No. __

IN THE

Supreme Court of the United States

MURRAY ENERGY CORPORATION, et al.,

Petitioners,

v.

SCOTT PRUITT, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 321(a) of the Clean Air Act mandates the Administrator of the United States Environmental Protection Agency ("EPA") "shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement" of the Clean Air Act. EPA has repeatedly refused to comply with this statutory mandate. In concluding that EPA's refusal to comply is beyond the jurisdiction of the federal courts to correct, the Fourth Circuit has immunized EPA from evaluating the job losses suffered by the coal industry due to EPA's unprecedented efforts to curtail coal combustion. Absent action by this Court, this abdication of jurisdiction creates a substantial blind spot where EPA will be left to its own devices and raises fundamental questions about whether and how EPA can be required to meet its mandatory duties. This case therefore presents the following questions:

1. May a federal court decline jurisdiction to compel agency action where the statutory requirements for a claim have been satisfied?

2. Is EPA's refusal to comply with Section 321(a) of the Clean Air Act within the bounds of a federal court's authority to correct?

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the U.S. Court of Appeals for the Fourth Circuit:

1. Murray Energy Corporation, American Energy Corporation, KenAmerican Resources, Inc., Murray American Energy, Inc., OhioAmerican Energy, Inc., The American Coal Company, The Harrison County Coal Company, The Marion County Coal Company, The Marshall County Coal Company, The Monongalia County Coal Company, The Ohio County Coal Company, and UtahAmerican Energy, Inc., petitioners on review, were Plaintiff-Appellees below.

2. Scott Pruitt, Administrator, United States Environmental Protection Agency, in his official capacity, was Defendant-Appellant below.

In addition to the parties to the proceedings below, three nongovernmental organizations, Mon Valley Clean Air Coalition, Ohio Valley Environmental Coalition, and Keeper of the Mountains Foundation moved to intervene in the proceedings before the district court below. The motion was denied as moot and that decision was appealed to the Fourth Circuit, which dismissed the appeal as moot in the decision under review.

CORPORATE DISCLOSURE STATEMENT

Petitioners have the following parent corporations: Murray Energy Holdings, Company; Murray Energy Corporation; Murray American Energy, Inc.; Murray American Resources, Inc.; AmCoal Holdings, Inc.; Mill Creek Mining Company; Coal Resources, Inc.; Coal Resources Holdings Company; and Ohio Valley Resources, Inc., each of which is located at 46226 National Road, St. Clairsville, OH 43950.

No publicly held company owns 10% or more of any Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners (collectively "Murray Energy"), seek a writ of certiorari for review of a judgment of the Court of Appeals for the Fourth Circuit. That court held that the federal district courts do not have subject matter jurisdiction to compel compliance with § 321(a) of the Clean Air Act, which requires EPA to conduct continuing evaluations of the potential loss or shifts in employment resulting from its administration and enforcement of the Clean Air Act. In doing so, the Fourth Circuit vacated an injunction that would have compelled the agency to not only evaluate job losses generally, but would have compelled the agency to specifically address the recent job losses suffered by the coal industry as a result of EPA's unprecedented utility strategy.

OPINIONS BELOW

The June 29, 2017 order and opinion of the United States Court of Appeals for the Fourth Circuit that is the subject of this petition is reported at 861 F.3d 529 (4th Cir. 2017) and reproduced in the Appendix hereto ("App.") at pages 1-18.

The district court's final order is reported at 232 F. Supp. 3d 895 and reproduced in the Appendix at pages 23-53.

The district court's orders denying the Administrator's motion for summary judgment and motions to dismiss are reported at 2016 WL 6083946 (summary judgment), 2015 WL 1438036 (second motion to dismiss), and 2014 WL 4656221 (first

motion to dismiss) and are reproduced in the Appendix at pages 54-124, 125-144, and 145-161 respectively.

JURISDICTION

The Court of Appeals issued its opinion on June 29, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The underlying action was brought by Petitioners to compel the Administrator to comply with § 321(a) of the Clean Air Act (42 U.S.C. § 7621):

§ 7621. Employment effects

(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 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.

Jurisdiction for this claim is under 42 U.S.C. § 7604, which provides in pertinent part:

§ 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf-

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(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 full text of 42 U.S.C. § 7621 is reproduced at App. 169-171. The full text of 42 U.S.C. § 7604 is reproduced at App. 162-168.

Article III, Section 1 of the U.S. Constitution provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

STATEMENT

A. Section 321(a) of the Clean Air Act Requires EPA to Conduct Continuing Evaluations of Potential Loss or Shifts in Employment.

Enacted in 1977, Clean Air Act § 321(a) requires the Administrator to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement" of the Clean Air Act. 42 U.S.C. § 7621(a).

The origins of this provision can be traced to Congressional concern that, while it was vesting EPA with considerable new powers to protect the environment in the 1970s, increased compliance obligations were also playing a role in plant shutdowns and worker dislocations, and that these individualized harms were not being adequately addressed.

In 1971, the Senate subcommittee on air and water pollution held hearings on "economic dislocation, plant shutdowns, and worker layoffs" arising from environmental control orders. Its Chairman, Senator Muskie, asked at the outset: "If people, workers, communities, [and] industrial plants are to be affected because we have resolved to protect the environment, how and by what means shall their interest, their personal health and welfare, also be protected?" CA App. 418.[1]

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[1] References to the "CA App." are to the joint Appendix in the circuit court (ECF 26-1 to 26-9).

The committee began by turning to prominent advocate Ralph Nader, who testified that enforcing pollution laws without addressing the problem of "environmental layoffs or closedowns" would be "too narrow a policy and a cruel one at that for workers." CA App. 423. He referenced efforts to study the macroeconomic costs and benefits of environmental regulations, but testified that this was not enough, since "macro-economic studies do not answer the question which a worker has about his or her family's macro-economy." *Id.* To address these individualized impacts, Mr. Nader proposed legislation that would require the Administrator to "investigate every plant closing or threat of plant closing involving 25 or more workers, which he has reason to believe results from an order or standard for the protection of environmental quality." *Id.* at 425. The evaluations would result in reports "detailing the causes of the dislocation, the ways in which it might be avoided and the effects on the community and the workforce." *Id.*

The following year, Congress amended the Clean Water Act to provide a program similar to Mr. Nader's proposal. It provides that "[t]he Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the issuance of any effluent limitation or order under this Act, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such limitation or order." 33 U.S.C. § 1367(e).[2] Congress

[2] Other provisions in § 1367(e) of the Clean Water Act bear further similarities to recommendations Mr. Nader offered in

would go on to add similar provisions not only to the Clean Air Act (42 U.S.C. § 7621(a)), but also to the Toxic Substances Control Act ("TSCA") (15 U.S.C. § 2623), the Solid Waste Disposal Act ("SWDA") (42 U.S.C. § 6971(e), and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") (42 U.S.C. § 9610(e)).

As Judge Bailey recognized in his Final Order below, one of the distinguishing features of these requirements is that they focus the Administrator on the specific job losses resulting from EPA's actions. App. 31. While other provisions require EPA to evaluate costs and benefits generally, or on an industry-wide basis, nothing else imposes on EPA the mandate to specifically evaluate the actual and threatened job loss and shifts resulting from its decisions.

There is also no question that Congress intended these evaluations to be mandatory. The language of the act itself uses clear language of command: "the Administrator *shall* conduct continuing evaluations." 42 U.S.C. § 7621(a) (emphasis added). The House committee report states "[u]nder this provision, the Administrator *is mandated* to undertake an ongoing evaluation of job losses and employment shifts due to requirements of the Act." CA App. 578 (emphasis added). Both Judge Bailey and the Fourth Circuit likewise noted the mandatory nature of § 321(a). *See* App. 25 ("this Court continues to believe that

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his 1971 testimony, including a provision for conducting investigations at the request of an employee and protections for employees terminated due to an investigation.

congress intended to impose a mandatory duty upon the EPA."); App. 13 ("Section 321(a)—when read as a whole—imposes on the EPA a broad, open-ended statutory mandate."). On appeal, even EPA conceded the point, stating "[t]he United States does not contest before this Court that the first clause of Section 321(a) imposes a requirement on EPA to 'conduct continuing evaluations.'" Principal Brief of EPA, CA Doc. 25 at 38 (February 21, 2017).

B. Section 304 of the Clean Air Act Vests Jurisdiction in the District Courts to Compel the Administrator to Comply with Mandatory Duties Under the Clean Air Act.

Section 304(a)(2) of the Clean Air Act allows "any person" to "commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under the Act which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). To reinforce the breadth of this jurisdictional grant, Congress provided 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. . . ." *Id.* at § 7604(a).

This citizen suit provision serves as an important check on EPA's compliance with its statutory mandates. Since it provides for judicial oversight of often complex agency decisions, Congress also imposed several limits on its use. For example, damages are typically not recoverable. *See Middlesex County Sewerage Authority v. Nat'l. Sea*

Clammers Assn., 453 U.S. 1, 18, n. 27 (1981). Notice provisions also allow the Administrator to take action before a suit is filed, preempting or mooting many citizen suits. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 87 (1998). With respect to the subject matter jurisdiction of the federal courts, however, there is only one limitation: that there be alleged an "act or duty" that is "not discretionary with the Administrator."

As initially proposed, even this limitation was not present. *See* Sen. Rep. 91-1196, 91st Cong., 2d Sess., at 39 (1970). Upon objection that this would allow citizen suits to compel agency enforcement actions, the limitation was added to restrict citizen suits against the Administrator to the "alleged failure to perform mandatory functions." H.R. Conf. Rep. 91-1783, 91st Cong. 2d Sess., Leg. Hist. at 56; *see also* House Consideration of the Report of the Conference Committee, December 18, 1970, Leg. Hist. at 112 ("Citizen suits against the Administrator will be limited to those duties which are mandatory under the legislation and the suits will not extend to those areas of enforcement with regard to which the Administrator has discretion.").

This citizen suit provision has served as a model for provisions in other major environmental statutes, including the Clean Water Act (33 U.S.C. § 1365(a)), CERCLA (42 U.S.C. § 9659(a)), the Emergency Planning and Community Right to Know Act ("EPCRA") (42 U.S.C. § 11046(a)(1)); the Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. § 6972); the Safe Drinking Water Act ("SDWA") (42 U.S.C. § 300j-8); and TSCA (15 U.S.C. § 2619). *See,*

e.g., *Middlesex*, 453 U.S. at 18, n. 27 ("the citizen-suit provision of the [Clean Water Act] was expressly modeled on the parallel provision of the Clean Air Act"). As a result, interpretations of one citizen suit provision have far-reaching impacts on how other citizen suit provisions are interpreted.

C. Plaintiffs File Suit to Compel EPA to Evaluate the Numerous Coal Jobs that Are Being Lost Because of EPA's Actions.

After his election in 2008, former President Barack Obama announced "a sustained, all-hands-on-deck effort" to pursue "a new energy economy." CA App. 985. In furtherance of these efforts, EPA developed a comprehensive strategy to reduce the national consumption of coal, particularly by the power sector.[3] Over the next eight years, EPA used its authority under the Clean Air Act to: encourage numerous facilities to switch from coal to other fuels; impose costly regulations on facilities that burn coal, incentivizing them to shut down or switch fuels; implement an enforcement strategy that discouraged the repair and continued operation of existing coal-fired facilities; and develop regulations and guidelines that would make it difficult for existing coal-fired facilities to predict future operating costs and all but impossible for new coal-fired facilities to be built. *See* Plaintiffs' Resp. in Opp. to EPA's New

[3] The power sector comprises approximately 93% of the market for domestic coal. *See* https://www.eia.gov/outlooks/steo/report/coal.cfm (last visited September 26, 2017).

Mot. for Sum. Judg., Doc. 256, at 11-16 (August 19, 2016).

As EPA set forth early in the Obama Administration, this utility strategy was to include not only a substantial increase in regulatory costs but extensive public outreach, both to advise utilities of the risk of investing in coal and to emphasize the job-creating potential of the Administration's vision for the economy. *See* CA App. 991, 997-99.

While EPA was publicizing the role it could play in job creation, the agency's attempt to rework the utility sector was contributing to devastating job losses, particularly in the coal industry. By 2015, coal consumption from electric utilities had fallen 29% from 2008 levels. CA App. 358. Through enforcement actions alone, EPA had obtained consent decrees requiring the retirement, repowering, or retrofit of numerous electric generating units, and from 2010 to 2014 alone, an estimated 330 coal-fired electric generating units were set to retire or convert to other fuels. Rapid decreases in coal consumption mirrored similar decreases in coal production. From 2008 to 2015, coal production in the United States fell approximately 24 percent, with a sharp acceleration in 2015 directly attributable to EPA's regulatory policies. App. 87. In central Appalachia, production fell approximately 43% from 2008 to 2014. Severe job losses in communities dependent on coal soon followed. By 2014, national coal mine employment had dropped nearly 20% from two years prior. According to the State of West Virginia's chief economist, EPA's policies resulted in a roughly 65%

reduction in coal employment in Boone County, West Virginia alone, and a 27% reduction in local employment overall. *Id.*

Section 321(a) required EPA to evaluate continuously these effects and to make public the actual and threatened plant closings and job losses associated with its unprecedented expansion of Clean Air Act authority. Indeed, members of Congress repeatedly asked the Administrator for just this information. On no fewer than seven occasions between 2009 and 2013, Senators and Representatives asked EPA for its evaluations or for an explanation why EPA was not complying with § 321(a). *See* App. 35-39. As recent as the current Administrator's confirmation hearing earlier this year, Senator Capito of West Virginia asked specifically about EPA's compliance with § 321(a).[4] The U.S. Chamber of Commerce similarly submitted a Freedom of Information Act request to try to obtain EPA's § 321(a) evaluations. Sixteen states have also filed amicus briefs in the proceedings below emphasizing the importance of EPA's compliance with § 321(a) to their interest in protecting the economic wellbeing of their citizens. *See, e.g.* Brief of Amici Curiae the State of West Virginia and 15 Other States Supporting Plaintiffs-Appellees, CA Doc. 61-1.[5]

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[4] *See* https://www.c-span.org/video/?c4648530/sen-capito-questions (last visited September 26, 2017).

[5] The sixteen states in the court of appeals were West Virginia, Arizona, Arkansas, Georgia, Kansas, Louisiana, Michigan, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, Texas, Utah, Wisconsin, and Wyoming.

In response to these repeated inquiries, Congress was told that EPA had no duty to comply and that compliance would have limited utility, the U.S. Chamber of Commerce was told that EPA had no evaluations, and when Plaintiffs served the Administrator with a notice letter advising her that they would file suit to compel the agency to comply if EPA did not respond, the agency stood mute. Consequently, Plaintiffs filed suit in the Northern District of West Virginia to compel EPA to comply with its statutory duty.

D. The District Court Compels EPA to Comply with Section 321(a).

In the district court, EPA filed *seriatim* motions to dismiss and for summary judgment. First, EPA argued it had no duty to comply with § 321(a). The district court disagreed. *See* App. 145-161 (denying motion to dismiss). Second, after losing a motion to "clarify" the district court's decision (CA App.69–70) and a motion to reconsider (CA App. 117–18), EPA filed a second motion to dismiss, this time on standing grounds. Again, the district court denied the motion, finding multiple grounds for Plaintiffs' standing. App. 125-144. Then, after yet another motion to reconsider (*see* CA App. 160–69), EPA moved for summary judgment.

In its motion for summary judgment, EPA again challenged Plaintiffs' standing, which the district court again rejected. App. 77-95. On the merits, EPA took the unusual step of conceding that, if a set of documents it identified did not satisfy the duty imposed by § 321(a), then summary judgment should

be entered *against* it, stating: "[i]f this Court concludes that the documents upon which EPA relies do not constitute performance of the evaluations described in Section 321(a), then the Court should enter judgment for Plaintiffs and order EPA to perform the duty." App. 119-120. Weighing the evidence from over two years of discovery, the district court found that EPA's documents did not constitute performance of the evaluations required by § 321(a) and entered summary judgment for Plaintiffs. *Id.*

The district court did not immediately issue an order for EPA to comply with § 321(a). Rather, the court ordered EPA to provide a plan and schedule for compliance. App. 123. EPA did not comply. Instead, EPA submitted at the deadline a document asserting that the district court's opinion was wrong, that EPA would not be complying with § 321(a) in the absence of a court order, that the time frame for submitting a plan and schedule for compliance was too short (though EPA never requested an extension), and asserting that it would take "around two years to come up with a methodology to use in an effort to begin to comply with § 321(a)." App. 24-25. The district court found this response "wholly insufficient, unacceptable, and unnecessary," and evidence of the "continued hostility on the part of the EPA to acceptance of the mission established by Congress." App. 25.

Finding that "[t]he record in this case demonstrates hostility on the part of the EPA to doing what is ordered by § 321(a)," App. 45, Judge Bailey ruled that EPA's "clear reticence to comply

coupled with 8 years of refusal to comply—even in the face of Congressional and public pressure—with the Clean Air Act justifies an injunction detailed enough to ensure compliance." App. 46-47. The district court therefore ordered EPA to "fully comply with the requirements of § 321(a)" and, "due to the importance, widespread effects, and the claims of the coal industry," to specifically evaluate "the effects of its regulations on the coal industry and other entities affected by the rules and regulations affecting the power generating industry." App. 50-51.

The district court gave EPA nearly six months (until July 1, 2017), to evaluate the job loss and shifts it had contributed to because of its power sector regulations. App. 51. The district court then gave EPA nearly one full year to show "that EPA has adopted measures to continuously evaluate the loss and shifts in employment which may result from its administration and enforcement of the Clean Air Act, including such rulemakings, guidance documents, and internal policies as necessary to demonstrate that EPA has begun to comply with § 321(a) and will continue to do so going forward." App. 52.

E. The Fourth Circuit Finds No Jurisdiction to Compel EPA to Comply with Section 321(a).

EPA sought reversal of the district court's summary judgment and final order in the Fourth Circuit. EPA did not seek a stay of the district court's injunction but the agency requested expedited appellate review. Just two days before its job loss evaluation of the coal industry was due, on June 29, 2017, the Fourth Circuit vacated the district court's

judgments insofar as they impacted EPA and remanded with instructions to have Murray Energy's suit dismissed "for want of jurisdiction," holding that "Section 304(a)(2) does not authorize the instant suit by Murray against EPA, and . . . the district court thus lacked jurisdiction over the suit." App. 15-16. In light of this ruling, the Fourth Circuit left unaddressed any challenges to the district court's standing, merits, and remedial rulings. *Id.* at 16.

The circuit court found that § 321(a) "when read as a whole—imposes on the EPA a broad, open-ended statutory mandate." App. 13. But the Fourth Circuit concluded that, based on its prior precedent, it must construe its citizen suit jurisdiction "narrowly," to "confin[e] its scope to the enforcement of legally required acts or duties of a specific and discrete nature that precludes broad agency discretion." App 12-13. Relying on this "narrow" interpretation of the federal courts' citizen suit jurisdiction, the Fourth Circuit ruled that § 321(a)'s mandate "does not impose on the EPA a specific and discrete duty amenable to Section 304(a)(2) review." App. 13.

The circuit court also did not set out any alternative basis on which a party could seek to compel compliance with § 304(a)(2). In one footnote, the Fourth Circuit rejected both the APA and mandamus as grounds for jurisdiction. App. 15, n.4. In another footnote, the circuit court declined to address whether Murray Energy's claim could proceed as a claim for "agency action unreasonably delayed" under § 304(a). App. 16, n.5.

REASONS FOR GRANTING THE PETITION

In shielding from judicial review EPA's open refusal to comply with a direct statutory mandate to evaluate the job losses arising from its own conduct, despite repeated requests from Congress, Plaintiffs, and third parties, the Fourth Circuit has created a gap in the protections Congress afforded in enacting environmental citizen suit provisions.

For the beleaguered coal industry in particular, the result is the denial of a detailed job loss evaluation that EPA was days from submitting to the district court and which would have shed valuable light on the true cost of EPA's recent energy policies.

Given the problems the Fourth Circuit's opinion will create for future judicial review, the ramifications on dozens of other programs, and the job loss information at stake, certiorari is warranted.

I. CERTIORARI IS WARRANTED TO CLARIFY THE BOUNDS OF THE FEDERAL COURTS' SUBJECT MATTER JURISDICTION IN CITIZEN SUITS.

As the Fourth Circuit recognized, this case addresses the important question of the "bounds of a federal court's authority under the Clean Air Act (CAA) to correct an alleged failure by the U.S. Environmental Protecting Agency (EPA) to perform a non-discretionary, CAA-based act or duty." App. 6.

In relying on its own policy judgment to decline jurisdiction expressly vested by Congress in the

federal courts, the Fourth Circuit established bounds that violate Article III of the Constitution and create a dangerous precedent for avoiding judicial review on jurisdictional grounds that is contrary to this Court's repeated holding that, once the statutory requirements for a claim have been satisfied, the courts cannot decline jurisdiction.

The Clean Air Act grants the district courts subject matter jurisdiction to compel compliance with "any act or duty" that is "not discretionary with the Administrator." 42 U.S.C. § 7604(a). Both the district court and the court of appeals recognized that § 321(a) of the Clean Air Act imposes a mandatory duty on the Administrator. App. 13, 25. This should have been the end of the circuit court's inquiry into subject matter jurisdiction. Preferring instead to avoid the "vice" of judicial disruption of "complex agency processes," the Fourth Circuit concluded it must construe its jurisdiction "'narrowly' by confining its scope to the enforcement of legally required acts or duties of a specific and discrete nature," thereby precluding review of even mandatory duties as long as they involve the exercise of "broad agency discretion." App. 12 (quoting *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 276, n.3 (4th Cir. 1992)).

This approach violates the express statutory language of the Clean Air Act and this Court's repeated admonitions that, where Congress vests the federal courts with authority to hear a claim within the scope of Article III, the courts cannot decline jurisdiction for prudential reasons. *See Lexmark Intern. v. Static Control*, ___ U.S. ___, 134 S. Ct.

1377, 1387-88 (2014) ("We do not ask whether in our judgment Congress *should* have authorized [the plaintiff's] suit, but whether Congress in fact did so," because "[j]ust as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, . . . it cannot limit a cause of action that Congress has created merely because 'prudence' dictates.") (*citing Alexander v. Sandoval*, 532 U.S. 275, 286-287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001)) (emphasis in original); *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) ("the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'") (*quoting Cohens v. Virginia*, 19 U.S. 264, 404, 6 Wheat. 264, 404 (1821)); *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922) (Congress "may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."). [6]

The result of the Fourth Circuit's decision is a broad yet ill-defined blind spot in the courts' ability

[6] In holding that it must construe its jurisdiction "narrowly," the Fourth Circuit also departed from this Court's "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 498-99 (1991); *see also Cuozzo Speed Techs., LLC v. Lee*, __ U.S. __, 136 S. Ct. 2131, 2140 (2016) ("We recognize the 'strong presumption' in favor of judicial review that we apply when we interpret statutes, including statutes that may limit or preclude review."); Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967) ("a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.").

to oversee EPA compliance with its statutory duties. Duties to review state implementation plans, develop federal implementation plans, evaluate and report on issues important to the administration and enforcement of the Clean Air Act, promulgate guidelines and guidance, review and approve designations, review and update existing emission standards, and take a host of other steps required by the Clean Air Act are all implicated. Under the Fourth Circuit's ruling, each is now subject to a case-by-case review to determine whether the "act or duty" at issue is sufficiently "specific" and "discrete" to be judicially reviewable.

Shielding EPA's noncompliance from citizen suit review can have serious repercussions. The Clean Air Act, like other comprehensive environmental statutes, contains numerous provisions designed to ensure that Congress and the public have adequate information to oversee EPA's administration and enforcement policies. In allowing EPA to avoid creating this information, the Fourth Circuit's decision allows EPA to short circuit the protections Congress put in place to correct regulation gone awry.

The problem will also not be limited to Clean Air Act citizen suits. Given the similar nature of the citizen suit provisions under most major environmental statutes, holdings as to one are often applied quickly to others as well. Already, the Fourth Circuit's opinion is being used by EPA to seek the dismissal of at least two citizen suits brought under the Clean Water Act. *See Ohio Valley Environmental Coalition, Inc., et al. v. Pruitt*, Case

No. 17-1430, Doc. 25, at 35 (July 17, 2017); *Blue Water Baltimore, Inc., et al. v. Pruitt*, Case No. 17-01253, Doc. 13-1, at 10 (July 17, 2017).

To support a narrower construction of its citizen suit jurisdiction, the Fourth Circuit relied on two arguments that further exacerbate the problem. First, the circuit court relied on legislative history to justify narrowing the scope of judicial review beyond what Congress enacted. Reasoning that Congress "recognized the potential for disruption of the administrative process inherent in a broad grant of jurisdiction, and inserted the non-discretionary requirement into the statute in order to minimize such disruption," App. 12, the Fourth Circuit found that it could add conditions to citizen suit review that also further that goal. This proves too much. Congress not only identified the risk of judicial interference, it presented its solution as well, restricting citizen suits to duties "which are not discretionary with the Administrator." As initially proposed, the provision would have extended even to enforcement decisions,[7] a subject "generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Upon concern being raised that this would interfere with the agency's ability to manage enforcement priorities, the final statute limits judicial review to non-discretionary duties, which the Conference Report equates to mandatory duties under the Act. *See* Conf. Rep. 91-1783, 91st Cong. 2d Sess., at 56 (1970) ("Suits against the Administrator [are] limited to alleged failure to perform mandatory functions to

[7] *See* Sen. Rep. 91-1196, 91st Cong., 2d Sess., at 39 (1970).

be performed by him."); House Consideration of the Report of the Conference Committee, December 18, 1970, Leg. Hist. at 112 ("Citizen suits against the Administrator will be limited to those duties which are mandatory under the legislation and the suits will not extend to those areas of enforcement with regard to which the Administrator has discretion."). Neither the text nor the legislative history supports the additional "specific" and "discrete" conditions imposed by the Fourth Circuit, and the Fourth Circuit did not have the authority to add them on its own.

Second, the Fourth Circuit reasoned that its "narrow construction" would give "Section 304(a)(2) a scope similar to that of both the traditional mechanism for judicial review of agency operations, the writ of mandamus, and the modern mechanism for judicial review of many types of agency inaction, Section 706(1) of the Administrative Procedure Act (APA)," App. 12, implying that the scope of APA and mandamus review should now play a role in interpreting grants of jurisdiction under other statutes. While this Court has held that judicial review under the APA is limited to "specific" and "discrete" agency actions, this was not based on a prudential need to limit APA jurisdiction. It was based on the language of the APA itself, which restricts judicial review to certain specific "agency actions." *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) ("When . . . review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be

"final agency action."); *Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55, 61-63 (2004) (relying on the language of 5 U.S.C. §§ 702, 704, and 706 to limit the scope of agency inactions judicially reviewable under the APA to specific and discrete duties). Nothing in this Court's precedent countenances equating "any act or duty" under the Clean Air Act with "final agency action" under the APA, and doing so would offer no judicial review for acts or duties that were not already reviewable under the APA, rendering Congress' choice of the phrase "any act or duty" odd indeed.

On the other hand, as a prerogative writ, the bounds of mandamus jurisdiction are not determined by statutory language at all, but by "the courts exercise [of] sound, legal discretion, in awarding it."[8] This allows for consideration of factors that are beyond the scope of the "traditional principles of statutory interpretation" this Court has stated should be used to determine the bounds of causes of action created by statute. *Lexmark*, 134 S. Ct. at 1388.

Finally, this case presents an excellent vehicle for defining the bounds of subject matter jurisdiction. While the Fourth Circuit cites a line of circuit court cases for support, none of these prior decisions squarely presented the holding at issue here. Two

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[8] *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 607 (1838); *see also Cheney v. United States Dist. Court for the District of Columbia*, 542 U.S. 367, 391 (2004) ("issuance of the writ is a matter vested in the discretion of the court to which the petition is made").

cases, *Envtl. Def. Fund v. Thomas*, 870 F.2d 892 (2d. Cir. 1989) and *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349 (9th Cir. 1978) do not state the proposition cited, merely holding that to be judicially reviewable, the duty alleged must be mandatory. The other two cases, *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 276, n.3 (4th Cir. 1992) and *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980) mention the scope of citizen suit jurisdiction in *dicta.*

The Fourth Circuit's opinion in this case, on the other hand, presents a case in which Plaintiffs seek an order to compel compliance with a duty that EPA concedes is mandatory and which the district court and court of appeals properly found mandates that EPA conduct continuing evaluations of loss and shifts in employment. The Fourth Circuit's rejection of subject matter jurisdiction therefore depends entirely on the circuit court's ability to add restrictions on federal subject matter jurisdiction beyond those in the Clean Air Act itself. As this fundamentally violates the separation of powers reflected in Article III of the Constitution and this Court's repeated admonitions for a strict adherence to the principal that the courts must accept the judicial power vested by Congress, certiorari is appropriate.

II. CERTIORARI IS WARRANTED TO CLARIFY THAT EPA'S REFUSAL TO COMPLY WITH SECTION 321(a) IS JUDICIALLY REVIEWABLE

Even if the Court were to hold that some limitations beyond those set forth in the statute must be applied to limit the jurisdiction of the federal courts to compel compliance with nondiscretionary duties under the Clean Air Act, this Court's precedent makes clear that the discretion given to EPA in conducting the evaluations mandated by § 321(a) is not one of them. EPA may have discretion in how it evaluates potential loss and shifts in employment, but the courts can still redress EPA's decision to avoid its duty entirely. As a result, the Fourth Circuit's decision violates another line of this Court's precedent when it relies on the nature of the evaluations themselves to determine whether the agency has jurisdiction to compel EPA to evaluate job loss at all. Throughout its opinion, the Fourth Circuit contends that the district court should base its subject matter jurisdiction on the nature of the duty required by § 321(a), ignoring the fact that this case is not about *how* the Administrator complies with § 321(a), but whether the Administrator will comply at all.

As this Court has held, "[i]t 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*, for example, this Court held that a statute providing that "[t]he 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 not "discretionary with the Secretary" under the Endangered Species Act because "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.'" *Id.*

For the same reason, this Court found in *Mach Mining, LLC v. EEOC*, ___ U.S. ___, 135 S. Ct. 1645 (2015) that the EEOC's statutory duty to "endeavor" to eliminate alleged unlawful employment practices "by informal methods of conference conciliation, and persuasion," was judicially reviewable. In reaching this holding, this Court recognized that the statute "smacks of flexibility," requiring only that the EEOC "endeavor" to conciliate a claim without specifying "any specific steps or measures" to comply. *Id.* at 1654. The Court nonetheless found a mandatory duty to endeavor to informally conciliate claims. *Id.* at 1651. This was because Congress had "not left everything to the Commission." *Id.* at 1652. If the Commission declined "to make any attempt to conciliate a claim," the statute "would offer a perfectly serviceable standard for judicial review." *Id.* at 1652. As this Court succinctly put it, "[w]ithout any 'endeavor' at all, the EEOC would have failed to satisfy a necessary condition of

litigation." *Id*; *see also Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (holding that, despite the broad discretion afforded the agency in distributing grant money, the agency still had to allocate funds).

Just as in *Mach Mining*, regardless of the discretion EPA may exercise in determining how to evaluate loss and shifts in employment, without any "evaluation" at all, EPA has failed to satisfy a mandatory duty, and the district courts have jurisdiction to correct this violation under the Clean Air Act's citizen suit provision. The Fourth Circuit ignored this principle, and in so doing established a basis for avoiding judicial review not just of EPA's discretionary actions but of any mandatory duty to exercise discretion.

The Fourth Circuit expressed concern that the "considerable discretion" EPA is given in "managing its Section 321(a) duty" would make it difficult for courts to "supervise this continuous, complex process." App. 14-15. But the courts' ability to manage how EPA evaluates job losses is no more relevant to the question of whether EPA must evaluate job losses at all than the Court's ability to manage the designation of critical habitats would have been in *Bennett*, or the ability to oversee claim conciliation would have been in *Mach Mining*.

This Court's guidance is needed to prevent courts of appeals from continuing to take disparate views on the breadth of their jurisdiction. Indeed, even two of the circuit courts relied upon by the Fourth Circuit drew the distinction that the Fourth Circuit now declines to make. In *Envtl. Def. Fund v. Thomas*,

870 F.2d 892, 899-900 (2d. Cir. 1989), the Second Circuit clearly drew the distinction between requiring EPA to exercise its judgment and managing how EPA did so, holding that "[a]lthough the district court does not have jurisdiction to order the Administrator to make a particular revision, we cannot agree with appellees that the Administrator may simply make no formal decision to revise or not to revise, leaving the matter in a bureaucratic limbo. . . ." Similarly, the Ninth Circuit in *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1354 (9th Cir. 1978) held that, while "[t]he Administrator . . . retains a good deal of discretion as to the content" in its decision whether to approve a state revision to its implementation plan under the Clean Air Act, "[i]t is clear that the Administrator has a non-discretionary duty to make a decision regarding the state revision." The Fourth Circuit's holding that the discretionary nature of EPA's compliance with § 321(a) prevents the courts from compelling EPA to comply with § 321(a) at all conflicts with this well-established principle and justifies certiorari.

III. CERTIORARI IS WARRANTED TO COMPEL EPA TO PUBLICLY EVALUATE THE JOB LOSSES IT IS CAUSING

This case presents a lengthy and troubling saga of an agency entrusted with protecting the health and welfare of the nation ignoring and even suppressing the damaging effects its policies are having on jobs.

The agency's impulse to avoid at all cost a frank discussion of the actual plant closings, workers who have lost their jobs, and communities that are losing

their tax base because of EPA's actions has proven to be so strong that the district court concluded, after three years of litigation, that EPA had not only failed to comply with its statutory duty to evaluate and make public the job losses it was causing, the agency was *hostile* to compliance. App. 45 ("The record in this case demonstrates hostility on the part of the EPA to doing what is ordered by § 321(a).") It is plain on the facts of this case that, absent a court order, EPA will not comply. Rather, it will continue to look to bury the true risks of its policies to families and local communities.

There is also no practical barrier to EPA's compliance. As the district court found, EPA has the tools and resources to comply. App. 49. When the Fourth Circuit issued its opinion, EPA was mere days from publishing its six-month evaluation of job losses in the coal industry. Since the Fourth Circuit's opinion, no version of this evaluation, draft or final, has been made public.

In the meantime, EPA actions have weakened, and continue to wreak havoc on, the coal industry. The past nine years have seen a rapid expansion of EPA's authority over areas of the economy not traditionally regulated by the agency. The result has been catastrophic for the large portion of this Country dependent on coal for its chief source of energy, income, or taxes. The new Administration must now deal with the consequences of these policies.

As the U.S. Chamber of Commerce noted below, compliance with § 321(a) will help "EPA to regulate

better" and "to take into account the economic costs" of achieving future environmental benefits. U.S. Chamber Amicus Brief, ECF No. 275, at 11. Moreover, as this Court noted in the context of the similar statutory mandate in the Clean Water Act, continuing evaluations of loss and shifts in employment will also "allow the Congress to get a close look at the effects on employment of legislation such as this, and will thus place [it] in a position to consider such remedial legislation as may be necessary to ameliorate those effects." *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 83, n.24 (1980) (quoting Representative Fraser from the legislative record).

EPA, Congress, and the States must now grapple with the consequences of the past Administration's unprecedented actions under the Clean Air Act. An evaluation of the job losses that have occurred and those jobs that remain under threat because of EPA's decisions will be a powerful tool in helping EPA, Congress, the States, and Plaintiffs address and correct a policy that, up until now, has been far "too narrow a policy and a cruel one at that for workers" in the coal industry. CA App. 423.

Because this case will decide whether the individuals most directly impacted by EPA's policies will become an integral part of EPA's evaluations of its administration and enforcement of the Clean Air Act going forward, as Congress intended, or whether EPA will be able to continue to marginalize the individual impacts of the actions it takes in the name of the general public and the national welfare, certiorari is warranted.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit and review its decision in this case.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A

FILED: June 29, 2017

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2432

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; UTAHAMERICAN ENERGY, INC.,

Plaintiffs - Appellees,

v.

ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY,

Defendant – Appellant,

and

MON VALLEY CLEAN AIR COALITION; OHIO VALLEY ENVIRONMENTAL COALITION; KEEPER OF THE MOUNTAINS FOUNDATION,

Movants.

No. 17-1093

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

Plaintiffs – Appellees,

v.

THE ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant – Appellee,

v.

KEEPER OF THE MOUNTAINS FOUNDATION; MON VALLEY CLEAN AIR COALITION; OHIO VALLEY ENVIRONMENTAL COALITION,

Movants – Appellants.

CAUSE OF ACTION INSTITUTE; STATE OF WEST VIRGINIA; STATE OF ARIZONA; STATE OF

ARKANSAS; STATE OF GEORGIA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MICHIGAN; STATE OF NEBRASKA; STATE OF NEVADA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF TEXAS; STATE OF UTAH; STATE OF WISCONSIN; STATE OF WYOMING,

Amici Supporting Appellees.

No. 17-1170

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

Plaintiffs – Appellees,

v.

THE ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant – Appellant,

v.

MON VALLEY CLEAN AIR COALITION; KEEPER OF THE MOUNTAINS FOUNDATION; OHIO VALLEY ENVIRONMENTAL COALITION,

Movants.

CAUSE OF ACTION INSTITUTE; STATE OF WEST VIRGINIA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF GEORGIA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MICHIGAN; STATE OF NEBRASKA; STATE OF NEVADA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF TEXAS; STATE OF UTAH; STATE OF WISCONSIN; STATE OF WYOMING,

Amici Supporting Appellees.

Appeals from the United States District Court for the Northern District of West Virginia, at Wheeling. John Preston Bailey, District Judge. (5:14-cv-00039-JPB)

Argued: May 9, 2017 Decided: June 29, 2017

Before DIAZ, FLOYD, and THACKER, Circuit Judges.

Vacated in part and remanded with instructions; dismissed in part by published opinion. Judge Floyd wrote the opinion, in which Judge Diaz and Judge Thacker joined.

ARGUED: Matthew Littleton, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; William V. DePaulo, Charleston, West Virginia, for Appellants. John Lazzaretti, SQUIRE PATTON BOGGS (US) LLP, Cleveland, Ohio, for Appellees.

ON BRIEF: Gautam Srinivasan, Matthew C. Marks, Air and Radiation Law Office, Office of General Counsel, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Washington, D.C.; Jeffrey H. Wood, Acting Assistant Attorney General, Jennifer Scheller Neumann, Patrick R. Jacobi, Richard Gladstein, Laura J.S. Brown, Sonya Shea, Environment & Natural Resources Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant/Cross-Appellee United States Environmental Protection Agency. Geoffrey K. Barnes, Robert D. Cheren, Danelle M. Gagliardi, Robert B. McCaleb, SQUIRE PATTON BOGGS (US) LLP, Cleveland, Ohio, for Appellees. Joshua N. Schopf, Eric R. Bolinder, CAUSE OF ACTION INSTITUTE, Washington, D.C., for Amicus Cause of Action Institute. Patrick Morrisey, Attorney General, Elbert Lin, Solicitor General, Erica N. Peterson, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Amici State of West Virginia, State of Arizona, State of Arkansas, State of Georgia, State of Kansas, State of Louisiana, State of Michigan, State of Nebraska, State of Nevada, State of Ohio, State of Oklahoma, State of South Carolina, State of Texas, State of Utah, State of Wisconsin, and State of Wyoming.

FLOYD, Circuit Judge:

In this case, we consider the bounds of a federal court's authority under the Clean Air Act (CAA) to correct an alleged failure by the U.S. Environmental Protection Agency (EPA) to perform a non-discretionary, CAA-based act or duty. *See* 42 U.S.C. § 7604(a)(2). The precise issue before us is whether this authority extends to review of the EPA's management of its continuous duty to evaluate the potential employment impact of CAA administration and enforcement. *See* 42 U.S.C. § 7621(a). We hold that it does not.

I.

In 1977, after extensive public debate about the effects of the CAA's environmental rules on employment, Congress enacted Section 321 of the CAA as a mechanism for reviewing those effects. *See* H.R. Rep. No. 95-294, at 316–18 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1395–97.

At issue in this case is Section 321(a) of the CAA, 42 U.S.C. § 7621(a), which directs the EPA to continuously evaluate the potential employment impact of CAA administration and enforcement. Section 321(a) provides:

> The [EPA] 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.

42 U.S.C. § 7621(a).

In 2014, Murray Energy Corporation and related companies (collectively, "Murray") filed the instant suit against the EPA Administrator, alleging a failure to comply with Section 321(a). Murray filed its suit under Section 304(a)(2) of the CAA, 42 U.S.C. § 7604(a)(2), which in pertinent part provides: "[A]ny person may commence a civil action on his own behalf . . . against the [EPA] Administrator where there is alleged a failure of the Administrator to perform any act or duty under [the CAA] which is not discretionary with the Administrator." Murray's suit requested an injunction (1) ordering the EPA to conduct Section 321(a) evaluations; and (2) prohibiting the EPA from engaging in certain regulatory activities until it had conducted such evaluations.

At the outset of the litigation, the EPA moved to dismiss Murray's suit on jurisdictional grounds. The EPA first argued that its Section 321(a) duty was not a non-discretionary duty cognizable under Section 304(a)(2). In a subsequent filing, the EPA added that Murray lacked standing to challenge the EPA's alleged non-compliance with Section 321(a). The district court rejected both of the EPA's jurisdictional arguments, and declined to dismiss Murray's suit at the pleading stage.

Subsequently, the EPA moved for summary judgment and simultaneously proffered fifty-three documents to prove the agency's compliance with Section 321(a). The EPA's documents—which the agency conceded had not been prepared explicitly for the purpose of Section 321(a) compliance—included regulatory impact analyses, economic impact analyses, white papers, and other reports. The EPA asked the district court to grant summary judgment

in its favor on the basis of its proffer or, in the alternative, that the court grant summary judgment in Murray's favor if it were to conclude that the agency's proffer was insufficient.

Murray moved to hold in abeyance the EPA's motion for summary judgment pending the completion of discovery. The district court granted Murray's motion, and discovery continued.[1]

At the close of discovery, the EPA filed a renewed motion for summary judgment. The EPA reiterated its position that Murray's suit was not judicially cognizable and that, even if it was, Murray lacked standing to bring its suit. Finally, the EPA renewed its request for an up-or-down merits ruling that its proffer demonstrated compliance with Section 321(a). In light of the continuous nature of the EPA's duty under Section 321(a), the EPA's proffer at the renewed summary judgment stage increased from fifty-three to sixty-four relevant documents.

On October 17, 2016, the district court issued an opinion and order granting summary judgment in

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[1] At one point during discovery, the district court refused to preclude a noticed deposition of the EPA Administrator that was designed to address an alleged conflict between the EPA's litigation position that it had complied with Section 321(a) and prior concessions by the EPA to Congress that it had not been conducting evaluations for the purpose of Section 321(a) compliance. This Court, however, ultimately granted a writ of mandamus precluding the noticed deposition. *In re McCarthy*, 636 F. App'x 142 (4th Cir. 2015). We explained that the claim that the EPA had not prepared documents with the *intent* of Section 321(a) compliance was not in conflict with the claim that the agency had nonetheless prepared documents with the *effect* of Section 321(a) compliance, as nothing in Section 321(a) conditions compliance on intent. *Id.* at 143–44.

Murray's favor. *Murray Energy Corp. v. McCarthy*, No. 5:14-cv-39, 2016 WL 6083946 (N.D.W. Va. Oct. 17, 2016) ("Summary Judgment Opinion"). The court first held that Section 321(a) creates a non-discretionary duty that gives rise to Section 304(a)(2) jurisdiction. The court then held that Murray possessed standing to seek redress for alleged procedural, economic, and informational injuries.

Finally, the court ruled in Murray's favor on the merits. The court read Section 321(a) as obligating the EPA to assess the actual, site-specific employment effects of CAA implementation. The court concluded that the EPA's proffered documents did not satisfy this requirement. In light of this conclusion, the court ordered the EPA to file a "plan and schedule for compliance with [Section] 321(a) both generally and in the specific area of the effects of its regulations on the coal industry." *Id.* at *28.

On October 31, 2016, the EPA submitted a response to the Summary Judgment Opinion. The EPA's response opened with a set of objections to the court's jurisdictional, merits, and preliminary remedial rulings. Nonetheless, the EPA's response ultimately set forth a proposed plan and schedule to supplement its performance of Section 321(a) evaluations. The EPA's proposal drew sharp criticism from Murray.

On December 14, 2016—before the district court had resolved the issue of an appropriate remedy—Mon Valley Clean Air Coalition and related non-governmental organizations (collectively, "Mon Valley") filed a motion for leave to intervene in support of the EPA. Specifically, Mon Valley claimed to have an interest in the EPA's regulatory activities under the CAA, and sought intervention under

Federal Rule of Civil Procedure 24 to prevent Section 321(a) from being used to stay or impede certain CAA regulations.

On January 11, 2017, the district court issued an opinion and order outlining the appropriate remedy. *Murray Energy Corp. v. McCarthy*, No. 5:14-cv-39, 2017 WL 150511 (N.D.W. Va. Jan. 11, 2017) ("Remedial Opinion"). In its opinion, the court rejected the EPA's proposed plan and schedule, and opted to craft its own remedy. The court's remedy was an extensive injunction ordering the EPA to conduct an evaluation identifying, *inter alia*, facilities that are at risk of closure or reductions in employment because of the EPA's coal-related regulatory activities under the CAA, the past employment ramifications of those activities, and the impact of CAA-related employment losses and shifts on families and communities. *Id*. at *11.

The court stopped short, however, of granting Murray complete relief. Specifically, the court denied Murray's request for an injunction staying the effective date of certain pending CAA regulations and limiting the EPA's authority to propose or finalize new CAA regulations pending the agency's compliance with Section 321(a). The court reasoned that it lacked the authority to grant such relief in light of Section 321(d), 42 U.S.C. § 7621(d), which in pertinent part provides: "Nothing in [Section 321] shall be construed to require or authorize the [EPA] Administrator . . . to modify or withdraw any requirement imposed or proposed to be imposed under this chapter." *Id.* (quoting 42 U.S.C. § 7621(d)).

On January 17, 2017, the district court issued an order denying as moot Mon Valley's motion to intervene, explaining that the court in its Remedial

Opinion had already denied the relief that Mon Valley opposed. *Murray Energy Corp. v. McCarthy*, No. 5:14-cv-39 (N.D.W. Va. Jan. 17, 2017), J.A. 288–89 ("Intervention Order"). The court's order also administratively closed the case, but noted that the court would continue to supervise the implementation and enforcement of its injunction against the EPA.

The EPA noted timely appeals of the Summary Judgment Opinion, the Remedial Opinion, and the Intervention Order. On appeal, the EPA challenges the district court's adverse jurisdictional, merits, and remedial rulings.[2] In addition, Mon Valley noted a timely appeal of the Intervention Order. On appeal, Mon Valley challenges the district court's denial of the organization's motion to intervene. We consolidated the EPA's set of appeals and Mon Valley's appeal, and we examine each in turn.

II.

We begin by reviewing the district court's conclusion that Section 304(a)(2) authorizes Murray's Section 321(a)-based suit against the EPA. Because this conclusion implicates the subject matter jurisdiction of the federal courts, we review it de novo. *Lontz v. Tharp*, 413 F.3d 435, 439 (4th Cir. 2005). We hold that the district court erred in concluding that it could adjudicate Murray's suit pursuant to Section 304(a)(2).

Section 304(a)(2) authorizes suit to correct "a failure of the [EPA] Administrator to perform any act or duty under [the CAA] which is not discretionary

[2] Neither the EPA nor Murray contests the district court's decision to partially deny Murray injunctive relief.

with the Administrator." 42 U.S.C. § 7604(a)(2). We have construed Section 304(a)(2) "narrowly" by confining its scope to the enforcement of legally required acts or duties of a specific and discrete nature that precludes broad agency discretion. *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 276 n.3 (4th Cir. 1992) (citing, *inter alia, Envtl. Def. Fund v. Thomas*, 870 F.2d 892, 899 (2d Cir. 1989); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980); *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1355 (9th Cir. 1978)).

Our narrow construction reduces the risk of judicial disruption of complex agency processes—a vice that Congress appeared intent on avoiding by writing a non-discretionary requirement into the statute. *See Kennecott*, 572 F.2d at 1353 (explaining that Section 304(a)(2)'s "legislative history reveals that Congress recognized the potential for disruption of the administrative process inherent in a broad grant of jurisdiction," and inserted the non-discretionary requirement into the statute in order to minimize such disruption (citing S. Comm. on Public Works, 93d Cong., 2d Sess., A Legislative History of the Clean Air Amendments of 1970, Serial No. 93-18, Vol. 1 at 278 (1970))); *accord Nat. Res. Def. Council, Inc. v. Thomas*, 885 F.2d 1067, 1073 (2d Cir. 1989).

Moreover, our narrow construction gives Section 304(a)(2) a scope similar to that of both the traditional mechanism for judicial review of agency operations, the writ of mandamus, and the modern mechanism for judicial review of many types of agency inaction, Section 706(1) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(1). *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63–64 (2004) (describing mandamus relief as "normally limited to enforcement

of a specific, unequivocal command, the ordering of a precise, definite act about which an official had no discretion whatever," and further explaining that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*") (internal quotation marks, citations, and alterations omitted).

With this understanding in mind, we turn to the question of whether Section 304(a)(2) authorizes suits to enforce the duty outlined in Section 321(a). As described above, Section 321(a) provides that the EPA "shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of [the CAA] 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). This statutory language, in our view, does not impose on the EPA a specific and discrete duty amenable to Section 304(a)(2) review.

Rather, Section 321(a)—when read as a whole—imposes on the EPA a broad, open-ended statutory mandate. To begin, Section 321(a) calls for *evaluations* of the potential employment impact of regulatory and enforcement activities—a duty which demands the exercise of agency judgment. *See Webster's Third New Int'l Dictionary* 786 (1976) (defining "evaluate" as "to examine and judge concerning the worth, quality, significance, amount, degree, or condition of"). Moreover, the relevant class of regulatory and enforcement activities is extensive—it is *the entire set of actions administering and enforcing the CAA*. Finally, and perhaps most

importantly, the required evaluations are not confined to a discrete time period, but instead are to be conducted on a *continuing* basis. *Cf. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 (1990) (refusing to treat a certain set of "continuing (and thus constantly changing) operations of the [Bureau of Land Management]" as an "agency action" reviewable under the APA).

The open-ended nature of Section 321(a)'s command is further confirmed by what the statute does not say. Section 321(a) calls for evaluations without, for the most part, specifying guidelines and procedures relevant to those evaluations.[3] Furthermore, Section 321(a) establishes no start-dates, deadlines, or any other time-related instructions to guide the EPA's continuous evaluation efforts.

The EPA is thus left with considerable discretion in managing its Section 321(a) duty. The agency gets to decide how to collect a broad set of employment

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[3] The only detail of the evaluation duty that Section 321(a) provides is that the duty includes "investigating threatened plant closures or reductions in employment allegedly resulting from [CAA] administration or enforcement." 42 U.S.C. § 7621(a). However, Section 321(a) explicitly notes that these investigations need only be conducted "where appropriate," *id.*, and thereby renders them a matter of agency direction unreviewable under Section 304(a)(2). *See Guilford Cty. Cmty. Action Program, Inc. v. Wilson*, 348 F. Supp. 2d 548, 556 (M.D.N.C. 2004) (holding that a statute providing that a state "shall" offer training and assistance "if appropriate" leaves the state with "discretion in providing training and assistance"); *cf. Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (explaining that "'appropriate' is the classic broad and all-encompassing term"—one that "leaves agencies with flexibility") (internal quotation marks omitted).

impact data, how to judge and examine this extensive data, and how to manage these tasks on an ongoing basis. A court is ill-equipped to supervise this continuous, complex process. *Cf. Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 194 (4th Cir. 2013) (explaining, in an APA case, that "the obvious inability for a court to function in such a day-to-day managerial role over agency operations" justifies "limit[ing] judicial review to discrete agency action" (citing *Norton*, 542 U.S. at 62–64)).

On a final note, we add that Section 321(a)'s poor fit for judicial review is underscored when the statute is viewed alongside other CAA provisions that offer discrete directives accompanied by specific guidance on matters of content, procedure, and timing. For example, the very next provision, Section 321(b), 42 U.S.C. § 7621(b), directs the EPA to investigate an employee's claim that an actual or proposed CAA requirement adversely affected his or her employment, and establishes a framework for related public hearings, reports, and findings of fact. Meanwhile, Section 317, 42 U.S.C. § 7617, directs the EPA to prepare economic impact assessments for enumerated agency actions, and outlines deadlines, procedural details, and specific factors for analysis. Section 321(a) fails to offer such clear instructions that could serve as a solid basis for judicial review.

Accordingly, we hold that Section 304(a)(2) does not authorize the instant suit by Murray against the EPA, and that the district court thus lacked jurisdiction over the suit.[4] Consequently, we vacate

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[4] Murray briefly suggests that—setting aside Section 304(a)(2) of the CAA—jurisdiction may be conferred to the district court in this case by the APA, *see* 5 U.S.C. § 702 et seq., or by the mandamus statute, *see* 28 U.S.C. § 1361. Assuming

the district court's judgments insofar as they impact the EPA, and remand this matter to the district court with instructions that it dismiss Murray's suit for want of jurisdiction. *See Steel Co v. Citizens for a Better Env't*, 523 U.S. 83, 94, 101 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. 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 cause." (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868))). In light of this disposition, we decline to address the EPA's challenges to the district court's standing, merits, and remedial rulings.[5]

III.

We next turn to Mon Valley's appeal of the district court's denial of its motion to intervene. We conclude

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arguendo that the APA or the mandamus statute could ever authorize judicial review of the EPA's compliance with the CAA, we conclude that those provisions do not do so in this case. As explained above, those provisions only empower a court to respond to an agency's failure to act in the face of a clear-cut duty, *see Norton*, 542 U.S. at 63–64; they do not empower a court to supervise an agency's compliance with a broad statutory mandate of the sort contained in Section 321(a), *see id.* at 66–67.

[5] We note one additional point. In its appellate briefing, Murray claims that the EPA's alleged dereliction of its Section 321(a) duty constitutes "agency action unreasonably delayed" that is actionable under Section 304(a) of the CAA, 42 U.S.C. § 7604(a). We decline to consider this claim because Murray failed to plead it in its complaint. *See S. Walk at Broadlands Homeowners Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) ("It is well-established that parties cannot amend their complaint through briefing.").

that this appeal is moot, and must therefore be dismissed.

"A case becomes moot, and thus deprives federal courts of subject matter jurisdiction, 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013) (quoting *Simmons v. United Mortg. & Loan Inv. LLC*, 634 F.3d 754, 763 (4th Cir. 2011)). We have recently described the circumstances in which an appeal of a denial of a motion to intervene is not rendered moot by the dismissal of the underlying action: "[W]e can provide an effective remedy on appeal and therefore have jurisdiction" only "[1] when the motion to intervene is made while the controversy is live and [2] the subsequent disposition of the case does not provide the relief sought by the would-be intervenors" and does not preclude us from granting said relief. *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 475 (4th Cir. 2015).

Assuming *arguendo* that Mon Valley has satisfied the first condition for jurisdiction, its appeal nonetheless falters on the second condition. Mon Valley sought to intervene in this case to help the EPA resist Murray's request for an injunction restricting the EPA's regulatory authority under the CAA pending the agency's compliance with Section 321(a). However, our holding that the EPA's compliance with Section 321(a) is not judicially reviewable under Murray's jurisdictional theories—plus our resulting remand for dismissal of Murray's suit—forecloses the possibility that the district court could issue the above-described injunction. Our disposition of this case therefore provides Mon Valley all of the relief it was seeking through intervention, and leaves us with

no basis to entertain the organization's appeal of the denial of its motion to intervene. As such, that appeal must be dismissed as moot.[6]

IV.

For the foregoing reasons, we vacate the district court's judgments insofar as they impact the EPA, and remand with instructions to have Murray's suit dismissed for want of jurisdiction. We also dismiss as moot Mon Valley's appeal of the denial of its motion to intervene.

VACATED IN PART AND REMANDED WITH INSTRUCTIONS; DISMISSED IN PART

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[6] For the first time on appeal, Mon Valley argues that it has an interest in influencing the content of the evaluations that the district court ordered the EPA to conduct. Even if we assume that this belated argument is properly before us, it still does not alter our conclusion that Mon Valley's appeal is moot. Because we are vacating the district court's orders against the EPA and remanding for dismissal of Murray's suit, there are no longer any valid court-ordered evaluations that we can authorize Mon Valley to participate in. In other words, our disposition of this case precludes us from granting Mon Valley the remedy that it seeks.

APPENDIX B

FILED: June 29, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2432 (L)
(5:14-CV-00039-JPB)

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; UTAHAMERICAN ENERGY, INC

Plaintiffs - Appellees

v.

ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY

Defendant - Appellant

and

MON VALLEY CLEAN AIR COALITION; OHIO VALLEY ENVIRONMENTAL COALITION; KEEPER OF THE MOUNTAINS FOUNDATION

Movants

No. 17-1093
(5:14-CV-00039-JPB)

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

Plaintiffs - Appellees

v.

THE ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Defendant - Appellee

v.

KEEPER OF THE MOUNTAINS FOUNDATION; MON VALLEY CLEAN AIR COALITION; OHIO VALLEY ENVIRONMENTAL COALITION

Movants – Appellants

CAUSE OF ACTION INSTITUTE; STATE OF WEST VIRGINIA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF GEORGIA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MICHIGAN; STATE OF NEBRASKA; STATE OF NEVADA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF TEXAS; STATE OF UTAH; STATE OF WISCONSIN; STATE OF WYOMING

Amici Supporting Appellee

No. 17-1170
(5:14-CV-00039-JPB)

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

Plaintiffs - Appellees

v.

THE ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Defendant - Appellant

v.

MON VALLEY CLEAN AIR COALITION; KEEPER OF THE MOUNTAINS FOUNDATION; OHIO VALLEY ENVIRONMENTAL COALITION

Movants

CAUSE OF ACTION INSTITUTE; STATE OF WEST VIRGINIA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF GEORGIA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MICHIGAN; STATE OF NEBRASKA; STATE OF NEVADA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF TEXAS; STATE OF UTAH; STATE OF WISCONSIN; STATE OF WYOMING

Amici Supporting Appellee

J U D G M E N T

In accordance with the decision of this court, Mon Valley's appeal is dismissed as moot. The judgments of the district court are vacated insofar as they impact EPA. This case is remanded with instructions to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX C

FILED: January 11, 2017

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.

FINAL ORDER

On October 17, 2016, this Court entered its Memorandum Opinion and Order Denying the United States' New Motion for Summary Judgment and Granting Summary Judgment in Favor of the Plaintiffs [Doc. 293]. In that Order, this Court ordered the EPA to provide, within two weeks, a plan and schedule for compliance with § 321(a) both generally and in the specific area of the effects of its regulations on the coal industry. This Court also granted plaintiffs the opportunity to file any comments or criticisms of the defendant's submission within fourteen days of the filing of the same.

On October 31, 2016, the EPA filed its response to this Court's order [Doc. 296], and on November 14, 2016, the plaintiffs filed their response to the EPA submission [Doc. 297].

In her submission, EPA Administrator Gina McCarthy takes several positions. First, that this Court is wrong and that the EPA would not be complying with § 321(a) in the absence of this Court's order; Second, that the time frame set by this Court was too short to provide a full response to the Order,

but not requesting any extension of the response time; and Third, that it will take the EPA around two years to come up with a methodology to use in an effort to begin to comply with § 321(a).

This response is wholly insufficient, unacceptable, and unnecessary. It evidences the continued hostility on the part of the EPA to acceptance of the mission established by Congress.

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).

As discussed at length in this Court's summary judgment decision, this Court continues to believe that Congress intended to impose a mandatory duty upon the EPA.

With specific statutory provisions like Section 321(a), Congress unmistakably intended to track and monitor the effects of the Clean Air Act and its implementing regulations on employment in order to improve the legislative and regulatory processes. As noted in this Court's summary judgment decision, the legislative record for these statutory provisions, as well as Supreme Court precedent, confirm this

purpose. For example, the House Committee Report accompanying the 1977 amendments noted that the continuing job-loss assessment requirements under Section 321(a) were inserted to address frequent issues that have arisen concerning "the extent to which the Clean Air Act or other factors are responsible for plant shutdowns, decisions not to build new plants, and consequent losses of employment opportunities" H.R. Rep. 95-294, at 316, 1977 U.S.C.C.A.N. 1077, 1395.

A subsequent portion of the legislative history provides:

> On one side of this dispute, it has been argued that many employer statements that plants will have to shut down if certain pollution control measures become effective constitute "environmental blackmail." Thus, Representative George Brown testified in 1975 that:
>
> > (t)here have already been major instances in which plant closings due to non-environmental factors have been blamed on environmental legislation. The effect of such blackmail is to generate public pressure for the weakening of environmental standards, and to force labor unions into opposing enforcement of environmental laws. (H. 217)
>
> On the other hand, it has been argued that environmental laws have in fact been responsible for significant numbers of plant closings and job losses. In any particular case

> in which a substantial job loss is threatened, in which a plant closing is blamed on Clean Air Act requirements, or possible new construction is alleged to have been postponed or prevented by such requirements, the committee recognizes the need to determine the truth of these allegations. For this reason, the committee agreed to section 304 of the bill, which establishes a mechanism for determining the accuracy of any such allegation.
>
> COMMITTEE PROPOSAL
>
> Section 304 of the committee bill is based on a nearly identical provision in the Federal Water Pollution Control Act. The bill establishes a new section 319 of the act. 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. 95-294, 316-17, 1977 U.S.C.C.A.N. 1077, 1995, 96.

In the summer of 1971, Congress held hearings to determine how to address the problem of "economic dislocation, plant shutdowns, and worker layoffs resulting from environmental control orders." *Economic Dislocation Resulting from Environmental Controls: Hearings Before the Subcomm. on Air &*

Water Pollution of the S. Comm. on Public Works, 92d Cong. 1 (1971) ("*Economic Dislocation Hearings*") [Doc. 258-1 & 2, Ex. 5]. Senator Muskie, Chairman of the subcommittee, noted at the outset of these hearings that one "very broad aspect" of the "national policy" on the environment is: "If people, workers, communities, [and] industrial plants are to be affected because we have resolved to protect the environment, how and by what means shall their interest, their personal health and welfare, also be protected?" [Id. at 1]. He observed that this "very broad question leads to an entire series of smaller ones," including in particular: "How do we determine . . . that a worker layoff or plant shutdown does, indeed, result from an environmental control order?" [Id.].

In an effort to answer these questions, the subcommittee began by turning to prominent advocate Ralph Nader, who testified that to ignore the "problem of environmental layoffs or closedowns" and "simply enforce the pollution laws" "would be too narrow a policy and a cruel one at that for workers" and that ignoring the problem could lead to "[a] regime of fear and economic insecurity . . . spread[ing] through the blue-collar labor force . . . that w[ould] reflect itself in alienation from or antagonism to the cause of a delethalized environment." [Id. at 6]. He testified that it would not be enough to approach the issue using "macro-economic studies" because they "do not answer the question which a worker has about his or her family's macro-economy." [Id. at 7]. Nader explained that "[t]he first step toward an intelligent policy toward the ecology layoff or closedown posture by companies is to require a full and candid disclosure of relevant data." [Id.].

Accordingly, Nader proposed that Congress should "consider legislation requiring the Administrator of the Environmental Protection Agency to investigate every plant closing or threat of plant closing involving 25 or more workers, which he has reason to believe results from an order or standard for the protection of environmental quality." [Id. at 7–8]. He proposed that "[t]his would apply to actual or proposed orders issued by his agency, other Federal agencies, or State and municipal agencies pursuant to approved implementation plans." [Id. at 8]. Nader also urged that, "[t]o the extent possible, the Administrator should try to anticipate problems and investigate them before anyone is actually laid off." [Id.].

On the third day of the hearings, Chairman Muskie summarized the subcommittee's findings "that all of us need more information on why plants are shut down" and "the public needs better access to this information." [Id. at 281]. Over time, Congress amended each of the five major federal environmental statutes to include a provision requiring the Administrator to generate this information. *See* Section 507(e) of the Clean Water Act (33 U.S.C. § 1367(e)); Section 24 of the Toxic Substances Control Act (15 U.S.C. § 2623); Section 7001(e) of the Solid Waste Disposal Act (42 U.S.C. § 6971(e)); Section 321 of the Clean Air Act (42 U.S.C. § 7621); and Section 110(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9610(e)).

The provision first appeared in a House floor amendment to the Clean Water Act amendments of 1972 on March 29, 1972. The floor amendment provided: "The Administrator shall conduct continuing evaluations of potential loss or shifts of

employment which may result from the issuance of any effluent limitation or order under this Act, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such limitation or order." 118 CONG. REC. 10,766 (1972) [Doc. 258-2, Ex. 6]. In support of the floor amendment, Representative Dulski explained: "What we are proposing in simplest terms is that the Environmental Protection Agency *constantly monitor* the economic effect on industry of pollution control rules." [Id. at 10,767 (emphasis added)]. Representative Abzug summarized the provision as one that "would require the Environmental Protection Administration *to study and evaluate, on a continuing basis*, the effects of effluent limitations on employment," which would "allow the Congress to get a close look at the effects on employment of legislation such as this, and will thus place us in a position to consider such remedial legislation as may be necessary to ameliorate those effects." [Id. (emphasis added)]. Representative Meeds observed in support of the amendment that when plant shutdowns are attributed to environmental requirements, "workers and other people of the community have the right to know the truth," noting that "[i]f indeed the closure is caused by pollution controls, there should be no difficulty in establishing that fact." [Id.]. The House adopted the floor amendment, and the Senate acceded to the "addition of a new subsection . . . which *requires* the Administrator to investigate threatened plant closures or reductions in employment allegedly resulting from any effluent limitation or order under the Act." S. REP. NO. 92-1465, at 146 (1972) (Conf. Rep.) [Doc. 258-2, Ex. 7 (emphasis added)].

The following year, Congress added the provision to the Clean Air Act in Section 321. Pub. L. No. 95-95, § 311, 91 Stat. 685, 782 (1977). The House committee report summarized that, "[u]nder this provision, the Administrator is mandated to undertake an ongoing evaluation of job losses and employment shifts due to requirements of the Act." H.R. REP. NO. 95-294, at 317 (1977) [Doc. 258-2, Ex. 8]. This evaluation was "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." [Id.].[1] The committee report also specifically references the 1971 Economic Dislocation Hearing as providing "a comprehensive review" of the issue addressed by this provision. [Id. at 317 n.4]. The final conference report further describes § 321(a) as "related to the Administrator's evaluations and investigations of loss of employment and plant closure." H.R. REP. NO. 95-564, at 181 (1977) (Conf. Rep.) [Doc. 258-2, Ex. 10].

One of § 321(a)'s distinguishing characteristics is its focus on specific worker dislocations resulting from EPA's actions. As this Court discussed in its opinion and order granting summary judgment, § 321(a) focuses on the "people, workers, communities, [and] industrial plants" that "are to be affected because we have resolved to protect the environment." Opinion at 41 [Doc. 293] (quoting *Economic Dislocation Resulting from Environmental Controls: Hearings Before the*

[1] An earlier conference report similarly summarized § 321(a) as providing that "[t]he Administrator shall . . . conduct an ongoing evaluation of the effect of this Act's requirements on employment." H.R. REP. NO. 94-1742, at 116 (1976) (Conf. Rep.) [Doc. 258-2, Ex.9].

Subcomm. on Air & Water Pollution of the S. Comm. on Public Works, 92d Cong. 1 (1971) ("Economic Dislocation Hearings") [Doc. 256-5]). While EPA is elsewhere required to research national, regional, and sector-wide economic impacts, § 321 requires EPA to answer the particular question of whether the EPA is contributing to specific worker dislocations and plant and mine closures. *See Economic Dislocation Hearings* at 1 [Doc. 256-5]. No other provision requires this type of "'facility - and - community-specific at-risk assessment' of jobs." Opinion at 55 [Doc. 293] (quoting Expert Report of Anne E. Smith ("Smith Report") at 10 [Doc. 256-11].

To comply with § 321(a), EPA must both "track and monitor the effects of the Clean Air Act and its implementing regulations on employment," Opinion at 39 [Doc. 293], and evaluate "the cause of specific job dislocations." *Id*. In this way, EPA is both prospectively "investigat[ing] . . . threatened plant closures or reductions in employment allegedly due to requirements of the act," and retrospectively evaluating "any actual closures or reductions which are alleged to have occurred because of such requirements." *Id*. at 41 (quoting H.R. REP. No. 95-294, at 316-17 (1977) [Doc. 256-8]); *see also* Smith Report at 5 [Doc. 256-11] (providing the "core" elements of a § 321(a) program).

Congress did not envision EPA using § 321(a) to push the envelope of the economic literature or create new science, as EPA proposes to do. When "closure is caused by pollution controls [requirements]," Congress found "there should be no difficulty in establishing that fact." Opinion at 43-44 [Doc. 293] (quoting [118 CONG. REC. 10,767 (1972) [Doc. 256-6]. Plaintiffs' expert, Jeffrey Holmstead, has similarly

opined that "EPA has the expertise and resources to investigate actual and potential plant and mine closure, job losses and shifts in employment that result from CAA regulatory and enforcement actions." Expert Report of Jeffrey R. Holmstead ("Holmstead Report"), at 13 [Doc. 260].

Dr. Smith provided an example of how this could be done with EPA's current resources. Smith Report at 8-9 [Doc. 256-11]. Dr. Smith also provided historical background on EPA's own Economic Dislocation Early Warning System ("EDEWS"), which was used to identify at risk workers, track actual worker dislocations, and identify their causes and potential community impacts during her tenure at EPA. As this Court found, the EDEWS program "constantly monitored worker dislocations resulting from federal, state, and local enforcement actions, private civil actions, state implementation plans, and regulatory deadlines." Opinion at 45 [Doc. 293]. Through this program, EPA was able to identify threatened, actual, and avoided worker dislocations. Pls' Opp'n to Summ. J., at 9 [Doc. 256]. For each threatened and actual dislocation, EPA was able to: (1) determine the total plant employment; (2) determine the number of threatened or actual job losses; and (3) assess the workers and their local communities to determine the impacts of the worker dislocations at issue. *Id*. at 9-10.

While Congress took several years to enact employment effects provisions in each of the major environmental statutes, EPA did not wait to begin continuing evaluations of losses and shifts in employment caused by the agency's regulatory and enforcement actions. By the time Congress enacted § 321(a), EPA had in place already "in a single Agency

division, a practicable system for tracking actual employment losses and for performing economic impact analyses that could identify risks of additional employment losses from future regulations." [Doc. 258-2, Expert Report of Anne E. Smith, Ph.D. at 5, Ex. 11 ("Smith Report")]. Beginning in 1972, this Economic Dislocation Early Warning System ("EDEWS") "attempted to identify potential or actual industrial plant closings or curtailments and employment dislocations resulting from Federal, State, or local pollution control regulations" U.S. Resp. to Pls.' Second Set of Disc. Reqs. at 21, Oct. 19, 2015 [Doc. 258-4, Ex. 34 ("U.S. Resp.")].

The EDEWS process was designed "to identify at the earliest possible time plants which may be forced to close due to environmental regulations." [Doc. 258-3, *H.R. 7739 and H.R. 10632, Small Business Impact Bill (Part 2): Hearings Before the Subcomm. on Special. Small Bus. Problems of the H. Comm. on Small Bus.*, 95th Cong. 254 (1979) (Ex. 18) (statement of Roy N. Gamse, Deputy Assistant Adm'r for Planning and Evaluation, U.S. EPA)]. The EDEWS process constantly monitored worker dislocations resulting from federal, state, and local enforcement actions, private civil actions, state implementation plans, and regulatory deadlines. EPA would then notify relevant government agencies of threatened or actual plant closings and production curtailments that would result in job losses and shifts "so that their assistance programs and expertise c[ould] be used to aid the firms, workers, and communities which may be affected." [Id.]. This was specifically "intended to bring into play any government programs available to provide financial assistance which would prevent plant closings or production curtailments or to assist workers and communities impacted by closings and

curtailments." [Doc. 258-3, *SBA Assistance for Agric. Concerns & to Meet Pollution Standards: Hearings Before the Subcomm. on SBA & SBIC Legislation of the H. Comm. on Small Bus.*, 94th Cong. 163 (1975) (Ex.19)].

In the first ten years, EPA identified actual closures and curtailments of 155 plants and the dislocation of 32,899 workers resulting from environmental requirements. [Doc. 258-3, EDEWS Rep. 1982 Q4, at 2 (Ex. 28)]. Roughly half of the threatened dislocations actually occurred. [Id.].

At some point, and for reasons unknown to plaintiffs, EPA discontinued these continuing evaluations of losses and shifts in employment resulting from its actions. EPA stated in this case that it is not aware of any records regarding the cessation of the EDEWS system. [Doc. 258-3, U.S. Resp., at 22–23 (Ex. 34)].

Until recently in this case, the EPA has made no claim that it was complying with § 321(a). When six Senators requested the results of EPA's continuing evaluations of the potential loss or shifts in employment resulting from four greenhouse gas rulemakings, Administrator McCarthy responded on October 26, 2009, that the agency "has not interpreted CAA section 321 to require EPA to conduct employment investigations in taking regulatory actions" and that "[c]onducting such investigations as part of rulemakings would have limited utility." [Doc. 258-4, Letter from Gina McCarthy, Ass't. Adm'r, U.S. EPA, to Sen. James M. Inhofe, U.S. Senate (Oct. 26, 2009) (Ex.48) ("Letter to Sen. Inhofe")]. McCarthy candidly admitted EPA "has not conducted a section 321 investigation of its greenhouse gas actions" and informed the Senators that EPA would "not

undertak[e] a section 321 analysis" for a planned future greenhouse action. [Id.].

A few months later, responding to a letter from two members of Congress asking if EPA complies with § 321(a) of the Clean Air Act, McCarthy broadly repudiated any obligation "to conduct employment investigations in taking regulatory actions" and reiterated her position that such investigations have only "limited utility." [Doc. 258-4, Letter from Gina McCarthy, Ass. Adm'r, U.S. EPA, to Rep. Greg Walden, H. Comm. on Energy & Commerce (Jan. 12, 2010) (Ex. 49) ("Letter to Rep. Walden")]. In response to a follow-up question asking about potential employment impacts, without referencing § 321(a) McCarthy admitted "EPA did not analyze the potential employment impacts of the proposed standards." [Doc. 258-4, Letter from Gina McCarthy, Ass't. Adm'r, U.S. EPA, to Rep. Joe Barton, Ranking Member, H. Comm. on Energy & Commerce (Aug. 3, 2010) (Ex. 50) ("Letter to Rep. Barton")].

Then, on May 2, 2011, the Chairman of the House Oversight Committee wrote McCarthy directly and raised his concern that "it ha[d] come to [his] attention that the EPA has failed to perform the statutorily required job impacts analyses of GHG regulations under section 321(a)." [Doc. 258-4, Letter from Rep. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Gina McCarthy, Ass't. Adm'r, U.S. EPA (May 2, 2011) (Ex. 51)]. He informed her that "[e]mployers have expressed deep concerns that the requirements of the CAA, as implemented through GHG regulations, will adversely impact employment" and requested that she promptly provide the House Oversight Committee "[a] section 321(a) analysis on the individual and cumulative impact of GHG

regulations on potential job losses." [Id.]. Instead of honoring this request from the Chairman, McCarthy claimed that "EPA has not received any request under section 321" "to investigate specific allegations." She reiterated that "EPA has not interpreted section 321 to require the agency to conduct employment investigations in taking regulatory actions," and reiterated her judgment that investigating job losses "would have limited utility." [Doc. 258-4, Letter from Gina McCarthy, Ass't. Adm'r, U.S. EPA, to Rep. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform 2, 5 (June 22, 2011) (Ex. 52) ("Letter to Chairman Issa")].

Senator Vitter fared no better than Chairman Issa in late 2011 when he wrote former EPA Administrator Lisa Jackson requesting that she "[p]lease provide the results of your continuing Section 321(a) evaluations of potential loss or shifts of employment which may result from the suite of regulations EPA has proposed or finalized that address CSAPR and Utility MACT . . . including threatened plant closures or reductions in employment." *See* Letter from Gina McCarthy, Ass't. Adm'r, U.S. EPA, to Sen. David Vitter, U.S. Senate 2, 7 (Mar. 06, 2012) [Doc. 258-5 (Ex.53) ("Letter to Sen. Vitter")]. McCarthy personally "respond[ed] on the Administrator's behalf" and merely informed him that EPA did not believe it was required to conduct the job loss evaluations at all and that she believed that they "would have limited utility." [Id.].

When Ms. McCarthy was nominated to be EPA Administrator, Senator Inhofe asked her directly on the record during her confirmation hearing whether she "believe[d] the Agency has an obligation to conduct continuing evaluations of the impact its

regulations could have on jobs." [Doc. 258-5, *Hearing on the Nomination of Gina McCarthy to be Adm'r of the EPA: Hearing Before the S. Comm. on Env't & Pub. Works*, 113th Cong. 200 (2013) (Ex. 54) ("*Nomination Hearing*")]. McCarthy answered that "EPA has not interpreted this provision to require EPA to conduct employment investigations in taking regulatory actions," justifying her position with the claim that "EPA has found no records indicating that any Administration since 1977 has interpreted section 321 to require job impacts analysis for rulemaking actions." [Id. at 88]. Furthermore, Senator Vitter directly asked whether "EPA has ever investigated a plant closure or reduction in employment to see what role, if any, the administration or enforcement of the Clean Air Act played?" [Id.]. Rather than give a yes or no answer to this simple question, McCarthy avoided answering the actual question he asked her entirely. [Id.].

In a question for the record for a November 2013 House Science Committee hearing, Chairman Smith observed that EPA's regulatory impact analyses did not constitute compliance with Section 321(a) of the Clean Air Act, and then asked "[w]hy has EPA not conducted a study to consider the impacts of CAA programs on job shifts and in employment" and would EPA "commit to conducting such studies in the future." [Doc. 258-5, *Strengthening Transparency and Accountability Within the EPA: Hearing Before the H. Comm. on Sci., Space & Tech.*, 113th Cong. 82–83 (2013) (Ex. 55)]. Administrator McCarthy again justified EPA's actions by stating that "EPA has found no records to indicate that CAA section 321, since its inclusion in the 1977 amendments, has been interpreted by any Administration to require job impacts analysis of rulemakings or job impacts

analysis of existing CAA requirements as a whole." After claiming that EPA's regulatory impact analyses "have generally found that environmental regulations may have both positive and negative effects on jobs but that these effects tend to be relatively small and difficult to quantify with any precision," she committed only that EPA "will continue to comply with statutory and administrative requirements for analysis of our programs in a manner consistent with principles of sound science and economics." [Id. at 83].

Through it all, McCarthy consistently articulated the agency's statutory interpretation that the precise question addressed by Section 321(a) is whether specific lay-offs result from EPA's actions,[2] but she

[2] *Cf.* Doc. 258-5, *FY2014 Hearing*, at 69 (Ex. 56) (Acting EPA Administrator testifying that "**EPA has not conducted any studies or evaluations under Section 321(a)**" "[a]s a result" of EPA not finding "any records of any requests for Section 321 investigations of job losses alleged to be related to regulation-induced plant closure" (emphasis added)); *see also* Letter to Sen. Inhofe [Doc. 258-4, Ex. 48] (admitting EPA "has not conducted a section 321 investigation of its greenhouse gas actions" and stating that EPA would "not undertak[e] a section 321 analysis" for a planned future greenhouse action); Order Denying Motion for Protective Order, [Doc. 164 at 12 n.2 (Nov. 12, 2015)] (finding January 12, 2010, letter contained "an admission that as of January 12, 2010, the EPA had conducted NO section 321 investigations"); Letter to Rep. Barton, at 13–14 [Doc. 258-4, Ex. 50] (admitting "EPA did not analyze the potential employment impacts of the proposed" stringent national ambient air quality standard for ozone); [Doc. 164 at 14 n.3] (finding June 22, 2011, letter contained "an admission that as of June 22, 2011,the EPA had conducted NO section 321 investigations"); [id.] at 18 ("The fair reading of these statements, many of which were made by Administrator McCarthy, is that the EPA has never made any evaluations of job losses under § 321(a). This is directly contrary to the position of the EPA in this case.").

just as consistently admitted explicitly and implicitly that her agency is not conducting any efforts to answer it and claimed answering the question has "limited utility."

Consistent with the agency's admissions to Congress, EPA responded to a Freedom of Information Act request [Doc. 258-5, Ex. 57] asking for records pertaining to "[a]ll draft, interim final and final reports and/or evaluations prepared by EPA or its contractor(s) pursuant to section 321 of the Clean Air Act" by stating that "neither the Office of Air and Radiation nor the Office of Policy were able to find any documents pertaining to [the] request." [Doc. 258-5, Ex. 58].

As EPA's 30(b)(6) witness James DeMocker recently explained:

> Q. Is 321(a) about investigating specific layoffs?
>
> MR. GLADSTEIN: Objection; scope and form.
>
> THE WITNESS: Well, under the agency's prior interpretation of the scope of the Section 321 requirements, our interpretation back five or six years ago was that Section 321(a)'s specific reference to investigations was interpreted -- it was interpreted that the Congressional intent was to provide the authority for us in a reactive way to investigate claims submitted to us that a job dislocation was attributed by a company owner or operator to the need to comply with regulatory requirements.

[Doc. 258-1, U.S. Dep. IIA, at 297:20–298:11 (Ex. 3)].

Only in response to this Court's finding that § 321(a) was mandatory did EPA decide that § 321(a)

must instead be about "estimating employment effects [of] regulatory actions":

> Q. Has EPA's interpretation of 321(a) changed since then?
>
> MR. GLADSTEIN: Objection.
>
> THE WITNESS: I'm not an attorney, but my understanding is that there is an alternative interpretation of Section 321 that's been offered by the court in this case that defines a duty to conduct on an ongoing basis employment effects evaluations of our rulemaking activities. But under that interpretation the agency's view is that the work that we have done pursuant to estimating employment effects for our regulatory actions would meet any duty to conduct that type of employment analysis.

[Id. at 298:13–299:3].

The evidence also shows that, under the correct interpretation of § 321(a), the interpretation that EPA originally described to this Court, and the interpretation EPA had been using for almost 40 years, EPA is not complying:

> Q. Under EPA's original interpretation, the one that it held five or six years ago, under that interpretation of 321(a), are the RIAs what 321(a) is looking for?
>
> MR. GLADSTEIN: Objection as to scope and form.
>
> THE WITNESS: Under that interpretation, the RIAs are not the same as an investigation of a specific change in employment in response to an actual or a threatened plant closure that a facility owner is attributing to environmental requirements. . . .

[Id. at 312:2–312:14].

The most EPA does is "conduct proactive analysis of the employment effects of our rulemakings actions," which is simply not what § 321(a) is about. [Id. at 312:16–312:18]. As James DeMocker, EPA's declarant in support of the motion for summary judgment and Rule 30(b)(6) witness admitted, the agency is not investigating power plant and mine closures and worker dislocations resulting from the utility strategy on an ongoing basis.

When specifically asked whether EPA had ever investigated a threatened plant closure or reduction in employment allegedly resulting from administration or enforcement of the Clean Air Act, Mr. DeMocker could recall only "a couple of cases" from decades before, and he did not claim that any of the documents cited in his declaration in support of the motion were the result of such investigations. [Id. at 295:25–296:19]. He could not and did not claim that any documents reflected efforts to determine whether specific layoffs were the result of EPA actions. [Id. at 301:21–307:10]. And he was "not aware" of any "analysis specifically aimed at discerning the relevant contribution of regulatory requirements to a decision to close" power plants. [Doc. 258-4, U.S. Dep. I, at 244:11–245:2 (Ex. 40)].

One of EPA's expert witnesses, Dr. Charles Kolstad, likewise did not "recall seeing anything about investigating threatened plant closures" or reductions in employment resulting from the requirements of the Clean Air Act in the 64 documents. Furthermore, Dr. Kolstad agreed that documents like the RIAs for the Transport Rule, Utility MACT, and the Clean Power Plan, which estimate changes in labor utilization as measured by

full-time equivalents, do not even "answer" the "question" of how many people will be involuntarily terminated. [Doc. 258-7, Kolstad Dep. at 62–63].

In fact, no "facility- and community-specific at-risk assessment" of jobs has been done "in any electricity sector air RIA released in the past 20 years." [Id.]. Rather "the economic impact chapters of electric sector RIAs typically perform generic estimates of job losses based on total plant capacity changes and total coal demand changes nationally, or across very broad regions. [Id. at 16]. Moreover, the other documents cited by Mr. DeMocker "individually and as a group . . . provide even less of the type of evaluation . . . consistent with Section 321(a) requirements." [Id.]. As discussed by Dr. Smith, the cited RIAs share several fundamental flaws. First, "RIAs do not cover all Clean Air Act actions that can cause employment dislocations, and their discontinuous nature can result in "lost closures" associated even with the regulations that they do cover." [Id. at 21]. Second, "RIAs do not provide a continuing evaluation of regulations while they are being implemented, which is when the actual impacts that may merit assistance or other governmental response are first observed." [Id.]. Third, "RIAs fail to even provide an *ex ante* projection of potential employment dislocations with any of the specificity necessary to identify needs for effective worker and community assistance." In addition, "[n]one of the other studies or activities cited by Mr. DeMocker in his Declaration provides relevant or timely information on locations of closures and actual employment dislocations that might be viewed as consistent with Section 321(a)." [Id.].

Moreover, while there is nothing in § 321(a) that requires input from the SAB, EPA has also already

obtained SAB review of its EDEWS program. Sci. Advisory Bd., U.S. EPA, Economics in EPA, at 5, 38 (1980) [Doc. 259-2]. Specifically, after reviewing each of EPA's economic assessment programs, including EDEWS, the SAB found that EPA "can determine how much of a strain environmental requirements impose on an industry, locality, or segment of the population and can thus detect situations in which its regulations are causing hardship." *Id*. At 4.

To the extent EPA is implying it needs to study further how to determine whether EPA's actions contribute to plant closure decisions, the SAB has also already reviewed EPA guidelines for estimating plant closures and employment impacts. *See* U.S. EPA, Guidelines for Preparing Economic Analyses, at A-1, A-3 (2000) [Doc. 261-9]. EPA specifically charged the SAB to determine whether "the guidance document contain[s] an objective and reasonable presentation on the measurement of economic impacts, " including "facility closure" and changes in employment. *Id*. at A-5. SAB's advisory committee concluded that "the Guidelines . . . reflect[] methods and practices that enjoy widespread acceptance in the environmental economics profession. . .." [Doc. 261-9, at 88].

Incredibly, Dr. McGartland, EPA's chief economist, revised the SAB-approved guidelines by deleting the approved discussion of estimating plant closures *without* consulting or even notifying the SAB. Compare Doc. 298-2 (document containing the text of former sections 9.2.8, 9.2.9, and 9.2.10 in the form reviewed by the SAB) with Doc. 298-3 (document from Dr. McGartland's computer after meeting with EPA staff containing a dramatic revision to former section 9.2.8 and deleting the entirety of section 9.2.9). *See also* Doc. 298-4 (email informing then Assistant

Administrator McCarthy that "Al McGartland is personally writing" a "jobs section" for the Guidelines after Ms. McCarthy told Lisa Heinzerling on November 21, 2010, that she was "really interested in enhancing our jobs analysis that accompanies our rules" "for obvious reasons."); Doc. 298-5 ("Al is taking on the employment impacts revisions."); Doc. 298-6 (Dr. McGartland emailing the revised "unemployment write up for guidelines" to his staff on December 5, 2010, and asking for "review").

Dr. Charles Kolstad and EPA labor economist Ann Ferris admitted in depositions that these midnight changes to the Guidelines were significant, troubling, and highly irregular. *See* Ann Ferris Dep. at 204:18-24 [Doc. 298-7] (testifying she had "been told that peer review is required for updating the guidelines"); *id*. at 228-229 (testifying it "seems potentially significant in the sense that it was previously identified as a methodology and isn't identified as a methodology in the 2010 document"); Charles D. Kolstad Dep. at 255:7-19 [Doc. 263] (testifying that the Guidelines are "an important document, and probably things like that should be cleared with the SAB"); *id*. at 255:24-25 ("you would think one would be really careful about doing a switch").

EPA's rejection of SAB-approved language in the guidelines undermines EPA's professed need to consult the SAB before complying with § 321(a).

EPA cannot redefine statutes to avoid complying with them. Nor can EPA render them superfluous or contrary to their original purpose by simply defining them to be.

The record in this case demonstrates hostility on the part of the EPA to doing what is ordered by

§ 321(a). EPA thinks it is bad to make worker dislocations known to the public and bad policy for regulators to look at worker dislocations in making decisions. EPA has gone so far as to state that compliance with § 321(a) "would be irresponsible." Rule 30(b)(6) Dep. of the U.S. at 255:6-9, Aug. 10, 2016 ("U.S. IIB") (Ex. 64).

Dr. McGartland - EPA's primary expert and the individual most responsible for limiting EPA's discussion of employment effects in RIAs - cannot even fathom why EPA would want to track plant closures and layoffs resulting from the administration and enforcement of the Clean Air Act. McGartland Expert Dep. at 107:11-21 (Ex. 81) ("Why would EPA want to track all plant closures?"); see also Kolstad Dep. at 292:21-295:22 (Ex.80) ("I would say that I really don't think that serves the public interest. . . . It will take manpower, and to very questionable ends. . . . I don't really see a purpose."). More to the point, Dr. McGartland testified to fearing that, if EPA complied with § 321(a), there would be "calls from Congress about EPA not infiltrating the business of industry beyond environmental controls." McGartland Expert Dep. at 110:21-24 (Ex.81). And that it could be "misleading" if EPA were to identify threatened plants and the "New York Times, or the Washington Post picked it up and published it on their front pages." *Id*. at 145:9-14.

EPA does not get to decide whether compliance with § 321(a) is good policy, or would lead to too many difficulties for the agency. EPA can recommend amendments to Congress if it feels strongly enough, but EPA's clear reticence to comply coupled with 8 years of refusal to comply—even in the face of Congressional and public pressure—with the Clean

Air Act justifies an injunction detailed enough to ensure compliance. It is time for the EPA to recognize that Congress makes the law, and EPA must not only enforce the law, it must obey it.

EPA argues that the relief sought by plaintiffs is beyond the jurisdiction afforded to the Court by the Clean Air Act. EPA fails to mention, however, that it unsuccessfully raised a very similar argument in one of the very cases cited in its brief.

In ***Alaska Ctr. for the Env't v. Browner***, 20 F.3d 981 (9th Cir. 1994), the EPA argued that the district court could not even order it to prepare and submit a report on the review EPA had been statutorily mandated to undertake because the Clean Water Act did not "specifically require it to prepare or present a report on water quality monitoring," and "relegate[d] the pace" of EPA's review "entirely to the EPA's discretion." 20 F.3d at 986. The Ninth Circuit disagreed, holding "[t]he district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong." ***Id***. As the Ninth Circuit reasoned: "In this case the established wrong is the failure of the EPA to take any steps to establish the TMDLs mandated by Congress for more than a decade. In tailoring the relief granted, the district court correctly recognized that in order to bring about any progress toward achieving the congressional objectives of the CWA, the EPA would have to be directed to take specific steps." ***Id***. at 986. The Ninth Circuit thus made clear that the similarly-worded citizen suit provision of the Clean Water Act did not limit the scope of the district court's traditional, equitable, remedial authority:

> In enacting environmental legislation, and providing for citizen suits to enforce its

> directives, Congress can only act as a human institution, lacking clairvoyance to foresee the precise nature of agency dereliction of duties that Congress prescribes. When such dereliction occurs, it is up to the courts in their traditional, equitable, and interstitial role to fashion the remedy.

Id. at 987.

The above case affirmed the District Court's decision in ***Alaska Ctr. for the Env't v. Reilly***, 796 F.Supp. 1374, in which the District Court noted that:

> When the intent of Congress clearly requires the Agency to act without undue delay, courts have the authority to order the EPA to establish a reasonable schedule in which to achieve compliance. *See*, ***Abramowitz v. EPA***, 832 F.2d 1071, 1078–79 (9th Cir. 1987) (finding that the court had the authority under the Clean Air Act to set the deadline by which the EPA had to act on a state's proposed carbon monoxide and ozone controls); ***Natural Resources Defense Council, Inc. v. New York State Dep't of Envtl. Conservation***, 700 F.Supp. 173, 177–181 (S.D.N.Y. 1988) (ordering the EPA to establish a schedule for New York's compliance with the Clean Air Act); ***Environmental Defense Fund v. Thomas***, 627 F.Supp. 566, 569–570 (D.D.C. 1986) (finding that the EPA had a duty to set deadlines for compliance).

796 F.Supp. 1374, 1379–80 (W.D. Wash. 1992), *aff'd sub nom*. ***Alaska Ctr. for Env't v. Browner***, 20 F.3d 981 (9th Cir. 1994).

In ***Friends of Wild Swan v. U.S. EPA***, 74 F.App'x 718 (9th Cir. 2003), the Ninth Circuit held:

> While courts may not "usurp[] an administrative function, ***FPC v. Idaho Power Co***., 344 U.S. 17, 20 (1952) ("***Idaho Power***"), they retain equitable powers to shape an appropriate remedy. *See* ***West. Oil & Gas Ass'n v. EPA***, 633 F.2d 803, 813 (9th Cir. 1980) ("***Western Oil***"). Equitable considerations are appropriate in reviewing agency decisions under the APA and crafting a remedy. *See* ***Nat'l Wildlife Fed'n v. Espy***, 45 F.3d 1337, 1343 (9th Cir. 1995) ("The court's decision to grant or deny injunctive or declaratory relief under APA is controlled by principles of equity."); ***Sierra Pacific Indus. v. Lyng***, 866 F.2d 1099, 1111 (9th Cir. 1989) ("Our inquiry into the district court's authority to order equitable relief begins with the well-established principle that 'while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.'" (quoting ***Ford Motor Co. v. NLRB***, 305 U.S. 364, 373 (1939))).

74 Fed.App'x at 721.

EPA cannot legitimately contest that it has the data and resources to immediately begin complying with § 321(a). The unrebutted evidence at summary judgment demonstrated that EPA can "conduct such a continuing evaluation with the resources it already has and within the typical costs in time and resources

EPA expends on other types of economic assessments." Opinion at 59 [Doc. 293]. EPA itself "used to do this" through its EDEWS program. Anne E. Smith Dep. at 156:10-12 [Doc. 297-1]. And "[i]f anything, it should be easier to do now than it was back then." *Id*. Dr. John Deskins similarly used publicly available data to evaluate "whether EPA's rulemakings contributed to job losses in the coal industry' and whether the decline of coal production [can] be attributed solely to other factors such as a decline of exports or cheaper natural gas. " Opinion at 57-58 [Doc. 293] (quoting Expert Report of John Deskins, Ph.D § 1 [Doc. 281-6]). EPA's own expert, Dr. Charles Kolstad, also testified at his deposition that EPA can "certainly" determine "which plants have closed" because that is a matter of "public record," and can "go back and.. . get a better idea of the reasons for the closure," in part by examining "documents" "filed" with the state utility commissions "that address some of that already." Charles D. Kolstad Dep. at 126:18-25 [Doc. 263]. Dr. Kolstad further testified that this Court can "ask for a study of which mines were impacted by closed power plants," and that connecting mine impacts to power plants that have stopped burning coal "could be done," and this Court can further "order a report" "identifying what is due to EPA actions versus what is due to other actions." *Id*. at 294:1-295:4.

This Court finds that the EPA must fully comply with the requirements of § 321(a). This Court further finds that, due to the importance, widespread effects, and the claims of the coal industry, it would be an abuse of discretion for the EPA to refuse to conduct a § 321(a) evaluation on the effects of its regulations on the coal industry and other entities affected by the

rules and regulations affecting the power generating industry.

Based upon the foregoing, the Administrator of the EPA is hereby ORDERED and ENJOINED to do the following:

1. To address EPA's continuing failure to evaluate the loss and shifts in employment in the coal industry and other entities affected by the rules and regulations affecting the coal mining and power generating industries:

    a. Prepare and submit to the Court a § 321(a) evaluation of the coal industry and other entities affected by the rules and regulations affecting the coal mining and power generating industries as expeditiously as practicable and by no later than July 1, 2017, which evaluation shall:

        (i) identify those facilities that are at risk of closure or reductions in employment because of EPA's regulations and enforcement actions impacting coal and/or the power generating industry;

        (ii) evaluate the impacts of the potential loss and shifts in employment which may be attributable to EPA's regulations and enforcement actions impacting coal and/or the power generating industry, including identifying the number of employees potentially affected, the communities that may be impacted, and the reasonably foreseeable impacts on families and industries reliant on coal;

(iii) identify those coal mines and coal-fired power generators that have closed or reduced employment since January 2009 and, for each, evaluate whether EPA's administration and enforcement of the Clean Air Act contributed to the closure or reduction in employment; and

(iv) identify those subpopulations at risk of being unduly affected by job loss and shifts and environmental justice impacts.

2. To address EPA's continuing violation of § 321(a), as expeditiously as practicable, but by no later than December 31, 2017, submit evidence to the Court demonstrating that EPA has adopted measures to continuously evaluate the loss and shifts in employment which may result from its administration and enforcement of the Clean Air Act, including such rulemakings, guidance documents, and internal policies as necessary to demonstrate that EPA has begun to comply with § 321(a) and will continue to do so going forward.

3. To submit a comprehensive filing detailing the actions the agency is taking to comply with § 321(a) and this Court's orders within 60 days.

It is so **ORDERED**.

The plaintiffs have further requested that this Court stay the effective date of any pending regulations under the Clean Air Act for the coal

industry and coal-fired utilities until EPA complies with the Court's orders and enjoin EPA from proposing or finalizing new regulations under the Clean Air Act impacting the coal industry or coal-fired electric generating units until EPA complies with the Court's orders.

This Court is of the opinion that the plain reading of § 321(d), which 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 this chapter," precludes such relief. This Court can force the EPA to follow its statutory mandate, but lacks the jurisdiction to provide any other relief.

SO ORDERED.

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

DATED: January 11, 2017.

/s/
JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED: October 17, 2016

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 OPINION AND ORDER DENYING THE UNITED STATES' NEW MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFFS

Pending before this Court are the United States' New Motion for Summary Judgment [Doc. 204], the United States' First Motion in Limine to Exclude the Expert Report and Related Testimony of Plaintiffs' Expert, Anne E. Smith [Doc. 266], the United States' Second Motion in Limine to Exclude the Expert Report and Related Testimony of Plaintiffs' Expert, Timothy Considine [Doc. 268], and the United States' Third Motion in Limine to Exclude the Expert Report and Related Testimony of Plaintiffs' Expert, John Deskins [Doc. 270]. All Motions are ripe for decision.

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

[1] According to the Amended Complaint, the plaintiffs collectively employ over 7,200 and comprise the largest

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 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.

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.

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underground coal mining operations in the United States [Doc. 31, ¶ 76].

On October 9, 2014, the EPA filed its United States' Motion to Clarify the Court's September 16, 2014 Order [Doc. 50]. By Order entered October 24, 2014, this Court denied the Motion to Clarify [Doc. 53].

On December 23, 2014, the defendant filed The United States' Motion to Dismiss Due to Lack of Article III Standing [Doc. 59], as well as its Motion of the United States to Stay Discovery Pending Resolution of Dispositive Motion and Request for Expedited Proceeding [Doc. 61]. By Order entered March 27, 2015, this Court denied the Motion to Dismiss and denied as moot the Motion to Stay Discovery [Doc. 71].

On April 10, 2015, the EPA filed The United States' Motion for Summary Judgment [Doc. 75]. On April 22, 2015, Murray filed 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]. On May 8, 2015, the EPA filed United States' Motion for Entry of Protective Order [Doc. 87]. After briefing, on May 29, 2015, this Court granted 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 denied the United States' Motion for Entry of Protective Order [Doc. 93].

On June 1, 2015, the EPA filed United States' Motion to Reconsider or for Clarification [Doc. 95], seeking reconsideration of the May 29, 2015, Order, which was denied by this Court by Order entered June 4, 2015 [Doc. 100].

On June 4, 2015, the EPA sought an extension of the discovery completion deadline by motion [Doc. 101], which was granted by Order [Doc. 107].

On June 12, 2015, the EPA filed a petition with the United States Court of Appeals for the Fourth Circuit seeking a writ of mandamus directing this Court to vacate its order of May 29, 2015 [Doc. 93], 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. The EPA further requested that the Fourth Circuit direct this Court to disallow discovery in this case [Doc. 103]. By Order entered July 9, 2015, the Fourth Circuit denied the petition [Doc. 114].

On July 23, 2015, the EPA sought an additional extension of the discovery completion deadline by motion [Doc. 119], which was granted by Order [Doc. 120].

On August 14, 2015, the EPA filed a Motion for Protective Order [Doc. 121], which was granted by Order [Doc. 124].

On September 28, 2015, the parties filed a joint stipulation extending the time for the plaintiffs to respond to the EPA's discovery requests [Doc. 135].

On October 16, 2015, the EPA filed the United States' Emergency Motion for Protective Order Precluding the Deposition of EPA Administrator McCarthy [Doc. 147]. This Court denied the Motion by Order entered November 12, 2015 [Doc. 164]. The EPA, on November 10, 2015, sought a writ of mandamus from the Fourth Circuit preventing the deposition of Administrator McCarthy [Doc. 162],

which writ was granted by the Fourth Circuit on November 25, 2015 [Doc. 167].

On October 23, 2015, the parties jointly moved to extend certain deadlines in the amended scheduling order [Doc. 152], which motion was granted on October 27, 2015 [Doc. 153].

On December 11, 2015, the parties jointly moved to further extend certain deadlines in the amended scheduling order [Doc. 171], which motion was granted on December 23, 2015 [Doc. 172].

On February 19, 2016, this Court denied the EPA's then-pending motion for summary judgment so that a new motion could be filed upon the completion of discovery [Doc. 178].

On April 22, 2016, the EPA filed United States' Expedited Motion for Leave to File Material Designated as "Confidential" or "Highly Confidential—Attorneys Eyes Only" under Seal [Doc. 199], which motion was granted [Doc. 201].

On May 2, 2016, the EPA filed the pending motion for summary judgment [Doc. 204].

On May 16, 2016, the EPA filed United States' Expedited Motion to Disqualify or Exclude Jeffrey Holmstead [Doc. 206], which Motion was denied in part and deferred in part on May 20, 2016 [Doc. 212]. After briefing, the Motion was denied [Doc. 238].

On May 25, 2016, the parties jointly moved to extend the briefing deadlines on the Motion for Summary Judgment [Doc. 216], which was granted on May 26, 2016 [Doc. 218].

On May 31, 2016, the plaintiffs filed a motion for extension of time to file their response to the Motion for Summary Judgment and also filed a Motion for in

Camera Review, to Compel Production of Documents and to Permit Depositions [Docs. 222 & 223]. By Order entered June 2, 2016, this Court granted the motion for extension of time [Doc. 227]. The next day, the EPA filed a motion seeking reconsideration of the June 2 order [Doc. 230], which motion was denied on June 15, 2016 [Doc. 237].

On June 29, 2016, this Court heard oral argument on the Motion for in Camera Review, to Compel Production of Documents and to Permit Depositions [Doc. 223], which hearing is the subject of the Order filed July 8, 2016 [Doc. 250]. By Order entered July 20, 2016, this Court granted in part and denied in part the Motion [Doc. 251].

On August 22, 2016, the Chamber of Commerce of the United States and the National Mining Association sought leave to file an *amicus curiae* brief in support of plaintiffs [Doc. 265]. Leave was granted on August 24, 2016 [Doc. 273], and the brief was filed the same day [Doc. 275].

On August 23, 2016, the EPA filed United States' First Motion in Limine to Exclude the Expert Report and Related Testimony of Plaintiffs' Expert, Anne E. Smith [Doc. 266], the United States' Second Motion in Limine to Exclude the Expert Report and Related Testimony of Plaintiffs' Expert, Timothy Considine [Doc. 268], and the United States' Third Motion in Limine to Exclude the Expert Report and Related Testimony of Plaintiffs' Expert, John Deskins [Doc. 270], all three of which remain pending.

On September 2, 2016, the State of West Virginia and twelve other states moved for leave to file an *amicus curiae* brief in support of plaintiffs [Doc. 276].

Leave was granted on September 7, 2016 [Doc. 277], and the brief was filed the same day [Doc. 278].

On September 14, 2006, the plaintiffs filed a Motion for Leave to File Plaintiffs' Surreply in Opposition to Defendant's Motion for Summary Judgment and Response to Rule 56(c)(2) Objections [Doc. 283]. Leave was granted on September 15, 2016 [Doc. 284].

On September 23, 2016, the plaintiffs filed a Motion for Leave to File Plaintiffs' Surreply in Opposition to Defendant's Motions in Limine Seeking to Exclude the Expert Reports and Related Testimony of Anne E. Smith, Timothy Considine, and John Deskins [Doc. 288]. Leave was granted on September 28 [Doc. 289].

Legal Standard

Fed. R. Civ. P. 56 provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party seeking summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *See* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322-23 (1986). "The burden then shifts to the nonmoving party to come forward with facts sufficient to create a triable issue of fact." ***Temkin v. Frederick County Comm'rs***, 945 F.2d 716, 718 (4th Cir. 1991*), cert. denied*, 502 U.S. 1095 (1992) (citing ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247-48 (1986)).

However, as the United States Supreme Court noted in ***Anderson***, "Rule 56(e) itself provides that a

party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." ***Id***. at 256. "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." ***Id***. at 250; *see also* ***Charbonnages de France v. Smith***, 597 F.2d 406, 414 (4th Cir. 1979) (Summary judgment "should be granted only in those cases where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." (citing ***Stevens v. Howard D. Johnson Co.,*** 181 F.2d 390, 394 (4th Cir. 1950)). In reviewing the supported underlying facts, all inferences must be viewed in the light most favorable to the party opposing the motion. *See* ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.***, 475 U.S. 574, 587 (1986). Additionally, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." ***Id***. at 586. That is, once the movant has met its burden to show absence of material fact, the party opposing summary judgment must then come forward with affidavits or other evidence demonstrating there is indeed a genuine issue for trial. Fed. R. Civ. P. 56(c); ***Celotex Corp.,*** 477 U.S. at 323-25; ***Anderson***, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." ***Anderson***, 477 U.S. at 249 (citations omitted).

Discussion

In its Motion for Summary Judgment, the EPA seeks dismissal of this action on three grounds. First, the EPA asks this Court to reconsider its previous decision holding that Section 321(a) of the Clean Air Act, 42 U.S.C. § 7621(a), creates a non-discretionary duty on the part of the Environmental Protection Agency. Next, the EPA asks this Court to reconsider its previous decision holding that the plaintiffs have Article III standing to maintain this action. Finally, the EPA seeks a decision that it is fully complying with the requirements of § 321(a).

I. Section 321(a) creates a non-discretionary duty.

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 this Court noted in its prior order, "[a]s 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 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 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 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 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***.

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 . . .." (emphasis added).

"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 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) also 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). In fact, the provision does contain a date certain for the mandatory duty: the required timing is "continuing."

The EPA relies on ***Sierra Club v. Thomas***, 828 F.2d 783 (D.C. Cir. 1987). There, Sierra Club challenged EPA's delay in issuing a regulation where the Clean Air Act provided no deadline for such issuance. The D.C. Circuit held that, in the context of an unreasonable delay claim, "a duty of timeliness must 'categorically mandat[e]' that *all* specified action be taken by a date-certain deadline." ***Id***. at 791. For a claim of unreasonable delay in rulemaking, "the only

question for the district court to answer is whether the agency failed to comply with that deadline." ***Id***.

This case, by contrast, presents no freestanding challenge for undue delay in issuing a regulation. To the contrary, it concerns a statutory mandate that EPA "shall conduct continuing evaluations." 42 U.S.C. § 7621(a). That is an express, unambiguous requirement on the agency of a continuing nature. *Black's Law Dictionary* (8th Ed.) defines "continuing" as "uninterrupted."

To borrow from the Second Circuit in another of the (albeit-dissimilar) cases on which EPA relies, "we cannot agree with [EPA] that the Administrator may simply make no formal decision to revise or not to revise [a rule], leaving the matter in a bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court. No discernible congressional purpose is served by creating such a bureaucratic twilight zone, in which many of the Act's purposes might become subject to evasion." ***Envtl. Def. Fund v. Thomas***, 870 F.2d 892, 900 (2d Cir. 1989).

Whether a "date-certain deadline" is necessary to find a non-discretionary duty is open to some question. As Judge Sanders noted in ***Cross Timbers Concerned Citizens v. Saginaw***, 991 F.Supp. 563 (ND. 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, 1129, n. 6 (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 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).

Based upon the foregoing, this Court continues to believe that Congress intended to impose a mandatory duty upon the EPA.

II. The plaintiffs have standing to maintain this action.

The EPA, in its Motion for Summary Judgment, has requested this Court to reconsider its prior finding that the plaintiffs have standing to maintain this action.

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, 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 (2d 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. 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 operation 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;" and

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;

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 and will not alter its prior decision finding standing. In so doing, 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 EPA's argument that the plaintiffs' framing of concrete economic injury is insufficient because it "is based on the vague notion of a 'reduced market for coal' that is undefined and lacks any parameters" is a misdirected. Any absence of such evidence is precisely because EPA has failed to fulfill its Section 321(a) duty to "conduct continuing evaluations of potential loss or shifts of employment which may result from" EPA's regulatory activities.

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 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 Court 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 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 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 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.

EPA asserts that the "market for coal" is global and therefore cannot contribute to a concrete and particularized injury. [Doc. 205, p. 23]. A large marketplace, however, is not a barrier to standing. *See* ***Nat'l Envtl. Dev. Ass'ns Clean Air Project v. EPA***, 752 F.3d 999, 1005 (D.C. Cir. 2015) (oil and gas market); ***Int'l Bhd. of Teamsters v. DOT***, 724 F.3d 206, 211-12 (D.C. Cir. 2013) (trucking). Markets typically have "a seemingly endless list of participants," including consumers, suppliers, regulators, contractors, and associated business interests. [Id.] This does not prevent parties from being injured by the agency's manipulation of them. The breadth and complexity of the coal market poses no barrier to Article III standing. The economic injury

in ***Environmental Defense Fund v. Marsh***, 651 F. 2d 983, 1003 (5th Cir. 1981), for example, was from increased competition in the market for the shipment coal. Further, to the extent EPA is trying to imply that the size of the market for coal makes plaintiffs' injuries generalized grievance, this too has already been addressed and rejected by the Court. [Doc. 71, p. 7-8] ("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.").

EPA next argues that plaintiffs have not "quantif[ied] any lost profits, layoffs, or mine closures allegedly resulting from the reduced market for coal in a filing or discovery document in this case." [Doc. 205, p. 23-24]. Plaintiffs are not required to quantify a monetary injury to demonstrate standing. There is no threshold dollar amount for Article III standing. Furthermore, courts often find injury from difficult-to-quantify economic impacts, including increased competition and lost business opportunities. *See* 15 MOORE'S FEDERAL PRACTICE ¶ 101.40(c) (standing arising from "increased competitiveness" and "loss of business opportunity"); *see also* ***Defenders of Wildlife***, 504 U.S. at 578 (noting a company's interest in marketing its product free from competition is sufficient for standing); ***White Oak Realty, LLC v. Army Corps of Eng'rs***, *supra* (finding economic injury from business competition created as an indirect consequence of agency action).

Plaintiffs' expert, John Deskins, who prepares the annual Economic Outlook for the State of West Virginia, explains how EPA's Clean Air Act regulations have and will continue to affect the market for coal. As described in his expert report, there has been a national reduction in coal production

levels between 2008 and 2015 of 24 percent, with a "sharp acceleration in coal losses" in 2015 coming "as a direct result of the regulatory policy change" reflected in one of EPA's core utility strategy rules. [Doc. 258-1]. Dr. Deskins projects that future EPA rulemakings, including the Clean Power Plan, will "put further downward pressure on coal production." [Id.]. Looking at the employment effects of this downward pressure, Dr. Deskins found that in Boone County, West Virginia alone, a sharp reduction in coal production preceded a 65% reduction in coal employment and a 27% reduction in local employment overall, showing just how "heavy localized concentration of coal production losses is leading to devastating effects on entire communities." [Id.].

EPA argues that Murray Energy Corporation is larger today than it was in 2009, and so cannot be injured by the reduced market for coal, but EPA does not need to kill a company to injure it. "[E]ven an identifiable trifle of harm may establish standing. ***Halbig v. Burwell***, 758 F.3d 390, 396 (2014) (internal quotations omitted). Plaintiffs also addressed this very point in their depositions, none of which are cited by EPA. As plaintiffs' Rule 30(b)(6) witness explained, Murray Energy Corporation grew larger through transactions with Consol and a partnership with Foresight, but this growth was "[t]o basically survive the markets." [Rule 30(b)(6) Dep. of Plaintiffs, Doc. 260-14, at 351:12] *see also* [id. at 349:8-351:9]. As Mr. Robert Edward Murray explained at his deposition, the mines purchased from Consolidation Coal Company made Murray Energy Corporation larger but they were not themselves immune from the war on coal:

Q. But the Consolidated Coal, that transaction has ended up being a profitable one

A. Not necessarily, no.

Q. How has it not been profitable?

A. It's allowed us to continue to pay down our debt service to our lenders, okay, because that has to be factored into the discussion, but -- so it's allowed us to be profitable in that sense. But once we clear the debt service, once the debt service is paid, the operations do not generate a significant amount of profit.

Q. Do you know why they don't generate a significant amount of profit?

A. Depressed marketplace, low coal prices, less demand for coal, the destruction of our markets. As we sit here today, we're competing for less markets than what were available five, ten years ago, for example.

[Robert Edward Murray Dep., Doc. 260-15t 161:24-162:18].

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.

Even if EPA were to refuse to improve its regulatory activities to account for the actual employment effects of its existing regulations, accurate evaluation of substantial job loss would certainly cause heightened congressional oversight of EPA regulatory activities and provide critical

information during the congressional appropriations process with respect to EPA. Indeed, as the Supreme Court noted in the context of a similar statutory mandate in the Clean Water Act, such a continuing evaluation requirement "'will allow the Congress to get a close look at the effects on employment of legislation such as this, and will thus place us in a position to consider such remedial legislation as may be necessary to ameliorate those effects.'" ***EPA v. Nat'l Crushed Stone Ass'n***, 449 U.S. 64, 83 n.24 (quoting Representative Fraser from legislative record).

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

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 CHCs 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).

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 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 plaintiffs contend 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.

In fact, the legislative history specifically states that the results of the employment evaluations shall be shared with the public. "At the conclusion of any investigation under this section, the Administrator is required to make findings of fact, and such recommendations as he deems appropriate with respect to the issues before him. The report to the Administrator, and his findings of fact and recommendations are to be made available to the public." H.R. Rep. 95-294, 316, 318, 1977 U.S.C.C.A.N. 1395, 1397.

For the above reasons, this Court holds that the plaintiffs have standing to maintain this action.

III. The EPA has failed or refused to conduct the evaluations required by § 7621.

The EPA contends that certain evaluations that they have conducted, even though not explicitly

conducted under § 7621, should "count" as compliance with the statutory requirements.

In order to resolve this issue, it is necessary to determine what Congress was seeking when it enacted § 7621. In the debates over the 1977 amendments to the Clean Air Act, Congress directly confronted the issue of potential job loss and other negative effects on regulated industries when it enacted a provision requiring the Secretary of Labor, in consultation with EPA Administrator, to conduct a study of potential dislocation of employees due to implementation of the laws administered by EPA. *See* Pub. L. No. 95-95, § 403(e), 91 Stat 685 (Aug. 7, 1977). The 1977 legislation also added Section 321(a)'s similar mandate for EPA to "conduct continuing evaluations of potential loss or shift of employment" potentially caused by EPA's regulatory activities. *Id*. § 311 (adding Section 321 to the Clean Air Act).

With specific statutory provisions like Section 321(a), Congress unmistakably intended to track and monitor the effects of the Clean Air Act and its implementing regulations on employment in order to improve the legislative and regulatory processes. The legislative record for these statutory provisions, as well as Supreme Court precedent, confirm this purpose. For example, the House Committee Report accompanying the 1977 amendments noted that the continuing job-loss assessment requirements under Section 321(a) were inserted to address frequent issues that have arisen concerning "the extent to which the Clean Air Act or other factors are responsible for plant shutdowns, decisions not to build new plants, and consequent losses of employment opportunities" H.R. Rep. 95-294, at 316, 1977 U.S.C.C.A.N. 1077, 1395.

A subsequent portion of the legislative history provides:

> On one side of this dispute, it has been argued that many employer statements that plants will have to shut down if certain pollution control measures become effective constitute "environmental blackmail." Thus, Representative George Brown testified in 1975 that:
>
> > (t)here have already been major instances in which plant closings due to non-environmental factors have been blamed on environmental legislation. The effect of such blackmail is to generate public pressure for the weakening of environmental standards, and to force labor unions into opposing enforcement of environmental laws. (H. 217)
>
> On the other hand, it has been argued that environmental laws have in fact been responsible for significant numbers of plant closings and job losses. In any particular case in which a substantial job loss is threatened, in which a plant closing is blamed on Clean Air Act requirements, or possible new construction is alleged to have been postponed or prevented by such requirements, the committee recognizes the need to determine the truth of these allegations. For this reason, the committee agreed to section 304 of the bill, which

> establishes a mechanism for determining the accuracy of any such allegation.
>
> COMMITTEE PROPOSAL
>
> Section 304 of the committee bill is based on a nearly identical provision in the Federal Water Pollution Control Act. The bill establishes a new section 319 of the act. 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. 95-294, 316-17, 1977 U.S.C.C.A.N. 1077, 1995, 96.

In the summer of 1971, Congress held hearings to determine how to address the problem of "economic dislocation, plant shutdowns, and worker layoffs resulting from environmental control orders." *Economic Dislocation Resulting from Environmental Controls: Hearings Before the Subcomm. on Air & Water Pollution of the S. Comm. on Public Works,* 92d Cong. 1 (1971) ("*Economic Dislocation Hearings*") [Doc. 258-1 & 2, Ex. 5]. Senator Muskie, Chairman of the subcommittee, noted at the outset of these hearings that one "very broad aspect" of the "national policy" on the environment is: "If people, workers, communities, [and] industrial plants are to be affected because we have resolved to protect the environment, how and by what means shall their interest, their

personal health and welfare, also be protected?" [Id. at 1]. He observed that this "very broad question leads to an entire series of smaller ones," including in particular: "How do we determine . . . that a worker layoff or plant shutdown does, indeed, result from an environmental control order?" [Id].

In an effort to answer these questions, the subcommittee began by turning to prominent advocate Ralph Nader, who testified that to ignore the "problem of environmental layoffs or closedowns" and "simply enforce the pollution laws" "would be too narrow a policy and a cruel one at that for workers" and that ignoring the problem could lead to "[a] regime of fear and economic insecurity . . . spread[ing] through the blue-collar labor force . . . that w[ould] reflect itself in alienation from or antagonism to the cause of a delethalized environment" [Id. at 6]. He testified that it would not be enough to approach the issue using "macro-economic studies" because they "do not answer the question which a worker has about his or her family's macro-economy." [Id. at 7]. Nader explained that "[t]he first step toward an intelligent policy toward the ecology layoff or closedown posture by companies is to require a full and candid disclosure of relevant data." [Id. at 7].

Accordingly, Nader proposed that Congress should "consider legislation requiring the Administrator of the Environmental Protection Agency to investigate every plant closing or threat of plant closing involving 25 or more workers, which he has reason to believe results from an order or standard for the protection of environmental quality." [Id. at 7-8]. He proposed that "[t]his would apply to actual or proposed orders issued by his agency, other Federal agencies, or State and municipal agencies pursuant to approved

implementation plans." [Id. at 8]. Nader also urged that, "[t]o the extent possible, the Administrator should try to anticipate problems and investigate them before anyone is actually laid off." [Id.].

On the third day of the hearings, Chairman Muskie summarized the subcommittee's findings "that all of us need more information on why plants are shut down" and "the public needs better access to this information." [Id. at 281]. Overtime, Congress amended each of the five major federal environmental statutes to include a provision requiring the Administrator to generate this information. *See* Section 507(e) of the Clean Water Act (33 U.S.C. § 1367(e)); Section 24 of the Toxic Substances Control Act (15 U.S.C. § 2623); Section 7001(e) of the Solid Waste Disposal Act (42 U.S.C. § 6971(e)); Section 321 of the Clean Air Act (42 U.S.C. § 7621); and Section 110(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9610(e)).

The provision first appeared in a House floor amendment to the Clean Water Act amendments of 1972 on March 29, 1972. The floor amendment provided: "The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the issuance of any effluent limitation or order under this Act, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such limitation or order." 118 CONG. REC. 10,766 (1972) [Doc. 258-2, Ex.6]. In support of the floor amendment, Representative Dulski explained: "What we are proposing in simplest terms is that the Environmental Protection Agency *constantly monitor*

the economic effect on industry of pollution control rules." [Id. at 10,767 (emphasis added)]. Representative Abzug summarized the provision as one that "would require the Environmental Protection Administration to *study and evaluate*, on a *continuing basis*, the effects of effluent limitations on employment," which would "allow the Congress to get a close look at the effects on employment of legislation such as this, and will thus place us in a position to consider such remedial legislation as may be necessary to ameliorate those effects." [Id. (emphasis added)]. Representative Meeds observed in support of the amendment that when plant shutdowns are attributed to environmental requirements, "workers and other people of the community have the right to know the truth," noting that "[i]f indeed the closure is caused by pollution controls, there should be no difficulty in establishing that fact." [Id.]. The House adopted the floor amendment, and the Senate acceded to the "addition of a new subsection . . . which *requires* the Administrator to investigate threatened plant closures or reductions in employment allegedly resulting from any effluent limitation or order under the Act." S. REP. NO. 92-1465, at 146 (1972) (Conf. Rep.) [Doc. 258-2, Ex.7 (emphasis added)].

The following year, Congress added the provision to the Clean Air Act in Section 321. Pub. L. No. 95-95, § 311, 91 Stat. 685, 782 (1977). The House committee report summarized that, "[u]nder this provision, the Administrator is mandated to undertake an ongoing evaluation of job losses and employment shifts due to requirements of the Act." H.R. REP. NO. 95-294, at 317 (1977) [Doc. 258-2, Ex.8]. This evaluation was "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." [Id.][2] The committee report also specifically references the 1971 Economic Dislocation Hearing as providing "a comprehensive review" of the issue addressed by this provision. [Id. at 317 n.4]. The final conference report further describes § 321(a) as "related to the Administrator's evaluations and investigations of loss of employment and plant closure." H.R. REP. NO. 95-564, at 181 (1977) (Conf. Rep.) [Doc. 258-2, Ex.10].

While Congress took several years to enact employment effects provisions in each of the major environmental statutes, EPA did not wait to begin continuing evaluations of losses and shifts in employment caused by the agency's regulatory and enforcement actions. By the time Congress enacted § 321(a), EPA had in place already "in a single Agency division, a practicable system for tracking actual employment losses and for performing economic impact analyses that could identify risks of additional employment losses from future regulations." [Doc. 258-2, Expert Report of Anne E. Smith, Ph.D. at 5, Ex.11 ("Smith Report")]. Beginning in 1972, this Economic Dislocation Early Warning System ("EDEWS") "attempted to identify potential or actual industrial plant closings or curtailments and employment dislocations resulting from Federal, State, or local pollution control regulations" U.S. Resp. to Pls.' Second Set of Disc. Reqs. at 21, Oct. 19, 2015 [Doc. 258-4, Ex.34 ("U.S. Resp.")].

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[2] An earlier conference report similarly summarized § 321(a) as providing "[t]he Administrator shall . . . conduct an ongoing evaluation of the effect of this Act's requirements on employment." H.R. REP. NO. 94-1742, at 116 (1976) (Conf. Rep.) [Doc. 258-2, Ex. 9].

The EDEWS process was designed "to identify at the earliest possible time plants which may be forced to close due to environmental regulations." [Doc. 258-3, *H.R. 7739 and H.R. 10632, Small Business Impact Bill (Part 2): Hearings Before the Subcomm. on Special. Small Bus. Problems of the H. Comm. on Small Bus.,* 95th Cong. 254 (1979) (Ex.18) (statement of Roy N. Gamse, Deputy Assistant Adm'r for Planning and Evaluation, U.S. EPA)]. The EDEWS process constantly monitored worker dislocations resulting from federal, state, and local enforcement actions, private civil actions, state implementation plans, and regulatory deadlines. EPA would then notify relevant government agencies of threatened or actual plant closings and production curtailments that would result in job losses and shifts "so that their assistance programs and expertise c[ould] be used to aid the firms, workers, and communities which may be affected." [Id.]. This was specifically "intended to bring into play any government programs available to provide financial assistance which would prevent plant closings or production curtailments or to assist workers and communities impacted by closings and curtailments." [Doc. 258-3, *SBA Assistance for Agric. Concerns & to Meet Pollution Standards: Hearings Before the Subcomm. on SBA & SBIC Legislation of the H. Comm. on Small Bus.*, 94th Cong. 163 (1975) (Ex.19)].

In the first ten years, EPA identified actual closures and curtailments of 155 plants and the dislocation of 32,899 workers resulting from environmental requirements. [Doc. 258-3, EDEWS Rep. 1982 Q4, at 2 (Ex.28)]. Roughly half of the threatened dislocations actually occurred. [Id.].

At some point, and for reasons unknown to plaintiffs, EPA discontinued these continuing evaluations of losses and shifts in employment resulting from its actions. EPA stated in this case that it is not aware of any records regarding the cessation of the EDEWS system. [Doc. 258-3, U.S. Resp., at 22-23 (Ex.34)].

Until recently in this case, the EPA has made no claim that it was complying with § 321(a). When six Senators requested the results of EPA's continuing evaluations of the potential loss or shifts in employment resulting from four greenhouse gas rulemakings, Administrator McCarthy responded on October 26, 2009, that the agency "has not interpreted CAA section 321 to require EPA to conduct employment investigations in taking regulatory actions" and that "[c]onducting such investigations as part of rulemakings would have limited utility." [Doc. 258-4, Letter from Gina McCarthy, Ass't. Adm'r, U.S. EPA, to Sen. James M. Inhofe, U.S. Senate (Oct. 26, 2009) (Ex.48) ("Letter to Sen. Inhofe")]. McCarthy candidly admitted EPA "has not conducted a section 321 investigation of its greenhouse gas actions" and informed the Senators that EPA would "not undertak[e] a section 321 analysis" for a planned future greenhouse action. [Id.].

A few months later, responding to a letter from two members of Congress asking if EPA complies with § 321(a) of the Clean Air Act, McCarthy broadly repudiated any obligation "to conduct employment investigations in taking regulatory actions" and reiterated her position that such investigations have only "limited utility." [Doc. 258-4, Letter from Gina McCarthy, Ass. Adm'r, U.S. EPA, to Rep. Greg Walden, H. Comm. on Energy & Commerce (Jan. 12,

2010) (Ex.49) ("Letterto Rep. Walden")]. In response to a follow-up question asking about potential employment impacts, without referencing § 321(a) McCarthy admitted "EPA did not analyze the potential employment impacts of the proposed standards." [Doc. 258-4, Letter from Gina McCarthy, Ass't. Adm'r, U.S. EPA, to Rep. Joe Barton, Ranking Member, H. Comm. on Energy & Commerce (Aug. 3, 2010) (Ex. 50) ("Letter to Rep. Barton")].

Then, on May 2, 2011, the Chairman of the House Oversight Committee wrote McCarthy directly and raised his concern that "it ha[d] come to [his] attention that the EPA has failed to perform the statutorily required job impacts analyses of GHG regulations under section 321(a)." [Doc. 258-4, Letter from Rep. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Gina McCarthy, Ass't. Adm'r, U.S. EPA (May 2, 2011) (Ex.51)]. He informed her that "[e]mployers have expressed deep concerns that the requirements of the CAA, as implemented through GHG regulations, will adversely impact employment" and requested that she promptly provide the House Oversight Committee "[a] section 321(a) analysis on the individual and cumulative impact of GHG regulations on potential job losses." [Id.]. Instead of honoring this request from the Chairman, McCarthy claimed that "EPA has not received any request under section 321" "to investigate specific allegations." She reiterated that "EPA has not interpreted section 321 to require the agency to conduct employment investigations in taking regulatory actions," and reiterated her judgment that investigating job losses "would have limited utility." [Doc. 258-4, Letter from Gina McCarthy, Ass't. Adm'r, U.S. EPA, to Rep. Darrell E. Issa, Chairman, H. Comm. on Oversight &

Gov't Reform 2, 5 (June 22, 2011) (Ex.52) ("Letter to Chairman Issa")].

Senator Vitter fared no better than Chairman Issa in late 2011 when he wrote former EPA Administrator Lisa Jackson requesting that she "[p]lease provide the results of your continuing Section 321(a) evaluations of potential loss or shifts of employment which may result from the suite of regulations EPA has proposed or finalized that address CSAPR and Utility MACT . . . including threatened plant closures or reductions in employment." *See* Letter from Gina McCarthy, Ass't. Adm'r, U.S. EPA, to Sen. David Vitter, U.S. Senate 2, 7 (Mar. 06, 2012) [Doc. 258-5 (Ex.53) ("Letter to Sen. Vitter")]. McCarthy personally "respond[ed] on the Administrator's behalf" and merely informed him that EPA did not believe it was required to conduct the job loss evaluations at all and that she believed that they "would have limited utility." [Id.].

When Ms. McCarthy was nominated to be EPA Administrator, Senator Inhofe asked her directly on the record during her confirmation hearing whether she "believe[d] the Agency has an obligation to conduct continuing evaluations of the impact its regulations could have on jobs." [Doc. 258-5*, Hearing on the Nomination of Gina McCarthy to be Adm'r of the EPA: Hearing Before the S. Comm. on Env't & Pub. Works,* 113th Cong. 200 (2013) (Ex.54) ("*Nomination Hearing*")]. McCarthy answered that "EPA has not interpreted this provision to require EPA to conduct employment investigations in taking regulatory actions," justifying her position with the claim that "EPA has found no records indicating that any Administration since 1977 has interpreted section 321 to require job impacts analysis for rulemaking actions." [Id. at 88]. Furthermore, Senator Vitter

directly asked whether "EPA has ever investigated a plant closure or reduction in employment to see what role, if any, the administration or enforcement of the Clean Air Act played?" [Id.]. Rather than give a yes or no answer to this simple question, McCarthy avoided answering the actual question he asked her entirely. [Id.].

In a question for the record for a November 2013 House Science Committee hearing, Chairman Smith observed that EPA's regulatory impact analyses did not constitute compliance with Section 321(a) of the Clean Air Act, and then asked "[w]hy has EPA not conducted a study to consider the impacts of CAA programs on job shifts and in employment" and would EPA "commit to conducting such studies in the future." [Doc. 258-5, *Strengthening Transparency and Accountability Within the EPA: Hearing Before the H. Comm. on Sci., Space & Tech.,* 113th Cong. 82-83 (2013) (Ex.55)]. Administrator McCarthy again justified EPA's actions by stating that "EPA has found no records to indicate that CAA section 321, since its inclusion in the 1977 amendments, has been interpreted by any Administration to require job impacts analysis of rulemakings or job impacts analysis of existing CAA requirements as a whole." After claiming that EPA's regulatory impact analyses "have generally found that environmental regulations may have both positive and negative effects on jobs but that these effects tend to be relatively small and difficult to quantify with any precision," she committed only that EPA "will continue to comply with statutory and administrative requirements for analysis of our programs in a manner consistent with principles of sound science and economics." [Id. at 83].

Through it all, McCarthy consistently articulated the agency's statutory interpretation that the precise question addressed by Section 321(a) is whether specific lay-offs result from EPA's actions,[3] but she just as consistently admitted explicitly and implicitly that her agency is not conducting any efforts to answer it and claimed answering the question has "limited utility."

Consistent with the agency's admissions to Congress, EPA responded to a Freedom of Information Act request [Doc. 258-5, Ex. 57] asking for records pertaining to "[a]ll draft, interim final and final reports and/or evaluations prepared by EPA or its contractor(s) pursuant to section 321 of the Clean Air Act" by stating that "neither the Office of Air and

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[3] *Cf.* Doc. 258-5, *FY2014 Hearing*, at 69 (Ex.56) (Acting EPA Administrator testifying that "**EPA has not conducted any studies or evaluations under Section 321(a)**" "[a]s a result" of EPA not finding "any records of any requests for Section 321 investigations of job losses alleged to be related to regulation-induced plant closure" (emphasis added)); *see also* Letter to Sen. Inhofe [Doc. 258-4, Ex.48] (admitting EPA "has not conducted a section 321 investigation of its greenhouse gas actions" and stating that EPA would "not undertak[e] a section 321 analysis" for a planned future greenhouse action); Order Denying Motion for Protective Order, [Doc. 164 at 12 n.2 (Nov. 12, 2015)] (finding January 12, 2010, letter contained "an admission that as of January 12, 2010, the EPA had conducted NO section 321 investigations"); Letter to Rep. Barton, at 13-14 [Doc. 258-4, Ex.50] (admitting "EPA did not analyze the potential employment impacts of the proposed" stringent national ambient air quality standard for ozone); [Doc. 164 at 14 n.3] (finding June 22, 2011, letter contained "an admission that as of June 22, 2011,the EPA had conducted NO section 321 investigations"); [id.] at 18 ("The fair reading of these statements, many of which were made by Administrator McCarthy, is that the EPA has never made any evaluations of job losses under § 321(a). This is directly contrary to the position of the EPA in this case.").

Radiation nor the Office of Policy were able to find any documents pertaining to [the] request." [Doc. 258-5, Ex. 58].

Having failed in the agency's initial attempts to avoid compliance with the duty set forth in Section 321(a), the agency now asks the Court to enter summary judgment claiming that, based on a new interpretation of § 321(a) arising exclusively in this litigation, it has found 64 documents that somehow constitute compliance with EPA's obligation to conduct continuing evaluations of losses and shifts in employment caused by the agency's administration and enforcement of the Clean Air Act and applicable implementation plans. [Doc. 205 at 32].

While the 64 documents have some seemingly random additions, EPA cites primarily regulatory impact analyses and economic impact analyses that EPA has prepared since 2009 as a part of the rulemaking process. EPA offers no interpretation of § 321(a) other than the assertion that the 64 documents suffice to demonstrate compliance. EPA also does not explain the contradictions between its litigation position and the repeated admissions by McCarthy and her agency that EPA is not conducting the continuing evaluations described by § 321(a), intentionally or otherwise. And despite its previously consistent interpretation of § 321(a) and this Court's interpretation of that provision, EPA does not claim that any of the documents determine whether specific layoffs have already resulted or will in the future result from the war on coal, and EPA does not contend that the documents provide "a second look at" its actions "when one can calculate the damage (or lack thereof) to employment and the economy." [Order

Denying Second Motion to Dismiss, Doc. 71 at 16 (Mar. 27, 2015)].

EPA originally argued the duty expressed in § 321(a) was discretionary, as opposed to mandatory. Never outside its recent arguments, however, has EPA maintained that § 321(a) is about anything other than determining the cause of specific job dislocations. As EPA's 30(b)(6) witness James DeMocker recently explained:

> Q. Is 321(a) about investigating specific layoffs?
>
> MR. GLADSTEIN: Objection; scope and form.
>
> THE WITNESS: Well, under the agency's prior interpretation of the scope of the Section 321 requirements, our interpretation back five or six years ago was that Section 321(a)'s specific reference to investigations was interpreted -- it was interpreted that the Congressional intent was to provide the authority for us in a reactive way to investigate claims submitted to us that a job dislocation was attributed by a company owner or operator to the need to comply with regulatory requirements.

[Doc. 258-1, U.S. Dep. IIA, at 297:20-298:11 (Ex.3)].

Only in response to this Court's finding that § 321(a) was mandatory did EPA decide that § 321(a) must instead be about "estimating employment effects [of] regulatory actions":

> Q. Has EPA's interpretation of 321(a) changed since then?
>
> MR. GLADSTEIN: Objection.
>
> THE WITNESS: I'm not an attorney, but my understanding is that there is an alternative

> interpretation of Section 321 that's been offered by the court in this case that defines a duty to conduct on an ongoing basis employment effects evaluations of our rulemaking activities. But under that interpretation the agency's view is that the work that we have done pursuant to estimating employment effects for our regulatory actions would meet any duty to conduct that type of employment analysis.

[Id. at 298:13-299:3].

The evidence also shows that, under the correct interpretation of § 321(a), the interpretation that EPA originally described to this Court, and the interpretation EPA had been using for almost 40 years, EPA is not complying:

> Q. Under EPA's original interpretation, the one that it held five or six years ago, under that interpretation of 321(a), are the RIAs what 321(a) is looking for?
>
> MR. GLADSTEIN: Objection as to scope and form.
>
> THE WITNESS: Under that interpretation, the RIAs are not the same as an investigation of a specific change in employment in response to an actual or a threatened plant closure that a facility owner is attributing to environmental requirements. . . .

[Id. at 312:2-312:14].

The most EPA does is "conduct proactive analysis of the employment effects of our rulemakings actions," which is simply not what § 321(a) is about. [Id. at 312:16-312:18]. As James DeMocker, EPA's declarant in support of the motion for summary judgment and Rule 30(b)(6) witness admitted, the agency is not

investigating power plant and mine closures and worker dislocations resulting from the utility strategy on an ongoing basis.

When specifically asked whether EPA had ever investigated a threatened plant closure or reduction in employment allegedly resulting from administration or enforcement of the Clean Air Act, Mr. DeMocker could recall only "a couple of cases" from decades before, and he did not claim that any of the documents cited in his declaration in support of the motion were the result of such investigations. [Id. at 295:25-296:19]. He could not and did not claim that any documents reflected efforts to determine whether specific layoffs were the result of EPA actions. [Id. at 301:21-307:10]. And he was "not aware" of any "analysis specifically aimed at discerning the relevant contribution of regulatory requirements to a decision to close" power plants. [Doc. 258-4, U.S. Dep. I, at 244:11-245:2 (Ex.40)].

One of EPA's expert witnesses, Dr. Charles Kolstad, likewise did not "recall seeing anything about investigating threatened plant closures" or reductions in employment resulting from the requirements of the Clean Air Act in the 64 documents. Furthermore, Dr. Kolstad agreed that documents like the RIAs for the Transport Rule, Utility MACT, and the Clean Power Plan, which estimate changes in labor utilization as measured by full-time equivalents, do not even "answer" the "question" of how many people will be involuntarily terminated. [Doc. 258-7, Kolstad Dep. at 62-63].

EPA contends in its brief that the sufficiency of EPA's evaluations is not before the Court (Doc. 205 at 45) but this is precisely the question that the courts in ***Frey v. EPA***, 751 F.3d 461 (7th Cir. 2014) and ***Alaska***

Ctr. For the Env't v. Browner, 20 F.3d 981 (9th Cir. 2014) decided. As EPA itself later acknowledges, "whether EPA has *performed* the continuing evaluations described in Section 321(a)" is within the Court's role to decide. [Doc. 205 at 45]. EPA's consistent acknowledgement that it has no such evaluations, coupled with the testimony from various experts that EPA's claimed attempts do not comply, demonstrates that he EPA has not fulfilled its duty under § 321(a).

The documents cited do not evaluate loss and shifts in employment. The documents are Regulatory Impact Analyses ("RIAs") and Economic Impact Analyses ("EIA") prepared to comply with a number of other statutory and Executive Order requirements. The rest are analyses done pursuant to § 812 of the Clean Air Act and a handful of white papers and articles written by EPA staff—some not even published by the Agency—involving their own personal research. EPA readily admits that none of these documents were prepared because of or for the purpose of complying with § 321(a). *See* Doc. 205 at 44; *see also* U.S. Resp. at 24 (Ex.34) ("[N]one of the documents upon which it relies to demonstrate its performance of the duty in Section 321(a) were prepared explicitly for that purpose or labeled as Section 321(a) evaluations."). None of the documents even *mentions* § 321(a), despite each of the RIAs and ElAs cited by the agency containing explicit reference to the Executive Orders, statutes, and other requirements for which the analyses were prepared. *See, e.g.,* DeMocker Decl., Ex. 1 (Doc.205-30), at 6-1 (citing Executive Order 13,563). Substantively, these documents do not present a continuing evaluation of actual loss and shifts in employment either. [*See* Doc. 258-1, Smith Report at 20 (Ex.11)] ("EPA's claim that

RIAs and other studies it has produced meet the requirements of 321(a) is not supportable."). As explained by Dr. Smith:

> The important thing to note is that the role of RIAs has no relationship to the concept of continuing evaluation after promulgation. Indeed, they are much the opposite in nature, being a one-time analysis conducted only at the time when a rule is either proposed or finalized. They are inherently pre-promulgation in nature, and provide no information about actual outcomes of regulations.

[Id. at 10].

In fact, no "facility- and community-specific at-risk assessment" of jobs has been done "in any electricity sector air RIA released in the past 20 years." [Id.]. Rather "the economic impact chapters of electric sector RIAs typically perform generic estimates of job losses based on total plant capacity changes and total coal demand changes nationally, or across very broad regions. [Id. at 16]. Moreover, the other documents cited by Mr. DeMocker "individually and as a group . . . provide even less of the type of evaluation . . . consistent with Section 321(a) requirements." [Id.]. As discussed by Dr. Smith, the cited RIAs share several fundamental flaws. First, "RIAs do not cover all Clean Air Act actions that can cause employment dislocations, and their discontinuous nature can result in "lost closures" associated even with the regulations that they do cover." [Id. at 21]. Second, "RIAs do not provide a continuing evaluation of regulations while they are being implemented, which is when the actual impacts that may merit assistance or other governmental response are first observed."

[Id.]. Third, "RIAs fail to even provide an *ex ante* projection of potential employment dislocations with any of the specificity necessary to identify needs for effective worker and community assistance." In addition, "[n]one of the other studies or activities cited by Mr. DeMocker in his Declaration provides relevant or timely information on locations of closures and actual employment dislocations that might be viewed as consistent with Section 321(a)." [Id.].

EPA cannot redefine statutes to avoid complying with them. Nor can EPA render them superfluous or contrary to their original purpose by simply defining them to be.

Having determined that: (1) this Court will not change its previous decision holding that Section 321(a) of the Clean Air Act, 42 U.S.C. § 7621(a), creates a non-discretionary duty on the part of the Environmental Protection Agency; (2) this Court will not change its previous decision holding that the plaintiffs have Article III standing to maintain this action; and (3) that the EPA is not fully complying with the requirements of § 321(a), this Court will deny the United States' New Motion for Summary Judgment.

Inasmuch as this Court considered the opinions of John Deskins and Anne E. Smith, it is incumbent on the Court to address the Motions *In Limine* seeking to exclude their evidence. Inasmuch as this Court did not consider the opinions of Timothy Considine, the Motion seeking to exclude his opinions will be denied as moot.

With respect to John Deskins this Court did consider his opinions concerning the effect of EPA regulations on the coal industry. The EPA seeks to

exclude his opinions on the basis that: (1) Deskins is not qualified to render an expert opinion on the causes of power-plant retirements or on the impacts of federal environmental policy; and (2) Deskins' opinions are irrelevant, unreliable, and unhelpful to deciding the issues in this case.

With respect to the first issue, Dr. John Deskins is a professor of economics and Director of the West Virginia University Bureau of Business and Economic Research. [Doc. 281-6, Expert Report of John Deskins, April 25, 2016 ("Deskins Report") at 04]. Dr. Deskins has studied, testified, and published on the coal industry and effects of employment on local communities routinely. For example, he has co-authored the West Virginia Economic Outlook for the State Legislature annually since 2014; he has testified before the West Virginia State Legislature; and just ten days ago, he appeared before the United States Senate Committee on Energy and Natural Resources, where he testified about "the deep decline in coal production observed in recent years which has had a devastating effect on West Virginia's economy . . ." [Doc. 281-3, Decl. of John Deskins dated September 9, 2016 ("Deskins Decl.") at 1-2:3].

Dr. Deskins' report and testimony address whether "EPA's rulemakings contributed to job losses in the coal industry" and whether "the decline of coal production [can] be attributed solely to other factors such as a decline of exports or cheaper natural gas," an issue raised by EPA in its new motion for summary judgment. [Doc. 281-6, 02]. He offers insight on the "impact of coal-related job losses on the broader community" and how that information aids policy-making. [Id.]. His testimony therefore addresses two of the most fundamental questions in this litigation:

whether EPA is causing job losses and why Section 321(a) is invaluable to communities and policy-makers. [*See* Id. at 4-5:9].

This Court finds that Dr. Deskins is qualified to give his opinions, and, to the extent that this Court relied upon those opinions, finds that his opinions were relevant, reliable, and helpful to the Court. This Court will deny the Motion seeking the exclusion of Dr. Deskins' testimony.

With respect to Anne E. Smith, the EPA seeks to exclude her opinions and the bases that: (1) Smith proffers improper and unhelpful legal conclusions for which she lacks the qualifications to render; and (2) Smith's remaining opinions are irrelevant, unreliable, and unhelpful to deciding the issues in this case. In deciding the Motion for Summary Judgment in this case, this Court considered Dr. Smith's historical view of the "EDEWS" program, the type of product that was generated by that program, and her insight as to whether the 64 documents relied upon by the EPA provided the information sought by Congress in enacting § 321(a).

Dr. Anne Smith has specialized in environmental risk assessment, cost-benefit analysis, economic impact assessment, and decision analysis for over 35 years. [Doc. 281-4, Expert Report of Anne E. Smith, April 25, 2016 ("Smith Report") at 1]. She obtained her B.A. in economics from Duke University and Ph.D. in economics from Stanford University with a concentration in labor economics and industrial organization and a minor in Engineering-Economic Systems. [Id.]. In 1977, she served as an economist in the Economic Analysis Division of the Office of Policy Planning and Evaluation of the U.S. Environmental Protection Agency ("EPA"). [Id.]; [*See also* Doc. 281-1,

Declaration of Anne E. Smith dated September 9, 2016" ("Smith Decl.") at 1-2:3]. There, her "main responsibilit[y] was to prepare quarterly reports from the EPA Administrator to the Secretary of Labor on actual and threatened closures of plants in which environmental regulations were a contributing factor, and associated job losses" through the Economic Dislocation Early Warning System ("EDEWS"). Doc. 281-4 at 1]. Dr. Smith formally left EPA in 1979 to consult on risk assessment for environmental policy, but continued working with EPA serving as a contracted consultant for the Office of Air Quality Planning and Standards. [Id.]. Overall, "[t]he focus of [her] career in the 35 years since [she] left EPA's employment has been on applying and advancing the concepts and analytic tools of economic impact analysis and benefit-cost analysis." [Doc. 281-1, Smith Decl. at 2:4]. She is now Senior Vice President of NERA Economic Consulting and serves as the co-head for its global environmental practice, focusing on environmental and energy economic issues. [Doc. 281-4 at 1].

Dr. Smith's testimony provides insight on what "the key elements of a system for complying with the requirement of the [CAA] Section 321(a)" are. [Id. at 2-3]. She provides context for the EDEWS program that defendant has been unable to provide throughout this litigation. [Doc. 281-4 at 5]. She also offers a perspective on what a continuing evaluation of loss and shifts in employment would look like, and how EPA could conduct such a continuing evaluation with the resources it already has and within the typical costs in time and resources EPA expends on other types of economic assessments. Dr. Smith's testimony is also directly relevant to an issue which defendant has raised in both of its Motions for Summary

Judgment, which is whether its now 64 documents show EPA is complying with Section 321(a) despite the growing mountain of evidence to the contrary, as raised by EPA through the non-expert declaration of its employee James DeMocker. [See Doc. 77: Ex. A, 205: Ex. AA]. Dr. Smith's report addresses why EPA's RIAs and other documents simply do not provide a continuing evaluation of loss and shifts in employment, missing the fundamental point of Section 321(a).

While the EPA contends that certain of Dr. Smith's opinions are inadmissible legal conclusions, "opinion testimony that arguably states a legal conclusion is helpful to the jury and thus, admissible . . . if the case involves a specialized industry." Weinstein's Federal Evidence § 704.04 at 2; *See also* ***United States v. Offill***, 666 F.3d 168, 175 (4th Cir. 2011) ("expert testimony that arguably state[d] a legal conclusion [was admissible] to assist jury . . . to understand complex concepts involving securities, registration, registration exemptions, and specific regulatory practices").

This Court finds that Dr. Smith is qualified to give her opinions, and, to the extent that this Court relied upon those opinions, finds that her opinions were relevant, reliable, and helpful to the Court. This Court will deny the Motion seeking the exclusion of Dr. Smith's testimony.

In a typical case, a Court may not grant summary judgment to a party which has not filed a motion seeking the same, unless notice and a reasonable time to respond is provided. Rule 56(f), Federal Rules of Civil Procedure. In this case, however, the Court finds that the EPA has waived notice and time to respond, by stating "[i]f this Court concludes that the

documents upon which EPA relies do not constitute performance of the evaluations described in Section 321(a), then the Court should enter judgment for Plaintiffs and order EPA to perform the duty." [Doc. 205, p. 46].

Having found that the documents upon which the EPA relies do not constitute performance of the evaluations required by § 321(a), this Court will grant summary judgment to the plaintiffs. This leaves the issue of the remedy. While the EPA contends that all this Court may do is say "go, do your duty," this Court's discretion is more broad than that suggested by the EPA.

EPA argues that the relief sought by plaintiffs is beyond the jurisdiction afforded to the Court by the Clean Air Act. EPA fails to mention, however, that it unsuccessfully raised a very similar argument in one of the very cases cited in its brief.

In ***Alaska Ctr. for the Env't v. Browner***, 20 F.3d 981 (9th Cir. 1994), the EPA argued that the district court could not even order it to prepare and submit a report on the review EPA had been statutorily mandated to undertake because the Clean Water Act did not "specifically require it to prepare or present a report on water quality monitoring," and "relegate[d] the pace" of EPA's review "entirely to the EPA's discretion." 20 F.3d at 986. The Ninth Circuit disagreed, holding "[t]he district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong." ***Id***. As the Ninth Circuit reasoned: "In this case the established wrong is the failure of the EPA to take any steps to establish the TMDLs mandated by Congress for more than a decade. In tailoring the relief granted, the district court correctly recognized that in order to bring about

any progress toward achieving the congressional objectives of the CWA, the EPA would have to be directed to take specific steps." ***Id***. at 986. The Ninth Circuit thus made clear that the similarly-worded citizen suit provision of the Clean Water Act did not limit the scope of the district court's traditional, equitable, remedial authority:

> In enacting environmental legislation, and providing for citizen suits to enforce its directives, Congress can only act as a human institution, lacking clairvoyance to foresee the precise nature of agency dereliction of duties that Congress prescribes. When such dereliction occurs, it is up to the courts in their traditional, equitable, and interstitial role to fashion the remedy.

Id. at 987.

The above case affirmed the District Court's decision in ***Alaska Ctr. for the Env't v. Reilly***, 796 F.Supp. 1374, in which the District Court noted that:

> When the intent of Congress clearly requires the Agency to act without undue delay, courts have the authority to order the EPA to establish a reasonable schedule in which to achieve compliance. See, ***Abramowitz v. EPA***, 832 F.2d 1071, 1078-79 (9th Cir. 1987) (finding that the court had the authority under the Clean Air Act to set the deadline by which the EPA had to act on a state's proposed carbon monoxide and ozone controls); ***Natural Resources Defense Council, Inc. v. New York State Dep't of Envtl. Conservation***, 700 F.Supp. 173, 177-181 (S.D.N.Y. 1988) (ordering the EPA to

> establish a schedule for New York's compliance with the Clean Air Act); ***Environmental Defense Fund v. Thomas***, 627 F.Supp. 566, 569-570 (D.D.C. 1986) (finding that the EPA had a duty to set deadlines for compliance).

796 F.Supp. 1374, 1379-80 (W.D. Wash. 1992), *aff'd* sub nom. ***Alaska Ctr. for Env't v. Browner***, 20 F.3d 981 (9th Cir. 1994).

In ***Friends of Wild Swan v. U.S. EPA***, 74 Fed.Appx. 718 (9th Cir. 2003), the Ninth Circuit held:

> While courts may not "usurp[ ] an administrative function, ***FPC v. Idaho Power Co.***, 344 U.S. 17, 20 (1952) ("***Idaho Power***"), they retain equitable powers to shape an appropriate remedy. *See* ***West. Oil & Gas Ass'n v. EPA***, 633 F.2d 803, 813 (9th Cir. 1980) ("***Western Oil***"). Equitable considerations are appropriate in reviewing agency decisions under the APA and crafting a remedy. *See* ***Nat'l Wildlife Fed'n v. Espy***, 45 F.3d 1337, 1343 (9th Cir. 1995) ("The court's decision to grant or deny injunctive or declaratory relief under APA is controlled by principles of equity."); ***Sierra Pacific Indus. v. Lyng***, 866 F.2d 1099, 1111 (9th Cir. 1989) ("Our inquiry into the district court's authority to order equitable relief begins with the well-established principle that 'while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.'" (quoting ***Ford***

Motor Co. v. NLRB, 305 U.S. 364, 373 (1939))).

74 Fed.App'x at 721.

This Court finds that the EPA must fully comply with the requirements of § 321(a). This Court further finds that, due to the importance, widespread effects, and the claims of the coal industry, it would be a abuse of discretion for the EPA to refuse to conduct a § 321(a) evaluation on the effects of its regulations on the coal industry.

Based upon the foregoing:

(A) the United States' New Motion for Summary Judgment [**Doc. 204**] is **DENIED**;

(B) the United States' First Motion in Limine to Exclude the Expert Report and Related Testimony of Plaintiffs' Expert, Anne E. Smith [**Doc. 266**] is **DENIED**;

(C) the United States' Second Motion in Limine to Exclude the Expert Report and Related Testimony of Plaintiffs' Expert, Timothy Considine [**Doc. 268**] is **DENIED AS MOOT**;

(D) the United States' Third Motion in Limine to Exclude the Expert Report and Related Testimony of Plaintiffs' Expert, John Deskins [**Doc. 270**] is **DENIED**;

(E) Summary Judgment in favor of the plaintiffs is **GRANTED**; and

(F) The defendant is **ORDERED** to file, within fourteen days of the date of this Order, a plan and schedule for compliance with § 321(a) both generally and in the specific area of the effects of its regulations on the coal industry. The plaintiffs may file any

comments or criticisms of the defendant's submission within fourteen days of the filing of the same.

It is so **ORDERED**.

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

DATED: October 17, 2016.

/s/
JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

APPENDIX E

FILED: March 27, 2015

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 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 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

[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].

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

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[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 (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).

Motion of the United 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 Plaintiffs 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, 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. 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;

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 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 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 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 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 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 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) CA [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 '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.

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).

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. Dept 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 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 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.

/s/
JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

APPENDIX F

FILED: September 16, 2014

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.

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 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 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 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 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.***

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 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 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 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.

/s/
JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

APPENDIX G

§ 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to per-form any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, with-out regard to the amount in controversy or the citizenship

of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a

court of the United States any per-son may intervene as a matter of right.[1]

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(i)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; service of complaint; consent judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. No consent judgment shall be entered in an action brought

[1] So in original. The period probably should be ", or".

under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed con-sent judgment to the court and parties or may intervene as a matter of right.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or

sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

(f) "Emission standard or limitation under this chapter" defined

For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or[2]

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment),,[3] section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans,

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[2] So in original. The word "or" probably should not appear.

[3] So in original.

vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise); [4]or

(4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan ap-proved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations.[5]

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

(g) Penalty fund

(1) Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended, for use by the Administrator to finance air compliance and enforcement activities. The Administrator shall annually report to the Congress

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[4] So in original. The semicolon probably should be a comma.

[5] So in original. The period probably should be a comma.

about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof.

(2) Notwithstanding paragraph (1) the court in any action under this subsection[6] to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed $100,000.

(July 14, 1955, ch. 360, title III, § 304, as added Pub. L. 91-604, § 12(a), Dec. 31, 1970, 84 Stat. 1706; amended Pub. L. 95-95, title III, § 303(a)–(c), Aug. 7, 1977, 91 Stat. 771, 772; Pub. L. 95-190, § 14(a) (77), (78), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101-549, title III, § 302(f), title VII, § 707(a)-(g), Nov. 15, 1990, 104 Stat. 2574, 2682, 2683.)

[6] So in original. Probably should be "this section".

§ 7621. Employment effects

(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 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.

(b) Request for investigation; hearings; record; report

Any employee, or any representative of such employee, who is discharged or laid off, threatened with discharge or layoff, or whose employment is otherwise adversely affected or threatened to be adversely affected because of the alleged results of any requirement imposed or proposed to be imposed under this chapter, including any requirement applicable to Federal facilities and any requirement imposed by a State or political subdivision thereof, may request the Administrator to conduct a full investigation of the matter. Any such request shall be reduced to writing, shall set forth with reasonable particularity the grounds for the request, and shall be signed by the employee, or representative of such employee, making the request. The Administrator shall thereupon investigate the matter and, at the request of any party, shall hold public hearings on not less than five days' notice. At such hearings, the Administrator shall require the parties, including the employer involved, to present information relating to the actual

or potential effect of such requirements on employment and the detailed reasons or justification therefor. If the Administrator determines that there are no reasonable grounds for conducting a public hearing he shall notify (in writing) the party requesting such hearing of such a determination and the reasons therefor. If the Administrator does convene such a hearing, the hearing shall be on the record. Upon receiving the report of such investigation, the Administrator shall make findings of fact as to the effect of such requirements on employment and on the alleged actual or potential discharge, layoff, or other adverse effect on employment, and shall make such recommendations as he deems appropriate. Such report, findings, and recommendations shall be available to the public.

(c) Subpenas; confidential information; witnesses; penalty

In connection with any investigation or public hearing conducted under subsection (b) of this section or as authorized in section 7419 of this title (relating to primary nonferrous smelter orders), the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner, or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or

information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In cases of contumacy or refusal to obey a subpena served upon any person under this subparagraph,[1] the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Limitations on construction of section

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.

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[1] So in original. Probably should be "subsection,"