No. 15-____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re GINA MCCARTHY

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

Defendant-Petitioner,

v.

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

Plaintiffs-Respondents.

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

PETITION FOR A WRIT OF MANDAMUS

RELIEF REQUESTED BY JUNE 19, 2015

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

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

REASONS FOR GRANTING THE WRIT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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