No. 15-2390

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.)

REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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The EPA respectfully submits this short reply to correct the record in light of Murray's response filed on November 20, 2015. Given that the EPA has requested relief from this Court in the form of a ruling or a stay no later than November 30, 2015, we address only the most egregious misstatements in Murray's response.

1. Contrary to Murray's assertion (at 8–9 and 26), the EPA has not noticed the deposition of Robert E. Murray, even though Plaintiffs specifically identified him as a person "likely to have discoverable information that Plaintiffs may use to support their claims." Attach. 15 (Plaintiffs' Initial Disclosures (redacted)), at 2. After the district court held the EPA's summary judgment motion in abeyance and compelled the agency to respond to Murray's extensive discovery requests, the EPA noticed fact depositions of the other four people that the company designated as "likely to have discoverable information that Plaintiffs may use to support their claims." [*] *Ibid.*; *see* Dkt. Nos. 136–39 (notices of deposition). These individuals are all Vice Presidents of Murray Energy Corporation. Attach. 15, at 2–3.

2. Murray asserts (at 19) that "Administrator McCarthy has repeatedly refused specific entreaties from members of Congress that she comply with her Section 321(a) obligations, and it is wholly appropriate for her to answer for her

[*] The EPA continues to object to discovery in this nondiscretionary-duty suit, but once discovery was ordered, the EPA's need to defend itself at trial prompted it to propound discovery with regard to "the scope of injuries suffered by Plaintiffs," a topic on which the company has itself propounded discovery. *See* Attach. 3, at 20.

unusual and persistent recalcitrance." Murray fundamentally mischaracterizes the Administrator's statements to members of Congress.

The EPA's consistent legal position has been that (i) Section 321(a) does not impose a nondiscretionary duty, but that (ii) the EPA nevertheless has conducted evaluations as described in that provision. In the statements cited by Murray (at 9–11), Administrator McCarthy effectively admitted that the EPA had not prepared any documents with the intent and purpose of complying with Section 321(a). The EPA has conceded as much to the district court and asked that judgment be entered for Murray if the court decides, as a legal matter, that Section 321(a) requires such formality. Attach. 16, at 3–4 (reply to summary judgment motion). Administrator McCarthy's statements to Congress do not suggest, however, that the EPA has not conducted *any* evaluations that meet the description in Section 321(a).

Furthermore, even if the Administrator had said as much, that would not be a "***refusal*** to perform a duty," Murray Resp. 21, because no court has ruled that the EPA failed to perform a duty. Murray has put the cart before the horse by using the company's desired outcome of this lawsuit as a basis for punitive discovery. *See id.* at 19 (arguing that the Administrator must "answer for her unusual and persistent recalcitrance"). That backward approach to discovery is all the more inappropriate in this context, where only "extraordinary circumstances" could justify deposing a Cabinet-rank officer.

Respectfully submitted,

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90-5-2-4-20081
November 16, 2015

TABLE OF ATTACHMENTS TO PETITION

1. Order Denying Motion to Dismiss the Complaint and Motion to Strike Prayer for Injunctive Relief, Dkt. No. 40 (Sept. 16, 2014)
2. Order Denying Motion to Dismiss and Motion to Stay Discovery, Dkt. No. 71 (Mar. 27, 2015)
3. Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment, Dkt. No. 85 (May 4, 2015)
4. Plaintiffs' First Set of Discovery Requests (served Dec. 2, 2014)
5. Plaintiffs' Second Set of Discovery Requests (served Sept. 15, 2015)
6. 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, Dkt. No. 93 (May 29, 2015)
7. Fourth Circuit Order Denying Petition for a Writ of Mandamus (July 9, 2015)
8. Declaration of Sarah Hertz Wu, EPA Region VII Senior Assistant Regional Counsel, Dkt. No. 148-5 (Oct. 16, 2015)
9. Declaration of Bethanne Walinskas, Assistant Director of the Office of Litigation Support, Environment and Natural Resources Division, U.S. Department of Justice, Dkt. No. 148-6 (Oct. 16, 2015)
10. Joint Motion to Further Extend Certain Deadlines in Amended Scheduling Order, Dkt. No. 152 (Oct. 23, 2015)
11. Plaintiffs' Notice of Deposition of EPA Administrator (served Oct. 7, 2015)
12. Plaintiffs' Response in Opposition to Defendants' Motion for Protective Order Precluding Administrator's Deposition, Dkt. No. 157 (Oct. 30, 2015)
13. Plaintiffs' Amended Notice of 30(b)(6) Deposition of the United States Environmental Protection Agency *Duces Tecum* (served June 3, 2015)
14. Order Denying Motion for Protective Order and Motion to Stay Deposition, Dkt. No. 164 (Nov. 12, 2015)
15. Plaintiffs' Initial Disclosures (served Nov. 17, 2014) (redacted)

16. EPA's Reply in Support of Motion for Summary Judgment, Dkt. No. 90 (May 21, 2015)

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

MURRAY ENERGY CORPORATION, et al. Plaintiffs, v. GINA McCARTHY, Administrator, United States Environmental Protection Agency, in her official capacity, Defendant.	Case No.: 5:14-cv-00039-JPB Judge: BAILEY **PLAINTIFFS' INITIAL DISCLOSURES**

Pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure and the Court's First Order and Notice Regarding Discovery and Scheduling Conference, Doc. 41 (Sept. 17, 2014), Plaintiffs hereby submit these initial disclosures. These initial disclosures are based on information presently and reasonably available and known to Plaintiffs. These initial disclosures do not necessarily represent all of the information or documents that Plaintiffs may use to support their claims for relief, as discovery in this matter is continuing. Plaintiffs will comply with Federal Rule of Civil Procedure 26(e)(1) and will supplement these initial disclosures consistent with the Court's pre-trial orders.

Plaintiffs make these initial disclosures subject to and without waiving their right to protection from disclosing any attorney work product, material protected by the attorney-client privilege, and/or material constituting trade secrets, confidential information, or other proprietary information. These initial disclosures are further being made without waiving objection to the use or admissibility of any testimony or evidence for any purpose.

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Subject to all of the above, Plaintiffs respond to the categories of information called for in Rule 26(a)(1) of the Federal Rules of Civil Procedure as follows:

I. RULE 26(a)(1)(A)(i)

Based on information presently and reasonably available, Plaintiffs identify the following people as likely to have discoverable information that Plaintiffs may use to support their claims, unless the use would be solely for impeachment:

- Robert E. Murray, Chairman of the Board of Directors, President and Chief Executive Officer, Murray Energy Corporation; Director, President, and Chief Executive Officer, Murray American Energy, Inc.; Director and President, The American Coal Company; Director and President, American Energy Corporation; Director, President, and Chief Executive Officer, The Harrison County Coal Company; Director, KenAmerican Resources, Inc.; Director, President, and Chief Executive Officer, The Marion County Coal Company; Director, President, and Chief Executive Officer, The Marshall County Coal Company; Director, President, and Chief Executive Officer, The Monongalia County Coal Company; Director, OhioAmerican Energy, Inc.; Director, President, and Chief Executive Officer, The Ohio County Coal Company; and Director, UtahAmerican Energy, Inc., who has knowledge of the injuries caused by the Administrator's failure to comply with § 321(a) of the Clean Air Act and the injuries likely to continue to occur in the absence of a court order.

- Robert D. Moore, Director, Executive Vice President, Chief Operating Officer, and Chief Financial Officer, Murray Energy Corporation; Vice President, Murray American Energy, Inc.; Treasurer, The American Coal Company; Vice President, The Harrison County Coal Company; Asst. Treasurer, KenAmerican Resources, Inc.; Vice President, The Marion County Coal Company; Vice President, The Marshall County Coal Company; Vice President, The Monongalia County Coal Company; Treasurer, OhioAmerican Energy, Inc.; Vice President, The Ohio County Coal Company; and Treasurer, UtahAmerican Energy, Inc., who has knowledge of the injuries caused by the Administrator's failure to comply with § 321(a) of the Clean Air Act and the injuries likely to continue to occur in the absence of a court order.

- B.J. Cornelius, Senior Vice President — Marketing and Sales, Murray Energy Corporation; Senior Vice President, Sales, The American Coal Company; Senior Vice President, Sales, American Energy Corporation; Senior Vice President, KenAmerican Resources, Inc.; and Senior Vice President – Sales, UtahAmerican Energy, Inc., who has knowledge of the injuries caused by the Administrator's failure to comply with § 321(a) of the Clean Air Act and the injuries likely to continue to occur in the absence of a court order.

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- Paul B. Piccolini, Vice President, Human Resources & Employee Relations, Murray Energy Corporation; Vice President, Murray American Energy, Inc.; Vice President, The Harrison County Coal Company; Vice President, The Marion County Coal Company; Vice President, The Marshall County Coal Company; Vice President, The Monongalia County Coal Company; and Vice President, The Ohio County Coal Company, who has knowledge of the injuries caused by the Administrator's failure to comply with § 321(a) of the Clean Air Act and the injuries likely to continue to occur in the absence of a court order.

- Michael T. W. Carey, Vice President — Government Affairs, Murray Energy Corporation, who has knowledge of the injuries caused by the Administrator's failure to comply with § 321(a) of the Clean Air Act and the injuries likely to continue to occur in the absence of a court order.

[redacted]

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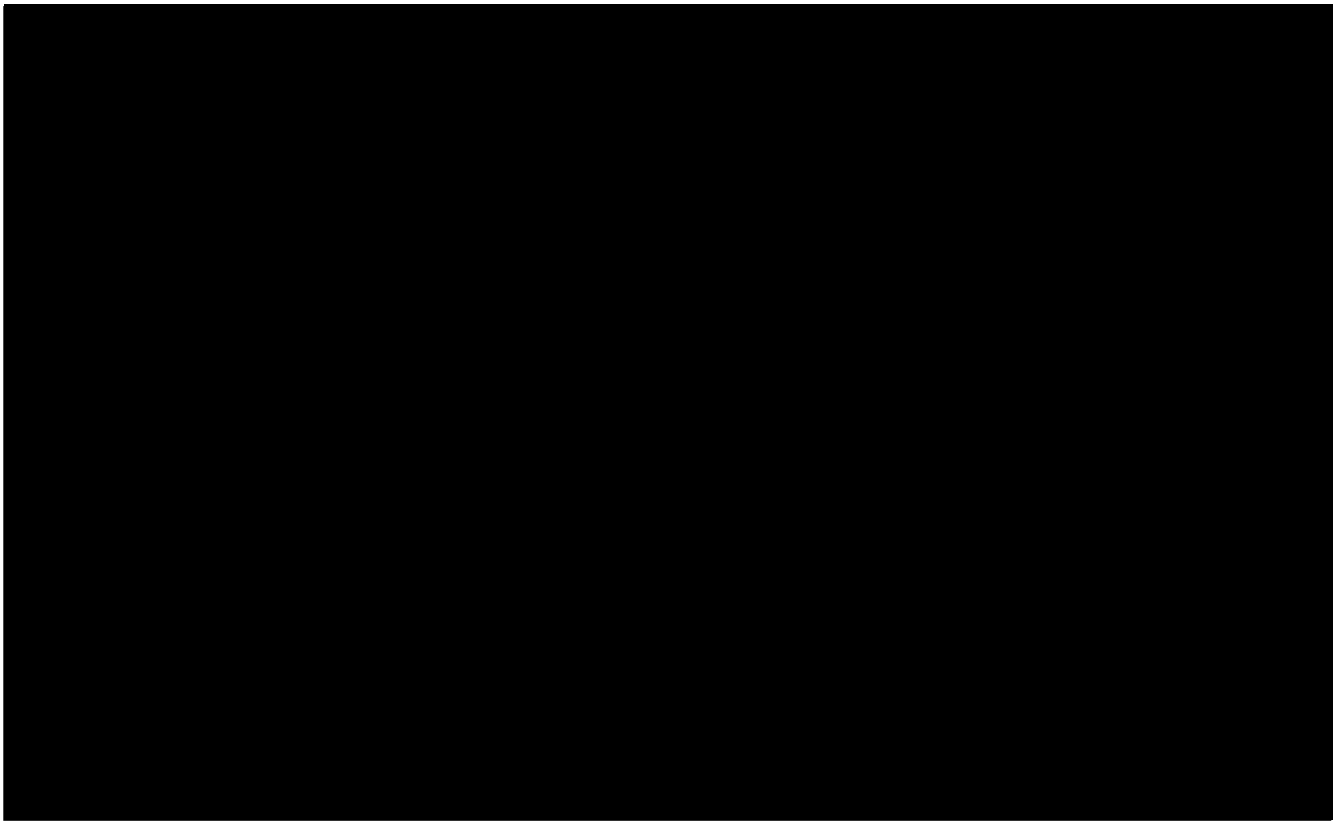

Dated: November 17, 2014

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

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

[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.

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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.

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2015, a copy of the foregoing brief was served by FedEx delivery at the following address:

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