary duty that impacts EPA's administration and enforcement of the entire Clean Air Act and applicable implementation plans over the past several years is hardly undue, particularly in light of the injuries alleged by Plaintiffs, which include EPA's waging of a war on their industry, the shutdown of numerous coal mines, and the unemployment of thousands of workers.[4] Doc. 89 at 20.

It is also notable that EPA is not just claiming undue burden as to a discovery request, or an additional deposition. Rather, EPA is claiming undue burden as to *any discovery*. Cases like *Nicholas v. Wyndham Int'l, Inc.*, 373 F.3d 537 (4th Cir. 2004), are therefore inapposite. In *Nicholas*, for example, the Fourth Circuit affirmed a protective order "[g]iven the extraordinary circumstances presented," including the defendant having already deposed both plaintiffs and defendant's counsel conceding that plaintiffs' business could have no more information about the facts of liability and damages than plaintiffs themselves. *Id.* at 543.

[4] EPA's estimates of the burden associated with responding to discovery are also suspect. EPA primarily relies on the estimates EPA submitted in support of its motion to stay (Doc. 61), which was denied as moot. Even at that time, Plaintiffs questioned the credibility of these estimates, since EPA's own claim has been that it has no relevant documents. It further strains credibility that this same estimate would be valid now that EPA has already responded to Plaintiffs' written discovery requests (albeit deficiently). Unless EPA is claiming that it put absolutely no time into locating documents or talking to employees before responding to Plaintiffs discovery responses, EPA's statement that the same time would be needed to respond to the remaining requests for discovery is not credible.

EPA's baseless cry of "fishing expedition" (Doc. 89 at 12) is untrue and also equally insufficient to avoid discovery. As the Supreme Court has held:

> [T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.

Hickman v. Taylor, 329 U.S. 495, 507 (1947) (footnote omitted).

Consistent with its refusal to comply with Congress' command, EPA is now refusing to comply with this Court's order that discovery take place. EPA cannot take documents out of context, refuse any investigation into their scope, purpose, and meaning, and claim with any credibility that it has "provided all properly discoverable, relevant information." Doc. 89 at 1.

III. EPA's refusal to cooperate in discovery is prejudicing Plaintiffs' ability to prepare for trial and fully respond to EPA's motion for summary judgment.

EPA has never tried to comply with Section 321(a), and until this case, believed it had no obligation to conduct job evaluations. Nonetheless, EPA on occasion has conducted a cost-benefit analysis or other economic assessment under other legal obligations and these assessments, from time to time, mention jobs. EPA asks this Court to read those reports and conclude that EPA is in compliance with Section 321(a) despite never trying to comply, never designating anyone to comply, never appropriating funding to comply, never publishing a single document stating it has complied, never producing a single email, memorandum, guidance, or other document mentioning that any of the documents cited by EPA were being used to comply, and despite several public statements and an official FOIA response showing that there are no Section 321(a) evaluations. In other words, now that EPA has unsuccessfully argued that it has no duty to comply with Section 321(a), it asks this Court to find that, as long as it can find a handful of documents somewhere, written by someone at EPA (even if not published by EPA),

and that mention something about jobs, it is "complying" with its statutory obligation. This is the same recalcitrance that led to the filing of this suit in the first place.

EPA is refusing to answer even the most basic questions about its documents:

i. How is EPA inadvertently complying with Section 321(a)?

ii. If not the Administrator, who is responsible for complying with Section 321(a)?

iii. How do these 53 documents "demonstrate" compliance with Section 321(a)?

iv. Why did James DeMocker's FOIA response state that EPA could find no evaluations of job losses and shifts if EPA is evaluating job losses and shifts?

EPA has refused to answer or provide information that could lead to answers to these questions. EPA boldly asserts they are irrelevant because "this Court's only task in adjudicating the merits of Plaintiffs' claim is to determine whether EPA has performed the non-discretionary duty in Section 321(a), not to assess how the evaluations were performed or who participated in them." Doc. 89 at 16. Even if EPA were correct that the only issue in the case is whether EPA has performed its nondiscretionary duty under Section 321(a), which it is not, how EPA has performed that duty and who has performed it are clearly relevant.

EPA is also incorrect that this is the only issue on which discovery can proceed. As Plaintiffs have discussed in their response to EPA's motion for summary judgment, there are credibility issues with EPA's declarant, arising from not only his own prior inconsistent statement in a FOIA response but also prior statements of other EPA employees, including the current Administrator, and the questionable wording of his declaration in this case. *See* Response to Motion for Summary Judgment, Doc. 85 at 5 (May 4, 2015); *see also* 6-26 Moore's § 26.41 ("Evidence that casts doubt on the credibility of substantive evidence undeniably

relevant to a claim or defense is equally relevant to that claim or defense, itself, even if it does so solely by discrediting the witness sponsoring the substantive evidence.").

This case also does not end with a finding that EPA is refusing to comply with Section 321(a). The next question will be the proper form of relief, and discovery is needed on this issue too. EPA has repeatedly challenged this Court's authority to enjoin its actions, but the fact remains that this Court has authority to issue injunctive relief. *See, e.g., Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972) (enjoining the Administrator from approving certain portions of state air pollution control plans); *Am. Lung Ass'n v. EPA*, Case No. 1:12-cv-243 (D.D.C. June 2, 2012), ECF No. 37 (issuing a preliminary injunction compelling the administrator to "sign a notice of proposed rulemaking" by a fixed date and expedite public notice and comment to have the rulemaking completed within a timeframe set by the court). A final determination on the appropriate injunctive relief is inherently fact-specific. As EPA itself argued in *American Lung Association*: "in ordering relief the court should examine the relevant facts and circumstances and evaluate the time needed by the agency to make well-reasoned, scientifically supportable, and defensible decisions." Defendant's Memorandum in Opposition, Doc. 28-3, *Am. Lung Ass'n v. EPA*, No. 1:12-cv-243 (D.D.C. filed May 4, 2012), ECF No. 28-3.

In this case, crafting an appropriate order is likely to depend not only on the nature of the injuries suffered by Plaintiffs, but also on the likelihood of any particular order in redressing Plaintiffs' injuries. In light of EPA's history of recalcitrance, both before and during this case, for example, it is likely that an even more detailed order will be necessary than in other circumstances. What are the actions that EPA will need to evaluate? How resource- and time-intensive will the evaluation be? When can it get done? Will the order need to contain specific deadlines for compliance? Will further injunctive relief be needed to preserve the status quo

pending EPA's compliance? These and other questions will need to be answered, and the answers may depend on EPA's history of noncompliance, the likelihood EPA will attempt to continue to evade its responsibilities despite an order from this Court to comply, and the likelihood that a less restrictive order will still redress Plaintiffs' injuries.

IV. An Order to Compel Discovery is Warranted

In light of EPA's blanket refusal to cooperate in discovery, an order to compel is warranted. This Court has ordered that discovery be allowed. There is no dispute that EPA is refusing to cooperate in that discovery. There has been no direct claim of privilege as to any discovery request. This alone is sufficient to grant an order to compel.

EPA now raises procedural arguments in an attempt to avoid discovery. First, EPA claims that Plaintiffs failed to set out the "specific rule, statute or case authority supporting the movant's position as to each such discovery request or disclosure requirement." Doc. 89 at 4-5 (internal quotations, emphasis omitted). Plaintiffs, however, not only identified the rules on which it was moving, *see* Doc. 82 at 3, but also specific case authority in support of the fact that EPA may not unilaterally limit the scope of discovery. *Id.* at 7-8. EPA is forced to acknowledge this in the very next paragraph of its Memorandum, when it cites to Plaintiffs' own case law. *See* Doc. 89 at 5 (citing *Herbalife Int'l, Inc. v. St. Paul Fire & Marine Corp.*, No. 05-cv-41, 2006 U.S. Dist. LEXIS 68744 (N.D. W. Va. Sept. 21, 2006).

Second, EPA claims Plaintiffs fail to meet their "burden" of "explaining how the requested information is needed to address the question of whether or not EPA has performed the duty set forth in Section 321(a)." *Id.* This, of course, is not the burden in a motion to compel. "[T]he party asserting that the information requested is not relevant, and, therefore, not discoverable, bears the burden of establishing that the information is not relevant." *Kidwiler*, 192 F.R.D. at 199; *see also Herbalife*, 2006 U.S. Dist. LEXIS 68744 at *17 ("[T]he party

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resisting discovery has the burden of clarifying, explaining and supporting its objections.") While it is true that "[o]nce this burden has been met, the burden shifts to the discovering party to show that the information sought is relevant to the subject matter of the present civil action," *id.* at *17, EPA has not come close to meeting its burden. Simply parroting the same objection to relevance is not a clarification, explanation, or support, especially when the objection is to the relevance of all discovery, not just a single interrogatory or deposition question. In any event, Plaintiffs did explain the relevance of their requests, including investigating prior inconsistent statements of the current Administrator and EPA's own declarant; putting in context and explaining the technical documents submitted by EPA in support of its motion for summary judgment; and determining the appropriate injunctive relief. *See* Doc. 82 at 10-11. These are some of the same issues on which Plaintiffs first requested discovery and they remain key issues in this case and well beyond the threshold for discoverability contained in Fed. R. Civ. P. 26(b).

EPA's laborious and repetitive objections to each discovery request do nothing but further underscore the evasion and gamesmanship that have been at the heart of EPA's approach to discovery in this case. For seven pages, EPA repeats the same boilerplate objections of relevancy, vagueness, ambiguity, over-breadth, and undue burden, with no attempt to support these objections, explain them further and having never sought clarification, refinement, or revision from Plaintiffs. EPA also repeatedly calls them "specific objections," but has no real argument in support, as they most certainly are not. *See O'Hara*, 2013 U.S. Dist. LEXIS 177511 at *4-*5 ("'The mere recitation of the familiar litany that an interrogatory or document production request is overly broad, burdensome, oppressive and irrelevant will not suffice.'") (*quoting PLX, Inc. v. Prosystems, Inc.*, 220 F.R.D. 291, 293 (N.D.W.Va. 2004)).

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EPA's quibbles with individual requests also gloss over the main issue, which is that regardless of how any individual request has been worded and regardless of how many notices of deposition have been served already, EPA has refused entirely to cooperate in any discovery. As MOORE'S notes, "[s]uch a complete failure strikes at the very heart of the discovery system, and threatens the fundamental assumption on which the whole apparatus of discovery was designed, that in the vast majority of instances, the discovery system will be self-executing. It provides the propounding party with no evidence at all, no basis to begin to understand the grounds for objection, and thus no basis for a dialogue that might refine and move the discovery process forward." 7-37 MOORE'S § 37.90. While it is true that EPA provided some form of a response to Plaintiffs' first set of written discovery requests before refusing to cooperate further, once EPA drew its improper line in the sand, there was nothing further Plaintiffs could do. Plaintiffs had no ability to move the discovery process forward with further requests, additional notices of deposition, or even continued calls to counsel. EPA had made clear, both in writing and telephonically, that it would cooperate no more. Further attempts to reconcile EPA's objections before moving for an order to compel would have been futile and were not required. *See Moats v. City Hosp., Inc.*, 2007 U.S. Dist. LEXIS 56511, *8 (ND. W.Va. Aug. 2, 2007). ("The Local Rules do not require litigants to suffer pointless formalities."); *see also In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 351, 356 (N.D. Ill. 2005) ("The doctrine of futility is as applicable in the context of Rule 37 . . . as it is in any other.").

V. An Extension of the Discovery Period is Warranted Given EPA's Constant Obstruction and Delay

EPA provides no basis for denying an extension of the discovery period. In fact, EPA seems to concede that, "[i]f this Court concludes . . . that limited discovery is necessary, the Court can set a schedule for any such discovery. . . ." Doc. 89 at 21. This, of course, is precisely

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what Plaintiffs have requested. While EPA claims that Plaintiffs did not serve them with additional discovery requests during the current discovery period, EPA does not say how that would have helped in light of EPA's blanket refusal to respond to any further discovery. *See* Email Chain, Doc. 82-2. Counsel for Plaintiffs called counsel for Defendant to ascertain whether there were any depositions or further discovery that Defendant would permit absent a court order and was told there was none. *See* Rule 37 Certification, Doc. 82-3 (April 22, 2015). As discussed above, further discovery requests would have been futile and were not required.

VI. Plaintiffs' Have Not Waived Their Rule 56(d) Motion

EPA argues that Plaintiffs' motion is somehow waived by their filing a response based on the information available as of the deadline set out in Local Rule 7.02. As with much of EPA's brief, there is no authority cited and no rational basis why a response that details, among other things, the topics on which discovery is needed should waive a request for that very discovery.

While EPA is correct that Plaintiffs cited a number of exhibits showing that questions of fact remain, both as to the credibility of EPA's declarant and as to the factual assertions made without support by EPA's counsel in its motion for summary judgment, this does not, as EPA argues, undermine the fact that further discovery is needed to fully respond to EPA's erroneous arguments. As the Supreme Court has noted, summary judgment should "be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986). This is not limited to situations where a party is entirely unable to prepare a response to summary judgment. In *Ralston Purina Co. v. McFarland*, for example, summary judgment on liability had already been granted by the district court and a trial held on damages. Nonetheless, because the Fourth Circuit found that the defendant had not had an adequate opportunity to complete discovery, the Fourth

Circuit remanded with instructions to vacate and reconsider summary judgment after discovery was complete. 550 F.2d 967, 971-74 (4th Cir. 1977).

While Plaintiffs have been able to respond to EPA's motion for summary judgment, they have not been able to fully respond. EPA's objections and refusal to produce witnesses for depositions have prevented Plaintiffs from putting the documents cited by EPA in context, resolving open questions of EPA's declarant's credibility, and responding to EPA's unfounded assertions on the scope of injunctive relief. Since questions of material fact remain outstanding, and further discovery is needed for Plaintiffs' to fully brief them in response to EPA's motion for summary judgment, Plaintiffs' Rule 56(d) motion remains relevant and an order holding further briefing in abeyance until the completion of discovery, with allowance for Plaintiffs' to supplement their currently-filed response as appropriate after the close of all discovery is proper.

VII. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that this Court extend the period for fact discovery, order Defendant to cooperate in the discovery process, hold further briefing on dispositive motions in abeyance until Plaintiffs have had the opportunity to complete discovery, and issue such further rulings as this Court deems necessary to ensure EPA's compliance in the discovery process and adequate time for the completion of fact and expert discovery before dispositive motions practice resumes.

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Dated May 21, 2015

Respectfully submitted,

/s/Jacob A. Manning

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

MURRAY ENERGY CORPORATION, **MURRAY AMERICAN ENERGY, INC.**, **THE AMERICAN COAL COMPANY**, **AMERICAN ENERGY CORPORATION**, **THE HARRISON COUNTY COAL COMPANY**, **KENAMERICAN RESOURCES, INC.**, **THE MARION COUNTY COAL COMPANY**, **THE MARSHALL COUNTY COAL COMPANY**, **THE MONONGALIA COUNTY COAL COMPANY**, **OHIOAMERICAN ENERGY INC.**, **THE OHIO COUNTY COAL COMPANY**, and **UTAHAMERICAN ENERGY, INC.**,

Plaintiffs,

v.

Civil Action No. 5:14-CV-39
Judge Bailey

GINA McCARTHY, Administrator, United States Environmental Protection Agency, in her official capacity,

Defendant.

ORDER DENYING MOTION TO RECONSIDER OR FOR CLARIFICATION

Pending before this Court is United States' Motion to Reconsider or for Clarification [Doc. 95], filed June 1, 2015. The plaintiffs filed their Plaintiffs' Opposition to Defendant's Motion to Reconsider or for Clarification [Doc. 97] on June 3, 2015, and the defendant filed its Reply [Doc. 99] on June 4, 2015.

In its Motion, the defendant seeks reconsideration and/or clarification of this Court's decision granting Plaintiffs' Motion to Compel Discovery, Extend the Deadline for Fact

Discovery, and Hold Defendant's Motion for Summary Judgment in Abeyance Pending Completion of Discovery and denying the United States' Motion for Entry of Protective Order [Doc. 93], entered May 29, 2015.

This Court is of the opinion that its May 29, 2015, Order clearly set forth the bases for the ruling and that no further explanation is necessary.

Accordingly, the United States' Motion to Reconsider or for Clarification [Doc. 95], filed June 1, 2015 is **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: June 4, 2015.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2015, copies of the foregoing petition and attachments were served by FedEx delivery at the following address:

Honorable John Preston Bailey
District Judge
United States District Court for the
Northern District of West Virginia
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Copies were served the same day on the parties below by e-mail and by U.S. mail:

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