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

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

MEMORANDUM IN SUPPORT OF UNITED STATES' EXPEDITED MOTION TO DISQUALIFY OR EXCLUDE JEFFREY HOLMSTEAD

The United States, on behalf of Defendant Gina McCarthy, Administrator, United States Environmental Protection Agency ("EPA"), acting in her official capacity, submits this memorandum in support of its motion to disqualify Jeffrey Holmstead based on significant conflicts of interest that preclude Mr. Holmstead from offering expert testimony on behalf of Murray Energy Corporation ("Murray Energy") and affiliated Plaintiffs in this action, just as he was disqualified in *United States v. Ameren Missouri ("Ameren")*, No. 4:11 CV 77 RWS, Ex. 1 (*Ameren* Order, Sept. 9, 2014); Ex. 2 (*Ameren* Tr. at 72–77, Sept. 9, 2014).[1] Mr. Holmstead's expert testimony also should be excluded under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), because it amounts to nothing more than legal conclusions and is otherwise unreliable. Because the deadline for the completion of expert discovery is June

[1] The United States presents this motion in advance of the deadline for filing motions in limine because it is plain, on the face of Mr. Holmstead's expert report, that his testimony should not be allowed, and because, if his proposed expert testimony is not challenged, the United States faces a dilemma in determining whether and how to depose Mr. Holmstead, including how to conduct such examination without inquiring about privileged or confidential matters.

10, 2016, the United States asks this Court to rule on this motion expeditiously so that, if the motion is denied, the United States can depose Mr. Holmstead before or near the close of expert discovery, if it so chooses.

BACKGROUND

Plaintiffs allege that the EPA has not fulfilled an alleged duty to perform the employment evaluations described in Section 321(a) of the Clean Air Act ("CAA" or the "Act"), 42 U.S.C. § 7621(a). The United States contends that EPA is entitled to summary judgment because it has, in fact, conducted "continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of [the Act] and applicable implementation plans," as described in Section 321(a). ECF Nos. 204 & 205. The United States submits that EPA's Regulatory Impact Analyses ("RIAs") developed using EPA's Integrated Planning Model ("IPM"), its Economic Impact Assessments ("EIAs"), and other documents and actions constitute EPA's performance of any duty in Section 321(a).[2] Plaintiffs have asked this Court to order EPA to evaluate whether its administration and enforcement of the CAA have resulted in job losses or shifts in the coal industry, and to enjoin EPA from approving proposed or final regulations impacting coal-industry employment and from continuing New Source Review ("NSR") enforcement against coal-fired power plants until EPA has completed its evaluation. Am. Compl. Prayer for Relief.

[2] The United States has also argued that Plaintiffs have not demonstrated that their alleged injury is likely to be redressed by any order issued in this litigation, especially in light of CAA Section 321(d), which provides that "[n]othing in this section shall be construed to *require or authorize* the Administrator, the States, or political subdivisions thereof, to modify or withdraw any requirement imposed or proposed to be imposed under this chapter." *See* ECF No. 205 at 28–30 (emphasis added).

A. Mr. Holmstead and His Proposed Testimony in this Matter

Mr. Holmstead is currently a lawyer, lobbyist, and head of the Environmental Strategies Group at the law firm of Bracewell LLP in Washington, D.C. *See* Ex. 3 at 1 (Expert Report of Jeffrey R. Holmstead ("Holmstead Report")); Ex. 4 (Senate Lobbying Database Report). In 2001, President Bush appointed Mr. Holmstead as EPA's Assistant Administrator for the Office of Air and Radiation, and he served in that position until 2005 when he joined Bracewell. Ex. 3 at 1 and Ex. B thereto. As Assistant Administrator, Mr. Holmstead reported directly to the Administrator. As the highest ranking official in the Office of Air and Radiation, Mr. Holmstead's duties involved him in confidential legal and policy deliberations and decision-making on behalf of EPA.

These confidential deliberations are central to Mr. Holmstead's expert report. He was:

> [T]he senior official in charge of implementing all the regulatory and permitting programs of the CAA. . . . During [his] tenure at EPA, [he] oversaw the development of many CAA regulations and was *intimately involved* in developing a number of them. [He] also *worked closely* with EPA economists and regulatory experts on the development of different types of analysis that were used to inform regulatory decisions and *explain the impacts of EPA regulations to the public*.

Ex. 3 at 1 (emphases added). Mr. Holmstead's curriculum vitae indicates that he "was the architect of several of the Agency's most important initiatives, including the Clean Air Interstate Rule ("CAIR"), the Clean Air Diesel Rule, the Mercury Rule *for power plants*, and the reform of the New Source Review program," the same NSR program whose enforcement the Plaintiffs seek to enjoin in this case. Ex. 3 at Ex. B (emphases added).

Having returned to private practice, Mr. Holmstead now seeks to testify against the EPA in this action. He has submitted an expert report offering his opinions and legal conclusions regarding the following:

1. Section 321(a) of the CAA and the extent to which EPA has sought to comply with it over the years.

2. The series of recent CAA regulatory and enforcement actions that have targeted coal-fired power plants and the extent to which such actions are unusual or consistent with historic EPA practice.

3. The extent to which EPA has the expertise and authority to evaluate the plant and mine closures, job losses, and shifts in employment that may result from the Agency's regulatory and enforcement actions under the CAA.

4. The purposes that would be served by such evaluations and the extent to which they would likely influence future EPA actions.

Ex. 3 at 2.

In his role at EPA, Mr. Holmstead was privy to and participated in internal privileged communications concerning the same topics that he addresses in his expert report. For instance, Mr. Holmstead contends that "EPA simply ignored Section 321 from 1989 until recently," and states that he has:

> [N]o recollection that anyone *ever briefed me* on Section 321 or even mentioned it to me in passing. During my tenure at EPA, the EPA career officials who worked in the Air Office *were very much aware* of the burdens that EPA actions could place on the regulated community, and *I worked with them to design* our regulations in a way that would reduce air pollution and satisfy the emission reduction requirements of the CAA without imposing an unnecessary burden on consumers, businesses, or workers.

Ex. 3 at 5 (emphases added). Mr. Holmstead states further:

> *When I started my job at EPA*, one of the things that most impressed me was the sophistication of the regulatory analysis done by the Air Office. Over the years, EPA experts have developed very robust models and other tools for analyzing the

> impacts of their regulations on the private sector and the overall costs and benefits of their regulatory actions.

Ex. 3 at 12 (emphasis added). He continues that "[t]here is no question that EPA has the expertise and resources to investigate actual and potential plant and mine closures, job losses, and shifts in employment that result from CAA regulatory and enforcement actions;" "[i]n my experience, EPA is much more focused on evaluating the benefits of its regulations rather than the adverse economic impacts;" and "[a]s far as I know, EPA has never made any effort to conduct continuing evaluations of the job losses or shifts in employment that result from CAA regulations." Ex. 3 at 13. Mr. Holmstead is providing opinions based on his internal communications and intimate involvement while at EPA regarding the very subjects at issue in this litigation.

B. Mr. Holmstead's Involvement in Preparing and Approving Privileged Materials Relevant to This Litigation

Further underscoring the privileged nature of his work at EPA, Mr. Holmstead was privy to more than 50 privileged communications and documents that appear on the United States' privilege logs provided to Plaintiffs in this matter, including documents relevant to the opinions expressed in his report. For instance, he participated in drafting a portion of the proposed fine particulate matter ("PM2.5") implementation rule for Electric Generating Units ("EGUs"), and he received drafts of the following: the RIA for the Clean Air Interstate Rule ("CAIR"); the RIA for the Final Clean Air Visibility Rule ("CAVR"); employment and economic analysis related to the Guidelines for Best Available Retrofit Technology ("BART"); economic impact analysis for the Utility Maximum Achievable Control Technology ("MACT") rule prepared by the EPA Clean Air Markets Division using the IPM; responses to comments related to National Emission Standards for Hazardous Air Pollutants and proposed Standards of Performance for New and

Existing Electric Utility Steam Generating Units; and various proposed EPA rules, including the Section 112 Utility MACT Rule. Mr. Holmstead also received drafts and briefings regarding the development of the Mercury and Air Toxics Standard ("MATS"); briefings on the 8-hour ozone NAAQS implementation proposed rulemaking that included modeling demonstrations; and draft reports and briefings on State and Regional impacts of the Clear Skies Act based on projections from IPM that included preliminary analysis of projected employment impacts and modeling of projected power-plant retirements. *See* Ex. 5 (Excerpt from U.S. Privilege Log Related to Jeffrey Holmstead). Thus, Mr. Holmstead was privy to privileged communications concerning the capabilities and limits of models and other tools that EPA's Office of Air and Radiation has available for analyzing the costs and benefits, including the potential employment impacts, of EPA's regulatory actions — the same models and tools that Mr. Holmstead is relying on to form the basis of his opinions in this case. *See* Ex. 5.

The substance of those communications — what Mr. Holmstead says was or was not discussed with him — is the linchpin of the opinion he offers in his expert report. In short, he gave and/or requested and/or received confidential advice on the specific issues about which he now seeks to testify, and was privy to privileged information concerning not only a number of EPA regulations, but also deliberations related to the capabilities and limits of the models and other tools used in the RIAs to support those regulations. The EPA, not Mr. Holmstead, holds these privileges and has not waived them.

In addition to the privileged matters discussed above, Mr. Holmstead also personally submitted a declaration on behalf of EPA in other litigation, asserting the deliberative process privilege over 173 documents collected from the very office charged with preparing the RIAs — the Office of Air Quality Planning and Standards ("OAQPS"). *See* Ex. 6 (Decl. of Jeffrey

Holmstead, May 26, 2002). In that declaration, Mr. Holmstead asserted privilege claims on behalf of EPA over certain documents that have been withheld from production in a series of coordinated civil enforcement actions brought to enforce the NSR provisions of the CAA against coal-fired power plants — the same enforcement actions that Plaintiffs seek to enjoin in this action. That privilege log includes documents reflecting the internal deliberations of Agency officials leading to the development of CAA regulations, such as the Wisconsin Electric Power Company (or "WEPCO") rule, NSR rulemakings, the Top-Down Best Available Control Technology (or "BACT") rule, State Implementation Plans, New Source Performance Standards (or "NSPS"), and Air Toxic regulations. Many of these rules are precursors or otherwise related to the regulations for which EPA has issued RIAs that the United States contends constitute performance of the evaluations described in Section 321(a) and the NSR enforcement that Plaintiffs have included in their prayer for relief. Thus, Mr. Holmstead himself has acknowledged the confidential and deliberative nature of some of the very matters upon which he bases the "expert" opinions in his report.

On May 3, 2016, the United States sent a letter to Plaintiffs' counsel requesting they withdraw Mr. Holmstead as an expert witness in this case based on the conflicts of interest described above, as well as the improper legal conclusions in his expert report. *See* Ex. 7 (Letter from Richard Gladstein to John Lazzaretti, May 3, 2016). Plaintiffs did not respond in writing. On May 9, 10, and 16, counsel met and conferred by telephone regarding this motion and made a good-faith but unsuccessful effort to narrow their areas of disagreement. After a further review of Mr. Holmstead's report, the United States has concluded that it cannot depose Mr. Holmstead without Mr. Holmstead revealing EPA's privileged and confidential information because his

opinions and legal conclusions are inextricably intertwined with the privileged and confidential communications that form the basis of his report.

ARGUMENT

A. Mr. Holmstead Should Be Disqualified Because the United States Cannot Depose Him or Properly Cross-Examine Him at Trial Without Revealing Privileged and Confidential EPA Information

Courts have the inherent authority to disqualify expert witnesses for conflicts of interest in furtherance of the judicial duty to protect the integrity of the adversary process and to promote public confidence in the legal process. *See* Ex. 1; Ex. 2; *In re C.R. Bard, Inc.*, MDL No. 2187, 2014 WL 6960396, at *7 (S.D. W. Va. Dec. 8, 2014); *Rhodes v. E.I. DuPont de Nemours Co.*, 558 F. Supp. 2d 660, 664 (S.D. W. Va. 2008); *United States v. NHC Health Care Corp.*, 150 F. Supp. 2d 1013, 1013 (W.D. Mo. 2001); *Wang Labs. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991). Courts recognize two distinct standards for disqualifying expert witnesses for conflicts of interest: the bright-line rule and the two-part test. Under the bright-line rule, when it is undisputed that an expert was previously employed or retained by the adverse party in the same or similar litigation, received confidential information, and is blatantly side-switching, disqualification is clear. *In re C.R. Bard, Inc.*, 2014 WL 6960396, at *7. Courts have disqualified experts that switch sides in such a manner that they could be called as a witness for either party. *E.g.*, *NCH Health Care*, 150 F. Supp. 2d at 1015–16.

This Court should not allow Plaintiffs to take advantage of Mr. Holmstead's decision to switch sides based only on the timing of their claim. While he was not employed by EPA during the course of this litigation, Plaintiffs' single claim alleges that EPA has not performed the evaluations described in CAA Section 321(a) currently, as well as prior to the filing of the claim. During a five-year period that occurred prior to Plaintiffs' claim, Mr. Holmstead was not only

employed by EPA, but in charge of the very office that would have performed any analysis that EPA might have labelled as a Section 321(a) evaluation or that EPA considers a continuing evaluation of the potential losses or shifts in employment that may result from the Act. Indeed, Mr. Holmstead had the authority to direct his staff to perform those evaluations Plaintiffs contend EPA should have performed during his tenure, but he did not do so (other than to require RIAs and other analyses). EPA could undoubtedly call Mr. Holmstead as a witness to testify in support of the argument that it satisfied Section 321(a) through the Agency's RIAs and other analyses issued during his time as Assistant Administrator. Now, however, Plaintiffs proffer Mr. Holmstead to provide "expert" testimony explaining why and how the Agency (allegedly) did not comply with Section 321(a) during his tenure. Plaintiffs should not be allowed to make an end-run around the fact that Mr. Holmstead could be called as a witness by either side simply because they filed their claim after he left the Agency. Thus, Mr. Holmstead has changed sides, effectively, in this litigation, and should be disqualified.

But even if the bright-line rule does not bar Mr. Holmstead here, the two-part conflict of interest test indisputably does. Under that test, courts first determine whether it was objectively reasonable for the moving party who employed the expert witness, in this case EPA, to conclude that it had a confidential relationship with the former employee being proffered as an expert, here Mr. Holmstead. Second, courts determine whether any confidential or privileged information was disclosed by the moving party, here EPA, to the expert, Mr. Holmstead, sufficiently related to the instant litigation. *See In re Bard*, 2014 WL 6960396, at *7*; Rhodes,* 558 F. Supp. 2d at 666–67; *Alien Tech Corp. v. Intermec, Inc.*, No. 3:06-CV-51, 2007 WL 4261972, at *2 (D.N.D. 2007); *Wang Labs.*, 762 F. Supp. at 1248.

Here, both parts of the test are easily satisfied. Mr. Holmstead was a senior EPA official, holding the highest ranking position within EPA's Office of Air and Radiation. As in *Ameren*, it is objectively reasonable for EPA to conclude that it had a confidential relationship with such a high-ranking official. *See* Ex. 2 at 73; *Alien Tech*, 2007 WL 4261972, at *2. Indeed, Mr. Holmstead himself appears on privileged documents identified on the United States' privilege log in this litigation, and he was personally involved in asserting privilege claims in EPA's CAA power-plant litigation involving some of the same EPA actions that Plaintiffs have attempted to put at issue in their requested relief in this case. *See* Ex. 5; Ex. 6.

The second prong of the two-part is also met because Mr. Holmstead was privy to privileged and confidential information. "[D]isqualification rules are designed to guard against even the *potential* breach of confidences by experts who had a confidential relationship with the party seeking disqualification." *United States v. Larkin, Hoffman, Daly & Lindgren*, Civ. No. 3-92-789, 1994 WL 627569, at *2 (D. Minn. Apr. 12, 1994) (emphasis added); *see Alien Tech.*, 2007 WL 4261972, at *2 ("The danger is that no one may know how the information [the expert] learned from [a party] may affect his opinion and [the expert] may inadvertently use confidential information."). Because Mr. Holmstead was provided with privileged and confidential information while at EPA on the specific subjects about which he now seeks to testify, he should be disqualified in this case even if he had *not* actually relied on privileged and confidential information in his report. *See, e.g.*, *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 578 (D.N.J. Apr. 25, 1994) (disqualifying defense expert even when defense counsel sent expert a letter requesting that the expert not disclose any information provided by the plaintiff); *Marvin Lumber & Cedar Co. v. Norton Co.*, 113 F.R.D. 588, 591 (D. Minn. Dec. 23, 1986) (disqualifying defendant's expert even when the expert pledged that "it has not divulged, and will not, any

information or knowledge acquired by it during its relationship with plaintiff"); *see also Eastman Kodak Co. v. AGFA-Gevaert N.V.*, No. 02-CV-6564, 2003 WL 23101783, at *5 (W.D.N.Y. Dec. 4, 2003) (to expect an expert "to somehow suppress . . . knowledge by not revealing confidential information . . . is unworkable if not quixotic."); *Michelson v. Merrill Lynch Pierce Fenner & Smith*, No. 83 CIV. 8898, 1989 WL 31514, at *4 (S.D.N.Y. Mar. 28, 1989) (an expert "cannot possibly create separate spaces within his memory" — one for public information and another for privileged and confidential information).

Moreover, as in *Ameren*, Mr. Holmstead actually based portions of his expert report on privileged and confidential information that he received while at EPA. For instance, a primary topic of Mr. Holmstead's proposed testimony is his purported lack of recollection that "anyone ever briefed me on Section 321" and his claim that EPA "never made any effort to conduct continuing evaluations of the job losses or shifts in employment that result from CAA regulations." Ex. 3 at 5, 13. Even if those contentions were somehow expert opinions,[3] they are barred because they are based upon privileged and confidential information. Indeed, the court in *Ameren* rejected nearly the same gambit, where Mr. Holmstead relied on his recollection that no one at EPA ever discussed with him the General Availability Data ("GADs") emissions analyses that EPA has used to prove violations in power-plant enforcement actions. He claimed he was "not even aware" of the GADs method during the regulatory development process when he worked at EPA. Ex. 8 at 3, 21–23 (Expert Report of Jeffrey Holmstead, *Ameren*). In disqualifying Mr. Holmstead as an expert, the court flatly rejected that claim:

[3] They are not. Given this Court's view that Section 321(a) includes a non-discretionary duty, Mr. Holmstead's testimony of what high-level officials at EPA, including possibly Office of General Counsel attorneys, allegedly did not discuss regarding Section 321(a) is tantamount to disclosure of an Agency's internal legal interpretation and position, or lack thereof. In short, Mr. Holmstead seeks to testify regarding unique information that he possesses only due to the confidential nature of his former EPA position.

> There is no doubt that confidential information was provided to Mr. Holmstead. . . . [H]e wants us to believe that he knew all the conversations about these regulations such that he could tell us what wasn't discussed, but when it comes to the confidential and privileged documents, he didn't really look at all of them or he didn't really know that was in all of them but he was prepared and able to sign an affidavit that they were, in fact, privileged documents in litigation, and not just any litigation, but litigation of this sort, and documents that are listed in the privilege log in this case. So it's beyond argument that he also had access to privileged information.

See Ex. 2 at 74. This Court should likewise disqualify Mr. Holmstead because his report relies upon privileged and confidential information.

In addition, Mr. Holmstead should be disqualified because the United States cannot probe the basis for other opinions he offers without disclosing EPA's own privileged information. For example, Mr. Holmstead concludes that "[t]here is no question that EPA has the expertise and resources to investigate actual and potential plant and mine closures, job losses, and shifts in employment that result from CAA regulatory and enforcement actions." Ex. 3 at 13. While Mr. Holmstead never discloses the facts or data that form the basis of this conclusion, the United States' privilege log provided to Plaintiffs in this action demonstrates that Mr. Holmstead was privy to privileged communications related to the development of EPA proposed actions, regulations, and RIAs. For instance:

- On May 17, 2002, Mr. Holmstead received a number of "draft email attachment[s] [that] reflects internal pre-decisional deliberations regarding development of state/regional impact report concerning Clear Skies Initiative." EPAII01559780–98.

- On December 13, 2003, he received a "draft [that] reflects internal pre-decisional deliberations concerning development of EIA for the proposed Utility MACT rulemaking." EPA3431684–89.

- On August 5, 2004, he received a "[d]ocument reflecting internal pre-decisional deliberations in briefing for [the] Administrator concerning [the] impact of MATS." EPAII01620670–92.

- On October 7, 2004, he received a "draft document [that] reflects pre-decisional deliberations concerning the [r]egulatory impact of CAIR." EPA4622395–746.

- On June 8, 2005, he received an "email and attachment [that] reflect internal pre-decisional deliberation regarding employment and economic impacts of BART and CAVR, including in relation to the coal industry." EPA8032572.

Ex. 5. The United States cannot determine the basis of Mr. Holmstead's conclusions regarding EPA's expertise and resources to evaluate actual and potential plant and mine closures, job losses, and shifts in employment without requesting disclosure of these privileged and confidential communications. This circumstance alone justifies disqualification under the reasoning of *Ameren*:

> [W]hile there may be distinctions that were aptly and ably discussed and drawn here, some things Mr. Holmstead may not think were knowledge he gained at EPA would be relevant or helpful in this case, but there's no way to know how the information he learned at EPA could affect his opinion, and even inadvertently, taking him at his — at the best here, would use that confidential information in forming his opinions. We cannot separate that out. The human brain does not compartmentalize information in that manner.
>
> And to just say, well, I only looked at it a little bit, there's no middle ground, because once you've attained that knowledge, you can't compartmentalize that knowledge.

See Ex. 2 at 75.

Furthermore, the United States cannot depose or cross-examine Mr. Holmstead about the bases for his recollections and the scope of his opinions without delving even further into already privileged communications that Mr. Holmstead is not authorized to divulge. Thus, in addition to being improper in its own right, Murray Energy's elicitation of testimony from Mr. Holmstead puts the United States in the untenable position of either being forced to disclose or elicit the disclosure of additional privileged and confidential information relevant to Mr. Holmstead's claims, or foregoing the opportunity to effectively examine and impeach Mr. Holmstead about

those claims. Either result is an improper and unnecessary disadvantage to the United States. For all these reasons, Mr. Holmsted must be disqualified.

Plaintiffs may argue, as they did in the meet-and-confer process, that Mr. Holmstead should not be disqualified from providing expert testimony unless he can be prosecuted criminally for violating 18 U.S.C. § 207(a). However, the United States has not alleged that Mr. Holmstead has violated 18 U.S.C. § 207(a). Rather, as in *Ameren*, "[t]his is not about Rules of Professional Conduct in the District of Columbia or the State of [West Virginia]" or 18 U.S.C. § 207(a). The United States is asking this Court to use the *Wang Laboratories* line of cases "and the inherent power of Federal Courts to disqualify experts in certain circumstances," which "exists in furtherance of the judicial duty to protect the integrity of the adversary process and to promote public confidence in the fairness integrity of the legal process." Ex. 2 at 73. Cases that examine whether an expert witness is barred for violations of 18 U.S.C. § 207(a) do not generally involve the issue of disqualification for disclosure of confidential or privileged information. In one exception, the court ruled that the expert potentially could be disqualified *either* for violations of 18 U.S.C. § 207(a) *or* under the two-part test relied on here. *See Return Mail, Inc. v. United States*, 107 Fed. Cl. 459, 461–69 (2012).

B. Mr. Holmstead's Expert Testimony Should Be Excluded Because it Includes Legal Conclusions and Is Otherwise Unreliable

Mr. Holmstead's testimony should be excluded under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Instead of offering expert opinions that may be helpful to this Court, Plaintiffs seek to introduce Mr. Holmstead's legal conclusions and unsupported fact testimony, neither of which are proper subjects for expert testimony. Such opinions would be improper even if Mr. Holmstead did not have the conflicts of interest described above.

The admissibility of expert opinion testimony is governed by Fed. R. of Evid. 702. As this Court reasoned in *Landis v. Hearthmark, LLC*:

> Expert testimony is admissible under Rule 702, . . . if it concerns (1) scientific, technical or other specialized knowledge that (2) will aid the jury or other trier of fact to understand or resolve a fact at issue. . . . The first prong of this inquiry necessitates an examination of whether the reasoning or methodology underlying the expert's proffered opinion is reliable — that is, whether it is supported by adequate validation to render it trustworthy. . . . The second prong of the inquiry requires an analysis of whether the opinion is relevant to the facts at issue. . . . Thus, an expert's testimony is admissible under Rule 702 if it "rests on a reliable foundation and is relevant."

Landis, C.A. No. 2:11-CV-101, 2014 WL 199261, at *1 (N.D. W. Va., Jan. 14 2014) (quoting *Westberry v. Gisiaved Gummi AB*, 178 F.3d 257 (4th Cir. 1999)) (further citations omitted).

Mr. Holmstead has no "scientific, technical or other specialized knowledge" or "expertise" that will aid this Court in understanding or resolving any facts at issue in this case. He identifies no scientific discipline in which he has any expertise. Rather, he considers himself "an expert on the CAA" and "an expert on the type of advocacy that can influence regulatory decisions." Ex. 3 at 1. But this is not a field of technical or specialized knowledge sufficient to form a basis for reliable expert testimony; nor is any such opinion testimony needed to understand or resolve any material facts in this litigation.

It is well-established in the Fourth Circuit and elsewhere that Rule 702 does not allow an expert to render conclusions of law. *See, e.g., United States v. McIver*, 470 F. 3d 550, 561–62 (4th Cir. 2006) ("[O]pinion testimony that states a legal standard or draws a legal conclusion by applying the law to the facts is generally inadmissible."); *Hall v. Boston Scientific Corp.*, No. 2:12-CV-08186, 2015 WL 868907, at *4 (S.D. W. Va. Feb. 27, 2015) (similar); *see also* Joseph McLaughlin, *Weinstein's Federal Evidence* § 704.04[1] (2d Ed. 2008) ("In general, testimony about a legal conclusion, or the legal implications of evidence is inadmissible under Rule 704.").

Courts repeatedly have held that because "[t]he interpretation of EPA regulations is [a] function that rests solely with the Court," "[w]itnesses testimony as to the EPA's interpretation, even by one who worked contemporaneously with the EPA at the time the CAA regulations were promulgated, improperly invades the province of the Court to determine the applicable law." *United States v. E. Ky. Power Coop.*, Civil Action No. 04-34-KSF, 2007 WL 4732047, at *3 (E.D. Ky. Mar. 30, 2007) (quoting *United States v. Ohio Edison Co.*, No. 2:99-CV-1181, 2003 WL 723269, at *1 (S.D. Ohio Feb. 25, 2003)).

Here, as in *Landis*, the proposed expert offers a number of legal conclusions, including what the CAA requires. Indeed, Mr. Holmstead provides a conclusion of law on the ultimate issue in this case — whether EPA has performed the evaluations described in Section 321(a) of the Act — in at least four places:

- "This is probably why EPA *has refused to conduct* this type of analysis, *notwithstanding the requirements* of Section 321."
- "EPA has essentially *ignored section 321(a)* of the Clean Air Act since at least 1989."
- "I am *not aware that EPA has made a meaningful effort during this time to disclose or even evaluate* actual or potential job losses or shifts in employment resulting from the administration and enforcement of the CAA."
- "As far as I know, EPA has *never made any effort to conduct continuing evaluations* of the job losses or shifts in employment that result from CAA regulations."

Ex. 3 at 3, 5, 13–14 (emphases added). Mr. Holmstead also offers legal conclusions on whether Plaintiffs' alleged injury is likely redressable by an order issued in this litigation — a legal point that the United States contests in its recent summary judgment motion. *See* ECF No. 205 at 28–

30. Specifically, Mr. Holmstead seeks to usurp this Court's role in deciding whether the Plaintiffs have demonstrated that their alleged injury is likely to be redressed:

- "If EPA were to evaluate plant and mine closures . . . , and this evaluation found that many workers had lost their jobs . . . because of EPA regulations, such an evaluation would be highly credible because it would be viewed as an 'admission against interest.'"
- "Such studies would be used in congressional oversight and regulatory advocacy and, if they show significant job losses, they would likely force EPA to scale back some of its regulatory actions."

Ex. 3 at 14. In addition, Mr. Holmstead opines on EPA's authority under CAA Section 114, 42 U.S.C. § 7414:

- "To the extent they need more information for such an evaluation, EPA has authority to collect such information."
- "To the extent EPA needs to gather information, it also has authority under section 114 of the CAA to request virtually any information its analysts might need from the regulated community."

Ex. 3 at 3, 13. This Court is capable of deciding the ultimate issue in this litigation, the redressability of Plaintiffs' alleged injury, and the scope of EPA's authority under CAA Section 114 without Mr. Holmstead's input, and this testimony should not be allowed.

Further, like the proposed expert in *Landis* case, Mr. Holmstead makes a number of conclusory statements in his opinions that are devoid of any discernible scientific or technical analysis or methodology and states alleged facts that this Court needs no help or expertise to determine. *Landis*, 2014 WL 199261, at *4. For example, Mr. Holmstead concludes that:

- "[B]ased on my experience with the power sector, I believe that the majority of these units would not have shut down had it not been for the regulatory burden imposed by EPA's recent actions."[4]

[4] Notably, Mr. Holmstead is not an economist and offers no scientific or technical analysis whatsoever.

- "There is no question that EPA has the expertise and resources to investigate actual and potential plant and mine closures, job losses, and shifts in employment that result from CAA regulatory and enforcement actions."

Ex. 3 at 8, 13. As in *Landis*, these conclusions are not properly the subject of expert discovery and should be excluded.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that Mr. Holmstead be disqualified and excluded from providing expert testimony in this case. If this Court does not disqualify Mr. Holmstead, the United States respectfully requests that the Court exclude the improper legal conclusions and unreliable, unsupported assertions in Mr. Holmstead's report and allow the United States opportunity to depose Mr. Holmstead regarding the remainder of his report, if it so chooses.

DATED: May 16, 2016

Respectfully Submitted,

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

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

CERTIFICATE OF SERVICE

I, Erin Carter Tison, hereby certify that on the 16th day of May, 2016, the foregoing Memorandum in Support of United States' Expedited Motion to Disqualify or Exclude Jeffrey Holmstead was served using the CM/ECF system, which will cause a copy to be served upon counsel of record.

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