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**

[REDACTED] REPLY IN SUPPORT OF THE UNITED STATES' NEW MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case is ripe for resolution now. Trial is unnecessary. Plaintiffs allege that the United States Environmental Protection Agency ("EPA" or "the Agency") has not fulfilled a 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). Plaintiffs lack standing to assert their claim. But if this Court concludes otherwise and finds that Plaintiffs have met their burden to establish subject-matter jurisdiction, then it should decide as a matter of law whether EPA has performed the duty in Section 321(a). The United States has identified 64 exhibits, consisting of EPA's Regulatory Impact Analyses ("RIAs"), Economic Impact Assessments ("EIAs"), and ongoing economic research, that constitute continuing evaluations of employment impacts and demonstrate EPA's performance of any duty in Section 321(a). If this Court agrees, then it should enter judgment for EPA. If not, then the Court should enter judgment against EPA and award Plaintiffs the only relief authorized by Congress: an order for EPA to perform that duty. *See Pancakes, Biscuits & More, LLC v. Pendleton Cty. Comm'n*, 996 F. Supp. 2d 438, 444 (N.D. W. Va. 2014) (entering summary judgment in favor of the non-moving party when there was no genuine issue of material fact and the non-movant was entitled to judgment as a matter of law) (Bailey, J.) (citations omitted).

While Plaintiffs have not cross-moved for summary judgment, their brief argues that EPA has failed to comply with Section 321(a) as a matter of law. For example, they argue that: EPA "is not doing anything to comply" with Section 321(a), Opp'n at 2; "EPA repeatedly refuses to conduct continuing evaluations of losses and shifts in employment," *id.* at 16; "EPA Has Not Complied With Section 321(a)," *id.* at 38; "Under EPA's Own Reading of Section 321(a), EPA is Not Complying," *id.* at 41; and "[n]one of the documents cited[] . . . raises a

reasonable inference of compliance with Section 321(a)," *id.* at 44.[1] Therefore, this Court should treat Plaintiffs' brief as a cross-motion for summary judgment.

Plaintiffs have not established a disputed issue of material fact.[2] Plaintiffs do not question this Court's authority to interpret Section 321(a) as a matter of law. Nor do they question the existence of the 64 exhibits identified by EPA. The Court need not make any credibility determinations to decide Plaintiffs' claim — the 64 exhibits speak for themselves, as does the statute, and a trial will not change the content of the exhibits. The Court should resolve this case on the United States' Motion.

ARGUMENT

I. PLAINTIFFS FAIL TO ADDRESS THE UNITED STATES' ARGUMENT THAT SECTION 321(A) DOES NOT IMPOSE A NON-DISCRETIONARY DUTY ON EPA.

In its opening brief, U.S. Br. at 20, the United States respectfully requested that this Court reconsider its decision that "the lack of a 'date-certain deadline' [was not] fatal" to Plaintiffs' non-discretionary duty claim under Section 304(a)(2), 42 U.S.C. § 7604(a)(2), ECF No. 40 at 13–14, because this Court relied on two non-binding district court decisions that interpreted statutes other than the CAA, neither of which held that a non-discretionary duty suit can proceed without a date-certain deadline. Plaintiffs fail to rebut this argument. Despite admitting that neither district court decision found a non-discretionary duty, *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563 (N.D. Tex. 1997); *Sierra Club v. Johnson*, No. C 08-01409 WHA, 2009 U.S. Dist. LEXIS 68436 (N.D. Cal. Aug. 5, 2009), Plaintiffs cite dicta in which courts expressed reluctance to adopt the date-certain deadline test. Opp'n at 24. But this dicta only proves the United States' point: no court has explicitly held that a non-discretionary duty exists absent a date-certain deadline. In contrast, the First, Second, and D.C. Circuits and three district

[1] The industry and state amici take the same tack. *E.g.*, ECF No. 275 at 3 (arguing that "EPA has failed to fulfill this statutory duty"), 6 (similar), 12 (similar); ECF No. 278 at 1 (similar).

[2] As demonstrated in footnotes 6–7, 16, 19, 21, 27, and 29, *infra*, none of Plaintiffs' suggestions that trial may be necessary evinces any disputed issue of material fact.

courts have all held that a date-certain deadline is required for a non-discretionary duty claim to proceed under the CAA. U.S. Br. at 21.

The other cases cited by Plaintiffs offer no counter to the United States' argument. *See* Opp'n at 25 and n.28. Contrary to Plaintiffs' assertion, the Ninth Circuit *rejected* a non-discretionary duty claim in *Kennecott Copper Corp. v. Costle*, holding that the CAA's citizen-suit provision "does not afford jurisdiction because the duty of the EPA" in that case was "discretionary." 572 F.2d 1349, 1353 (9th Cir. 1978).[3] The other cases Plaintiffs cite support the United States' argument. In *Conservation Law Foundation v. Reilly*, the court found "a nondiscretionary duty to assess all the facilities listed on the Docket *not later than April 17, 1988*," while still recognizing that "there is discretion granted to the Administrator as to the manner and extent of the evaluation." 743 F. Supp. 933, 942–43 (D. Mass. 1990) (emphasis added). Similarly, in *Alaska Center for the Environment v. Browner*, the Ninth Circuit described the Clean Water Act ("CWA") process at issue as being driven by date-certain deadlines: (1) state submissions to EPA are "due *no later than June 26, 1979*"; (2) "EPA . . . [must] review the state's submissions *within 30 days*"; and (3) if EPA disapproves the state's listing, "the agency must establish its own list . . . *within 30 days*." 20 F.3d 981, 983 (9th Cir. 1994) (emphases added).

Even if a date-certain deadline were not a firm prerequisite for a non-discretionary duty, Section 321(a)'s open-ended language is the antithesis of a "specific," "clear-cut" mandate from Congress. *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 276 n.3 (4th Cir. 1992) (citations omitted). Therefore, the United States respectfully requests that this Court reconsider its holding that a non-discretionary duty can exist even absent a date-certain deadline and instead follow the courts that have held otherwise.

[3] This Court already rejected Plaintiffs' argument that "emphasis on avoiding 'disruption of the Act's complex administrative process' . . . is simply not in accord with the 1990 Amendments," Opp'n at 25 n.27. *See* ECF No. 40 at 7 (citing *Kennecott Copper*).

II. PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN TO DEMONSTRATE ARTICLE III STANDING.

A. Plaintiffs Have Not Demonstrated a Concrete, Particularized Injury.

Plaintiffs have failed to demonstrate a concrete, particularized injury to their own interests. Plaintiffs *concede* that they have not attempted to quantify in a filing or discovery document any lost profits, layoffs, or mine closures allegedly resulting from the reduced market for coal. Opp'n at 29.[4] Because such information is uniquely in Plaintiffs' control and is necessary to demonstrate that Plaintiffs have suffered an injury-in-fact, this Court should expect Plaintiffs to produce such evidence at summary judgment. Instead, Plaintiffs argue that they "are not required to quantify a monetary injury to demonstrate standing" at summary judgment and that the irrelevant competitor-standing doctrine permits mere allegations of "difficult-to-quantify economic impacts." *Id.*[5] Indeed, none of Plaintiffs' cited authorities discusses the concept of market-based injury, which is what Plaintiffs have alleged. As the United States has explained previously, multiple cases have reasoned that the "breadth and complexity" of a market poses a "barrier to Article III standing." *See* U.S. Br. at 26 (discussing cases).

Plaintiffs' reliance on their purported expert, John Deskins, to satisfy their standing burden also fails for three reasons. First, Deskins' report is unsworn and therefore inadmissible.

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[4] Despite industry amici's argument that their "members report significant job losses" due to EPA activities, they fail to identify any job losses suffered by specific entities, demonstrate a causal connection of any sort between EPA's regulations and such alleged losses, and admit that there is an "*absence of such evidence*." ECF No. 275 at 2, 12 (emphasis added).

[5] Plaintiffs cite cases concerning the "doctrine of competitor standing," which is not at issue here because Plaintiffs do not challenge binding actions on themselves or their competitors. *See, e.g.*, *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014) ("EPA's action has caused injury because the *Summit* Directive has binding legal effect."); *Int'l Bhd. of Teamsters v. DOT*, 724 F.3d 206, 212 (D.C. Cir. 2013) ("[A]bsent the pilot program, [petitioners' competitors] would not be subject to increased competition from Mexico-domiciled trucks operating throughout the United States."); *Envtl. Def. Fund v. Marsh*, 651 F.2d 983 (5th Cir. 1981); 15 Moore's Federal Practice 101.40(c). Plaintiffs also erroneously cite *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1999) for the proposition that "a company's interest in marketing its product free from competition is sufficient for standing." Opp'n at 29. This language illustrated a specific example of "Congress' elevating to the status of concrete, *de facto* injuries that were previously inadequate in law," *Lujan*, 504 U.S. at 578 (citations and further quotations omitted), a situation not applicable here. Finally, Plaintiffs' citation to *White Oak Realty, LLC v. U.S. Army Corp of Engineers*, Civil Action No. 13-4761, 2014 WL 4387317 (E.D. La. Sept. 4, 2014), omits the court's finding that the regulatory requirement at issue applied *directly* to Plaintiffs, *id.* at *4.

E.g., *Edens v. Kennedy*, 112 F. App'x 870, 877 (4th Cir. 2004) (holding that an "[expert] report was not admissible on summary judgment" because "it was unsworn and was not accompanied by an affidavit affirming its authenticity") (citations omitted); *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993) ("It is well established that unsworn, unauthenticated documents cannot be considered on a motion for summary judgment.") (citations omitted). Second, the United States has moved to exclude Deskins' testimony as irrelevant to the issue of Plaintiffs' standing, and Plaintiffs have not met their burden of demonstrating otherwise. *See* United States' Third Motion in Limine to Exclude John Deskins, ECF No. 271 at 14–15. Third, as the United States illustrated in its Motion in Limine, Deskins offers nothing to bridge the gap between Plaintiffs' allegation of a reduced market for coal and a "concrete and particularized" injury to Plaintiffs. *Id.* Instead, Deskins admitted a "total lack of knowledge regarding Plaintiffs" and drew irrelevant job-loss conclusions based on his findings in Boone County, West Virginia, where Plaintiffs do not own any mines. *Id.* Even if Deskins' report could be admitted, the loss of coal jobs at mines or facilities not owned by Plaintiffs in a community where Plaintiffs do not own or operate any mines demonstrates, at most, injury to *others* and cannot form a sufficient basis for Article III standing.[6] *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[A] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.").

Plaintiffs' remaining arguments only reinforce their failure to demonstrate an injury-in-fact that is "concrete and particularized" and "actual or imminent" as opposed to "conjectural or hypothetical." *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 320 (4th Cir. 2002) (quoting *Lujan*, 504 U.S. at 560–61). For example, they cite a vague discovery response, Opp'n

[6] Plaintiffs also foreshadow that they "expect the evidence at trial to show further precipitous declines in the market for coal since these numbers were developed." Opp'n at 30. Plaintiffs cannot, however, rely on previously undisclosed evidence at trial to support their standing. *See, e.g.*, Fed. R. Civ. P. 37(c)(1) (failure to disclose evidence in a party's Fed. R. Civ. P. 26 disclosures or in response to a specific document request precludes use of such evidence at trial); *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 330 (4th Cir. 2011) (affirming district court's exclusion of an expert declaration when the disclosing party notified his opponent of the declaration "not only after the close of discovery but after [the opponent] had filed its motion for summary judgment").

at 29, and Rule 30(b)(6) testimony, *id.* at 30, but neither offers more specifics than their Amended Complaint. "[M]ere allegations" are insufficient to establish standing at summary judgment. *Lujan*, 504 U.S. at 561 (citations omitted). They also cite deposition testimony that [redacted] Opp'n at 30–31. [redacted] U.S. Br. at 28. At bottom, Plaintiffs are profitable and have not even attempted to demonstrate to what extent they would be more profitable if EPA performed additional employment evaluations. Because "there is an absence of evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett*, 477 U.S. 371, 325 (1986), the United States should be awarded summary judgment on the ground that Plaintiffs lack standing.

B. Plaintiffs' Alleged Economic Injury Is Not Fairly Traceable to EPA's Alleged Non-Performance of the Evaluations Described in Section 321(a).

In its opening brief, the United States demonstrated that Plaintiffs' alleged economic injury is not fairly traceable to EPA's alleged failure to perform employment evaluations for the following reasons: (1) Plaintiffs concede that their alleged injury is caused by EPA's regulation of electric utilities, not EPA's alleged failure to perform employment evaluations; (2) Plaintiffs' task of demonstrating standing is impeded because their alleged injury arises from the regulation of someone else; (3) numerous authorities reject theories of standing based on indirect, market-based economic harm; (4) Plaintiffs have identified a seemingly endless list of causes of a reduced market for coal; and (5) Plaintiffs' self-inflicted financial injuries from the ill-advised purchase of other coal companies further impedes their ability to establish traceability.

Plaintiffs' attempts to demonstrate traceability only serve to support the United States' arguments. For example, Plaintiffs cite this Court's prior holding that "Plaintiffs' *allegations*" were sufficient to demonstrate traceability at the motion-to-dismiss stage, Opp'n at 32 (emphasis added), but Plaintiffs can no longer rely on mere allegations for purposes of summary judgment. *Lujan*, 504 U.S. at 561. Similarly, Plaintiffs attempt to turn their evidentiary burden on its head by arguing that *EPA* has not offered sufficient evidence to undermine the Court's previous

findings. Opp'n at 32. Plaintiffs, not EPA, bear the burden of providing evidence sufficient to demonstrate their standing. *Frank Krasner Enters., v. Montgomery Cty.*, 401 F.3d 230, 234 (4th Cir. 2005) (holding that the party invoking federal jurisdiction bears the burden of establishing standing) (citing *Lujan*, 504 U.S. at 561).

Plaintiffs next provide a laundry list of examples of how EPA's regulation of electric utilities has allegedly led to a reduced market for coal, Opp'n at 32, but make no attempt to extend this alleged causal relationship to EPA's alleged non-performance of employment evaluations on the one hand or a concrete and particularized injury to Plaintiffs on the other. Plaintiffs also make inapt references to this Court's prior holding on redressability and cite to congressional inquiries, a Freedom of Information Act ("FOIA") request, discovery documents, and testimony from Jeffrey Holmstead and EPA witnesses for the proposition that Congress and EPA might take some kind of action if more job-loss data were available. *Id.* at 33–36. As explained in Section II.C, *infra*, none of Plaintiffs' purported "[a]mple evidence," *id.* at 36, changes the fact that the potential for congressional action is "inherently speculative." *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 147 (D.C. Cir. 2012), *aff'd in part and rev'd in part on other grounds, Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014)). Plaintiffs even incorrectly argue that their credit downgrades are irrelevant to the traceability inquiry. Opp'n at 36. The downgrades are relevant because they show that the *only* financial injuries to Plaintiffs for which there is *any* evidence are traceable to the Consol and Foresight purchases, not EPA's alleged non-performance of employment evaluations. U.S. Br. at 28, 10 ("The downgrade reflects our expectation that the company's cash flow generation will be under additional stress *due to* the recent cut in dividends by Foresight Energy GP LLC.") (quoting U.S. Ex. L) (emphasis added).

Finally, Plaintiffs make a last-ditch effort to demonstrate traceability by relying on their expert witnesses. Opp'n at 36. Plaintiffs' reliance on unsworn and inadmissible statements from their experts' reports is improper. *E.g.*, *Edens*, 112 F. App'x at 877. Moreover, the Court should disregard the reports and the testimony of Smith, Considine, and Deskins for the reasons set forth

in the United States' motions in limine. *See* ECF Nos. 266–71. Even if the expert reports were admissible, however, none of them, alone or together, demonstrates a causal relationship from Plaintiffs' unsupported allegations of economic injury, to a reduced market for coal, to EPA's regulation of electric utilities, and to EPA's alleged non-performance of employment evaluations. Plaintiffs have failed to demonstrate standing.

C. Plaintiffs Have Not Demonstrated That Their Alleged Injury Will Likely Be Redressed by an Order From This Court.

In its opening brief, the United States established that Plaintiffs had not demonstrated redressability for three reasons. First, Section 321(*d*) does not authorize EPA to modify or withdraw existing or proposed regulations based on EPA's performance of the employment evaluations in Section 321(a). U.S. Br. at 28–29. Second, the argument that a court order will convince Congress to modify EPA's prior decisions is inherently speculative. *Id.* (discussing *Coalition for Responsible Regulation*, 684 F.3d at 146–47). Third, Plaintiffs' identification of a nearly infinite set of independent causes for the alleged reduced market for coal has made it implausible for them to demonstrate redressability. U.S. Br. at 30.

Plaintiffs fail to rebut any of these arguments. First, their contention that the Court must have addressed the language in Section 321(d) because the parties briefed the issue in prior court filings, Opp'n at 37, is specious. Section 321(d) is explicit that EPA is not authorized to modify or withdraw its regulations based on the results of an employment evaluation,[7] so Plaintiffs

[7] Plaintiffs use snippets from staff emails in an attempt to weave a narrative about how "identified job losses lead to action within the agency" before EPA finalizes its RIAs. Opp'n at 34–36. Plaintiffs' argument is nonsensical. EPA's deliberations regarding what information should be presented in an RIA do not alter the regulations themselves. Moreover, Plaintiffs concede that EPA did not include certain information on plant closures and jobs losses in RIAs because the data were of poor quality, Opp'n at 35; *see also* Bates No. EPA6948986 (Pls.' Ex. 75) (emails from Dr. McGartland noting that a contractor's initial conclusions on plant closures and unemployment were "poorly grounded"), and that EPA updated its Guidelines for Preparing Economic Analyses in 2010 to set minimum standards for employment analyses to "present a complete picture of the effects" so as to avoid the "pitfalls" of a flawed analysis. Pls.' Ex. 73 at § 9.2.3.3–.4. Plaintiffs cannot seriously contend that EPA should subject its employment evaluations to a less rigorous economic analysis that relies on poor quality data. Even if EPA did so, it would not redress Plaintiffs' alleged injuries.

cannot establish that a ruling in their favor will actually redress their alleged injury.[8]

Second, Plaintiffs do not address the D.C. Circuit's decision in *Coalition for Responsible Regulation* that rejected the notion that redressability can hinge upon speculation that Congress will "enact corrective legislation." U.S. Br. at 28–29 (citations omitted). Instead, they double down on this hypothesis by pointing to occasional inquiries about Section 321(a) by members of Congress and speculation by Plaintiffs' expert witness, industry lobbyist Jeffrey Holmstead. Opp'n at 33–34. But the unpredictability of legislative action is the foundation of the D.C. Circuit's "serious doubts as to whether, for standing purposes, it is *ever* 'likely' that Congress will enact legislation *at all*." *Coal. for Responsible Regulation*, 684 F.3d at 146–47 (emphases added). Holmstead's report gets Plaintiffs no further. Because Plaintiffs failed to provide a sworn statement from Holmstead, his expert report is inadmissible. *E.g.*, *Edens*, 112 F. App'x at 877. Even if Holmstead's report were admissible, his "faith that Congress will alleviate [Plaintiffs'] injury is inherently speculative." *Coalition for Responsible Regulation*, 684 F.3d at 147.[9]

Third, Plaintiffs have not established that is likely, as opposed to speculative, that the events in the "lengthy chain of conjecture," *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 666 (D.C. Cir. 1996) (en banc), upon which their theory of redressability depends, will actually occur and redress their alleged injuries from a reduced market for coal. Indeed, Plaintiffs ask this Court to ignore the deposition testimony of their own Vice President of Human Resources, Paul Piccolini, who testified that he did not know how performance of the evaluations described in Section 321(a) could have any impact on Plaintiffs. Opp'n at 38. Plaintiffs' purported rejoinder — that other witnesses have "more direct knowledge" of the issue, *id.* — falls well short of

[8] Plaintiffs also attempt an end-run around Section 321(d) by citing the dissent in *Mingo Logan Coal Co. v. EPA*, No. 14-5305, 2016 WL 3902663 (D.C. Cir. July 19, 2016), but a dissenting opinion about an entirely different statutory provision has no application to the standing analysis at issue here.

[9] State amici engage in the same speculation. *See* ECF No. 278 (positing that if EPA had performed the evaluations described in Section 321(a), it "*may have allowed* state officials" to make legislative or regulatory changes) (emphasis added).

showing a likelihood of redressability. For example, one of Plaintiffs' witnesses hypothesized that an order compelling EPA to conduct employment evaluations might prompt legislative change, but otherwise could not identify any benefits with certainty. *See* Pls.' Ex. 62 at 167:19–169:24 [redacted]) (emphases added). Another witness speculated that new employment evaluations could aid Plaintiffs' lobbying efforts. *See* Pls.' Ex. 79 at 181:14–20. Plaintiffs' Rule 30(b)(6) witness stated that new employment evaluations might help the company communicate to employees why they are being laid off, *see* Pls.' Ex. 60 at 386:11–387:9,[10] and CEO Robert Murray gave an impenetrable response, *see* Pls.' Ex. 78 at 197:12–17.[11] In contrast, Plaintiffs' purported expert, John Deskins, has stated publicly that "it's *very unlikely*" that anyone will be "able to restore coal to where it was,"[12] and that even easing EPA regulations would not be enough "to offset the loss of market share to natural gas."[13] Plaintiffs have failed to satisfy their burden to demonstrate standing.

D. Plaintiffs Have Not Demonstrated an Informational or Procedural Injury That Is Fairly Traceable to EPA's Alleged Non-Performance of the Evaluations Described in Section 321(a) and Likely to Be Redressed by This Court.

The United States has requested that the Court reconsider its holding regarding procedural injury because the Court did not address Section 321(d) in resolving the United States' Motion to Dismiss for Lack or Article III Standing. U.S. Br. at 31. As explained *supra*,

[10] Plaintiffs' Rule 30(b)(6) witness also offered a statement that is no more specific than the allegations in Plaintiffs Amended Complaint. *See* Pls.' Ex. 60 at 383:4–15.

[11] [redacted]

[12] Nelson Schwartz, *Economic Promises a President Trump Could (and Couldn't) Keep*, N.Y. TIMES, (May 22, 2016) (emphasis added), http://www.nytimes.com/2016/05/22/business/economic-promises-a-president-trump-could-and-couldnt-keep.html?_r=1.

[13] David Koenig, *AP FACT CHECK: Trump's vow to create Appalachian coal jobs*, ASSOCIATED PRESS (May 5, 2016), http://bigstory.ap.org/article/2c55cd2496a14bdd98bcf84ccdb34810/ap-fact-check-bringing-coal-jobs-back-appalachia.

Plaintiffs' contention that the Court must have addressed the language in Section 321(d) because the parties briefed the issue in prior court filings, Opp'n at 26, is specious. Plaintiffs even quote the portion of the Court's opinion that found a procedural injury without addressing Section 321(d), which only underscores the United States' point. *Id.* at 26–27.[14]

The United States has also requested that the Court reconsider its holding that Plaintiffs have alleged an adequate informational injury because the Court did not reconcile its holding with the many cases that explain the difference between claims made pursuant to the FOIA and claims made under substantive statutes. U.S. Br. at 30. Without reconciliation, the Court's holding would allow for an informational injury due merely to the existence of FOIA for claims under many substantive federal statutes that involve incidental generation of information, a result that is squarely at odds with the limited nature of the informational standing doctrine. *See, e.g.*, *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 958 (7th Cir. 2005). Plaintiffs' respond that the statute in *Bensman* did not provide a right to information to the public, Opp'n at 27, which misses the point. They make no attempt to explain how this Court's invocation of FOIA to find a clear public right to information under Section 321(a) squares with *Bensman* or any of the other cases cited by the United States.

Finally, even if this Court does not reconsider its previous holdings, Plaintiffs have not demonstrated that they have been denied the benefit of employment evaluations because that information is contained in the RIAs and other documents identified in the Updated DeMocker Declaration. U.S. Br. at 31–32. Plaintiffs' only response is that these documents were not labeled "Section 321(a)" or specifically prepared to comply with Section 321(a). Opp'n at 27–28. But it is the *information* itself that Plaintiffs assert they have a right to, not labels or intentions. The Fourth Circuit has already ruled that "[i]t is not contradictory for EPA to argue that the documents nevertheless satisfy whatever obligation is imposed by Section 321(a)." *In re Gina McCarthy*, 636 F. App'x 142, 144 (4th Cir. 2015). Indeed, Plaintiffs do not even attempt to

[14] Plaintiffs previously conceded "that Congress prohibited the use of EPA's job evaluations to modify or repeal individual requirements under the Act." ECF No. 65 at 8 n.5.

address their Rule 30(b)(6) witness' acknowledgement that the RIAs evaluate employment impacts or his opinion that the RIAs are simply insufficient, which contradicts Plaintiffs' argument that they have been denied information altogether. U.S. Br. at 32. Thus, Plaintiffs' opposition provides no basis for this Court to conclude that Plaintiffs have met their burden to establish procedural or informational standing.

III. THE AGENCY HAS PERFORMED THE EVALUATIONS DESCRIBED IN SECTION 321(a) AS A MATTER OF LAW.

A. The Plain Meaning of Section 321(a) Supports the Argument That EPA Has Conducted Continuing Evaluations of Potential Loss or Shifts of Employment That May Result from the Administration and Enforcement of the Act and Applicable Implementation Plans.

The United States has argued that if Section 321(a) imposes a non-discretionary duty, the 64 exhibits submitted with the Updated DeMocker Declaration demonstrate EPA's performance of that duty. U.S. Br. at 32–44. Plaintiffs incorrectly argue that EPA has not provided a reading of Section 321(a) that would allow this Court to determine whether the 64 exhibits constitute performance. Opp'n at 44. On the contrary, the United States has explained that Section 321(a) provides EPA with considerable discretion in that the statute does not: (1) define the term "evaluation"; (2) prescribe with any specificity the scope, timing, frequency, form, content, or level of detail for evaluations; (3) require EPA to use any specific methodology when conducting evaluations; (4) require EPA to conduct employment evaluations for individual regulations; or (5) require EPA to evaluate potential employment impacts for any particular sector of the economy. U.S. Br. at 33. Nevertheless, in this case, it is ultimately the task of this Court to "explicate[] what Section 321(a) requires," *In re McCarthy*, 636 F. App'x at 144, if anything, by interpreting the language of the statute. In doing so, the Court "must follow the well-established canons of statutory interpretation," namely that where a "statute's meaning is plain, the sole function of the courts . . . is to enforce it according to its terms." ECF No. 40 at 9 (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004)) (further citations and quotations omitted). Looking to the plain meaning of the words in Section 321(a), this Court should

conclude that the 64 exhibits identified in the Updated DeMocker Declaration constitute performance of the evaluations described in Section 321(a).

As a first step, the RIAs, EIAs, and other documents identified by EPA constitute "evaluations." Webster's Dictionary defines the word "evaluate" as "to determine the significance, worth, or condition of usu[ally] by careful appraisal and study." Merriam-Webster's Collegiate Dictionary, def. 2 (11th ed. 2005); *see also* Oxford English Dictionary (2d ed. 1989) ("OED") (defining "evaluations" as "[t]he action of appraising or valuing (goods, etc.); a calculation or statement of value"). The 64 exhibits attached to the Updated DeMocker Declaration include detailed valuations of potential employment losses, shifts, and gains where feasible and qualitative appraisals regarding potential employment changes where not feasible. U.S. Br. at 32–44.

The RIAs, EIAs, and other documents identified by EPA are also "continuing" in nature. Webster's Dictionary defines the word "continue" as "to maintain without interruption," Merriam-Webster's Collegiate Dictionary, def. 1 (11th ed. 2005); *see also* Black's Law Dictionary Free Online Legal Dictionary (2d ed.) (defining "continuing" as "enduring; not terminated by a single act or fact; subsisting for a definite period or intended to cover or apply to successive similar obligations or occurrences").[15] Accordingly, this Court has recognized that the word "continuing" may provide EPA with discretion as to the timing of the evaluations. ECF No. 40 at 13.[16] EPA develops its RIAs and EIAs for each "successive" regulation, conducts analysis regarding its overall implementation and enforcement of the CAA, and continually seeks to improve its analyses going forward. U.S. Br. at 32–44. EPA's efforts are sufficiently "continuing" to constitute performance.

[15] http://thelawdictionary.org/continuing/.

[16] The Court should pay no heed to industry amici's ignorance of this Court's recognition that EPA may have discretion as to timing. *See* ECF No. 275 at 9 (arguing that the word "continuing" sets a deadline for the evaluations without identifying a date).

The RIAs, EIAs, and other documents identified by EPA also demonstrate that EPA evaluates "loss or shifts of employment." Webster's Dictionary defines "loss" as a "decrease in amount, magnitude, or degree" and "shift" as "to exchange or replace by another." Merriam-Webster's Collegiate Dictionary, def. 5 & def. 1, respectively (11th ed. 2005). While "employment" can mean an individual job, it also can mean an aggregation of jobs across an industry. *See, e.g.*, OED, def. 6 ("The number or proportion of employed persons within a population, industry, etc.").[17] The 64 exhibits attached to the Updated DeMocker Declaration evaluate both "losses" of employment (i.e., decreases in the amount or magnitude of jobs or job equivalents within an industry) and "shifts" of employment (i.e., exchange or replacement in the number of jobs or job equivalents from a given industry to another industry, which includes gains) using the most reliable metrics that the science allows. U.S. Br. at 32–44.

Section 321(a) also indicates that the evaluations must be prospective. Webster's defines "potential" as "existing *in possibility*" or "capable of development into actuality," Merriam-Webster's Collegiate Dictionary, def. 1 (11th ed. 2005) (emphasis added), and the Oxford English Dictionary defines it as "[p]ossible *as opposed to actual* . . . capable of coming into being or action." OED, def. 2 (2d ed. 1989) (emphasis added). Likewise, the word "may" is defined as "used to indicate *possibility* or probability." Merriam-Webster's Collegiate Dictionary, def. 1.c (11th ed. 2005) (emphasis added). The plain meaning of these words indicates that Congress envisioned that the "loss or shifts in employment" would not yet have occurred at the time of the evaluation, meaning EPA's evaluations must be prospective and predictive, not retrospective and forensic, as the amici States concede.[18] The 64 exhibits attached to the Updated DeMocker Declaration are primarily prospective in nature, evaluating

[17] http://www.oed.com/view/Entry/61378?redirectedFrom=employment#eid.

[18] *See* ECF No. 278 at 1 (alleging that performance of the evaluations described in Section 321 may allow them to "*anticipate* and mitigate" the effects of EPA's regulations), 4 (referencing "the *anticipated* impact") (emphases added).

"potential" employment effects that "may" result from EPA's administration and enforcement of the CAA, consistent with the language of Section 321(a).[19]

Aside from the discretion afforded to EPA to determine how the Agency will comply with the first clause of Section 321(a), *see* U.S. Br. at 45–46, the phrase "including where appropriate" precedes and modifies the phrase "investigating threatened plant closures and reductions in employment." 42 U.S.C. § 7621(a). Courts have interpreted phrases such as "where appropriate" to indicate that the identified activity is left to the discretion of the Administrator. *See Edwards v. Aurora Loan Servs., LLC*, 791 F. Supp. 2d 144, 153 (D.D.C. 2011) (holding that "where appropriate" is "a phrase that limits the Secretary's obligation and evinces a Congressional intent to afford discretion in the decision"); *see also NRDC v. EPA*, 489 F.3d 1364, 1372, 1375–76 (D.C. Cir. 2007) (upholding EPA's discretion based on the inclusion of the phrase "as appropriate" in a statute); *Consumer Fed'n of Am. v. HHS*, 83 F.3d 1497, 1504 (D.C. Cir. 1996) (holding that the phrase "shall, as appropriate," does not eliminate discretion). Therefore, Congress intended to leave to the Administrator the decision of whether to include an investigation of "threatened plant closures and reductions in employment" in an evaluation. Furthermore, the term "investigating" is not synonymous with the term "evaluations." Rather, investigations are a distinct feature in Section 321(a) that can be "included" in the evaluations, or not, "where appropriate." Thus, even if EPA has a non-discretionary duty to conduct "continuing evaluations" in Section 321(a), a non-discretionary duty claim cannot lie for EPA's

[19] Likewise, this Court should reject Plaintiffs' contention that EPA must evaluate the employment impacts of individual consent decrees *at the time* that EPA initiates enforcement, or of state implementation plans ("SIPs") *at the time* that EPA approves them. Opp'n at 47. Section 321(a) requires no such thing. So long as EPA accounts *at promulgation* for the possibility of future enforcement and the pollution-control choices that states might make when adopting SIPs to implement the National Ambient Air Quality Standards ("NAAQS"), EPA evaluates the "potential" employment effects of the enforcement and implementation of the CAA. EPA does this. *See generally* U.S. Br. at 32–44; *see also id.* at 37–38 (discussing RIAs for NAAQS and a federal implementation plan). If this Court determines that Section 321(a) requires EPA to undertake evaluations of each individual enforcement action at the time that EPA initiates enforcement or each individual SIP at the time of approval, such a determination would not, as Plaintiffs' suggest, "raise a question of fact" that is material to resolving their claim because EPA does not contend that it has performed any evaluations other than the 64 exhibits attached to the Updated DeMocker Declaration.

alleged failure to conduct wholly discretionary investigations of specific plant closures and related reductions in employment.

This Court should also reject Plaintiffs' attempts to ignore the language in Section 321(a) and add words that Congress did not. For example, Plaintiffs insist that Section 321(a) requires EPA to: (1) take a "*second* look at" agency actions "when one can calculate the damage (or lack thereof) to employment and the economy," Opp'n at 22 (emphasis added) (citations omitted), 38 (same); (2) conduct an "evaluation *after* promulgation," *id.* at 46 (emphasis added); and (3) provide "a continuing evaluation of regulations *while they are being implemented*," *id.* (emphasis added). Section 321(a) requires no such thing, however, because Congress used the words "potential" and "may result," which indicate that EPA would prospectively evaluate employment effects prior to (or contemporaneously with) an action.

Similarly, Plaintiffs argue that Section 321(a) requires EPA to: (1) "determine whether *specific* layoffs have already resulted or will" result, *id.* at 22; (2) provide "the *specificity* necessary to identify needs for effective worker and community assistance," *id.* at 46; (3) provide "information on locations of closures and *actual* employment dislocations," *id.*; and (4) "answer the question of *how many people* will be involuntarily terminated" due to its actions, *id.* at 43. (emphases added) (citations and internal quotations omitted). Again, Plaintiffs ignore Congress' decisions to: (1) use the word "potential," which by definition does not mean "actual"; (2) use the phrase "loss or shifts in employment," which is reasonably read to address consideration of aggregate employment changes, instead of words like "specific," "dislocations," or "layoffs"; and (3) use the phrase "where appropriate" to provide EPA with the discretion to decide to conduct investigations of threatened plant closures and related reductions in employment. Plaintiffs argue that "[t]he most EPA does is conduct proactive [sic] analysis of the employment effects of [its] rulemaking actions, which is simply not what [Section] 321(a) is about," Opp'n at 42 (citations and internal quotations omitted). On the contrary, that is precisely "what Section 321(a) is about," as the plain language shows.

Finally, many of Plaintiffs' arguments are merely challenges to the sufficiency of EPA's evaluations, which is not an issue before this Court. S*ee* Section III.E, *infra*. The only question before this Court is whether EPA has performed the employment evaluations described in Section 321(a) *at all*. Plaintiffs do not dispute that EPA's RIAs and other documents include evaluations of potential employment effects.[20] Therefore, EPA has performed any duty in Section 321(a), and the Court should enter summary judgment in the Agency's favor.

B. Section 321(a) Does Not Require EPA to Re-Implement EDEWS.

Rather than interpret the meaning of the words in Section 321(a), Plaintiffs attempt to bypass the statutory language by asking this Court to order EPA to reinstate a previous joint effort between EPA and the Department of Labor ("DOL") regarding employment. Specifically, Plaintiffs describe the development and operation of the Employee Dislocation Early Warning System ("EDEWS"), a joint program that began in 1971 (six years before Section 321(a) was enacted) and continued into the early 1980s. Opp'n at 4–11.[21] Plaintiffs contend that EDEWS was the inspiration for Section 321(a) and that by engaging in EDEWS, EPA complied with

[20] Industry amici's similar arguments regarding sufficiency should be disregarded because Section 321(a) does not require EPA's analyses to agree with those performed by industry. *See* ECF No. 275 at 6–7 (arguing that EPA has not conducted the "*in-depth* analyses" that industry would prefer), 11 (arguing that EPA must be ordered to undertake what industry contends would be "*accurate* reporting"), 13 (arguing that EPA has made "*flawed* estimates" because industry's estimates "far exceed" EPA's), 15 (accusing EPA of "*underestimating* the economic costs of its regulations" because industry reports higher numbers) (emphases added). Moreover, this Court should reject amici's claim that EPA "has a history of underestimating" economic costs based on two purported industry studies. *See* ECF No. 275 at 6–7, 15. This argument was not raised by Plaintiffs and cannot be introduced by amici. *See Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994). Further, the two purported studies offered by amici do not support their claim. *See* EIA, "EIA electricity generator data show power industry response to EPA mercury limits," (July 7, 2016), *available at* http://www.eia.gov/todayinenergy/detail.cfm?id=26972 (reporting environmental compliance costs that are $3.6 billion less than EPA's projection of $9.7 billion for 2015 and $4.3 billion less than NERA's projection of $10.4 billion for 2015); *see also id.* (reporting that only 20 GW of coal capacity retired between January 2015 and April 2016 (when MATS went into effect), not 50 GW as suggested by industry amici).

[21] In addition, Plaintiffs cite the report of their purported expert, Anne Smith, for her description of how the EDEWS operated at EPA during the two years that she worked at the Agency in the 1970s. Opp'n at 9, 39–40. Smith's unsworn statements are inadmissible. *E.g.*, *Edens*, 112 F. App'x at 877. Even if her testimony were admissible, her factual description of how EDEWS operated is irrelevant to the purely legal question of whether the 64 exhibits attached to the Updated DeMocker Declaration constitute performance of the evaluations described in Section 321(a).

Section 321(a) (even before it was enacted). The plain language of Section 321(a) does not, however, describe the EDEWS process or require EPA to reinstate EDEWS. Through EDEWS, EPA tracked plant closures and related job losses and reported this information to the DOL. Section 321(a) does not include the word "tracking" or require EPA to report information to the DOL, and it explicitly provides EPA with the discretion to determine whether threatened plant closure should be investigated. While it is possible that EPA's participation in EDEWS could constitute performance under the broad language of Section 321(a), Plaintiffs have not established — and cannot establish — that the statute's plain language forecloses all other means of performance.[22] Nothing in the history of EDEWS alters the language of Section 321(a) or the content of the 64 exhibits that EPA contends demonstrate its performance. This Court should reject Plaintiffs' attempt to read EDEWS into Section 321(a).

C. The Legislative History and EPA's Interpretation of Section 321 Do Not Require EPA to Conduct Investigations of Plant Closures.

Plaintiffs also attempt to bypass the statute's plain language by providing inaccurate accounts of the legislative history and Administrator McCarthy's public statements to support their argument that EPA must investigate threatened plant closures to comply with Section 321(a). This Court should reject Plaintiffs' attempts to read the phrase "where appropriate" out of the statute by quoting selective excerpts of these documents and statements. When read in context, none of them support Plaintiffs' argument.

When enacting Section 321, Congress sought to resolve disputes about "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" because some members were wary that companies were using the prospect of job losses as a form of "environmental

[22] Indeed, Plaintiffs fail to identify a single statement in the legislative history that Congress intended Section 321(a) to be built around EDEWS. They also fail to note that Congress explicitly identified EDEWS in discussing a different statutory provision — section 403(e) of Public Law 95-95 (1977 CAA Amendments), which directs *the Secretary of Labor* to study "potential dislocation of employees due to implementation of laws administered by the Administrator" and then to submit that study to Congress within a year after August 7, 1977. Pls.' Ex. 8 at 341–42.

blackmail" "to generate public pressure for the weakening of environmental standards." Pls.' Ex. 8 at 316-17 (emphasis added). This concern dates back to the 1971 Senate hearings on Economic Dislocation Resulting from Environmental Controls. *See* Pls.' Ex. 5 at 273 (identifying the "trigger" for the hearings as environmental blackmail and how to deter it).[23] Thorough readings of the 1971 hearing transcript and the legislative histories of Section 321 and its CWA predecessor show that Congress enacted Section 321 to provide EPA with the tools to combat ongoing threats of environmental blackmail, not to undermine EPA's ability to administer and enforce the CAA.

The testimony of public-interest advocate Ralph Nader illustrates Congress' concern with environmental blackmail. Plaintiffs note that Nader called for EPA 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." Pls.' Ex. 5 at 8. However, Plaintiffs fail to disclose that Nader also: called out industry for using environment regulations as "a convenient scapegoat" "for management to get itself off the hook and at the same time discourage future regulatory action at its more profitable locations";[24] asked Congress to authorize EPA to collect "company records on technology profitability, costs and employment and so forth — information not now available to him or the victims of corporate action"; and recommended a process by which EPA could investigate and hold public hearings on threatened closures and layoffs. *Id.* at 5–9. Industry representatives at the hearing resisted Nader's proposals, referring to them as "a whole administrative structure to bring in tons of accounting

[23] "Many of these shutdowns are going to be of plants that have been marginal from an economic standpoint for a long time. The cost of environmental pollution may be just another factor that tips them over into the red side of the balance sheet and forces a business decision to close. What I am suggesting is that if we restrain or inhibit the use of blackmail to slow down environmental cleanup, the remaining cases usually will be marginal cases in which a number of economic factors have a bearing upon a decision to close a plant or to shut down parts of it." Pls.' Ex. 5 at 306 (Statement of Sen. Muskie).

[24] Nader's skepticism echoes the United States' standing arguments. *See, e.g.*, Pls.' Ex. 5 at 7 (arguing that Congress should "let [industry] describe in detail the economics of the hardship and the absence of alternative courses of action," including "[c]osts, cost-benefits, alternative costs, profits per plant, and profits per company").

figures" that could "transform the whole economy into a regulated economy" and jeopardize companies' confidential financial information. *Id.* at 62.

The legislative history is consistent with EPA's historical interpretation of Section 321 and supports the United States' argument that EPA has satisfied any alleged non-discretionary duty in Section 321(a). Although EPA has not interpreted Section 321(a) to require the Agency to undertake any specific action, EPA has always interpreted Section 321(*b*), when read in light of the broad language of Section 321(a), to provide a mechanism for individual employees to alert EPA if their jobs are threatened or adversely affected by the CAA requirements and to request an investigation. 42 U.S.C. § 7621(b).[25] *See* Pls.' Ex. 48 at 1 (describing Congress' intent "to create a mechanism to investigate and resolve" "allegations that environmental regulations will jeopardize employment possibly in order to stimulate union or other public opposition to environmental regulations"); Ex. 49, Resp. 7 (same); Ex. 52, Resp. 4 (same); Ex. 53, Resp. 7 (same); Ex. 54, Resp. 19 (same and finding no records of any requests to investigate a particular claim of "regulation-induced plant closure"); and Ex. 55, Resp. 26 (same as Ex. 54). If EPA undertakes an investigation in response to a plant-employee request, EPA may conduct public hearings on the record where the parties, including the employer involved, must present information on the allegations. 42 U.S.C. § 7621(b). After a hearing, EPA will "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 [it] deems appropriate." *Id.*

The language in Section 321(b) is the same language that Plaintiffs identify in the legislative history regarding investigations of plant closures and ensuing layoffs, except Plaintiffs selectively exclude the words that demonstrate the connection. For example, Plaintiffs are

[25] Plaintiffs cite deposition testimony of EPA's Rule 30(b)(6) witness, James DeMocker, which also clarifies this distinction. Opp'n at 41–42 (citing Pls.' Ex. 64, Dep. Tr. DeMocker II (Aug. 10, 2016) at 297:20–298:11, 298:13–299:3, 312:2–312:14). Plaintiffs also cite Mr. DeMocker's testimony in an attempt to demonstrate EPA's non-compliance with Section 321(a). *See* Opp'n at 49. However, the cited testimony did not concern Section 321(a) at all, but instead concerned the identification of potential plant closures in a single RIA. *See* Dep. Tr. DeMocker II at 254:21–255:22, 260:16–25.

correct that the language in Section 321 closely mirrors a nearly identical provision in the CWA, 33 U.S.C. § 1367(e), that was enacted as part of the 1972 CWA amendments, Opp'n at 5. However, when Plaintiffs excerpt a statement from the CWA's legislative history describing investigations of "threatened plant closures or reductions," they omit the subsequent sentence, which states that "*[s]uch investigation* shall be conducted *on request* of an employee or representative of an employee." Pls.' Ex. 7 at 146 (emphases added); *see also* Pls.' Ex. 10 at 180 (describing Section 321 as "*authoriz[ing]* the Administrator to investigate, report and make advisory recommendations concerning *employer allegations* that requirements under the Clean Air Act will adversely affect employment") (emphases added). Thus, when considered in its proper context, the legislative history supports EPA's historical interpretation of Section 321.

Although this Court need not consider statements made by Administrator McCarthy to interpret Section 321(a), her statements simply reflect EPA's historical interpretation of Section 321, notwithstanding Plaintiffs contentions otherwise. For example, Plaintiffs selectively quote a letter from then-Assistant Administrator McCarthy to Representative Walden for the proposition that "'section 321 was intended' to address whether 'specific requirements, including enforcement actions, as applied to . . . individual companies, would result in lay-offs.'" Opp'n at 40 (quoting Pls.' Ex. 48). In full, the quote reads: "section 321 was intended to *protect employees in individual companies by providing a mechanism for the EPA to investigate allegations — typically made by employers —* that specific requirements, including enforcement actions, as applied to those individual companies, would result in lay-offs." Pls.' Exs. 48 (emphasis added), 49, & 52–56. As is the case with many of Plaintiffs' quotations, the omitted language is significant. Here, it illustrates that Administrator McCarthy was referring to Section 321 generally, not Section 321(a) specifically, and that her references were consistent with the language of Section 321(b), not Section 321(a).[26] Thus, the legislative history and statements of

[26] Plaintiffs take the same tack when citing a previous government brief, Opp'n at 41 (citing ECF No. 35 at 17–18), omitting language from the quoted passage that demonstrates that EPA has consistently interpreted Section 321 to provide the Agency with discretion when conducting investigations of plant closures. *See* ECF No. 35 at 17–18.

Administrator McCarthy do not support Plaintiffs' argument that Section 321(a) requires EPA to investigate plant closures (except where appropriate) or that EPA historically had such an interpretation.

D. EPA's Employment Evaluations Need Not Be Labeled as "Section 321(a)" to Constitute Performance.

The United States has conceded that the exhibits attached to the Updated DeMocker Declaration were not prepared explicitly for the purpose of complying with Section 321(a) or labeled as such. However, EPA's intent is irrelevant to the purely legal question of whether the exhibits constitute "continuing evaluations of potential loss or shifts of employment." U.S. Br. at 44–45. The Fourth Circuit agreed that EPA's position is "eminently reasonable." *In re McCarthy*, 636 F. App'x at 144.

Despite the Fourth Circuit's ruling, Plaintiffs nevertheless argue that the lack of a "Section 321(a)" label on EPA's RIAs and other documents is evidence that EPA has not performed the evaluations described in Section 321(a). Opp'n at 45; *see also id.* at 39. Similarly, Plaintiffs cling to findings by this Court that the Fourth Circuit rejected. Opp'n at 20 n.21 ("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."). Plaintiffs cannot simply ignore the Fourth Circuit's conclusion that it "failed to see the contradiction" and that "[i]t is not contradictory for EPA to argue that the documents nevertheless satisfy whatever obligation is imposed by Section 321(a)" because "the district court may yet determine that EPA's documents satisfy Section 321(a)." *In re Gina McCarthy*, 636 F. App'x at 144.[27]

[27] Accordingly, the United States' statements that it has not prepared evaluations for the purpose of complying with Section 321(a) or labeled them as such does not, as Plaintiffs contend, "demonstrate[] a genuine issue of material fact for trial," Opp'n at 45, on the legal issue of whether EPA has performed the evaluations described in Section 321(a). Nor do inadmissible legal conclusions from Plaintiffs' purported experts. *See id.*

E. The Sufficiency of EPA's Evaluations Is Not Before This Court.

The United States has supplied many legal authorities to demonstrate that the sufficiency of the Agency's performance is not a question before this Court. U.S. Br. at 45–46 & n.38. Plaintiffs argue that courts in two of the authorities cited by the United States, *Frey v. EPA* and *Alaska Center for the Environment*, decided the sufficiency of an agency's performance, and cite the report of their purported expert, Anne Smith, for her opinions on what Section 321(a) requires. Opp'n at 44–46. This Court should reject both arguments.

Plaintiffs' description of *Frey* does not rebut the Seventh Circuit's holding that the CAA citizen-suit provision "allow[s] review of claims regarding whether the EPA complied with required procedures under [the statute], but not claims regarding the substance of the EPA's decisions, which is a matter of discretion for the agency." U.S. Br. at 45 (quoting *Frey*, 751 F.3d 461, 469–70 (7th Cir. 2014)). Plaintiffs characterize *Alaska Center for the Environment* as having decided the sufficiency of EPA's performance, but the Ninth Circuit could not have decided that issue because EPA conceded it had not performed its non-discretionary duty. 20 F.3d at 983. These cases only support the United States' argument.

Under the principle set forth in *Frey*, this Court should reject Plaintiffs' attempts to challenge the sufficiency of EPA's RIAs and other documents using the report of their purported expert, Anne Smith. Opp'n at 45–46; *see also* Part III.A *infra*. Smith's unsworn statements in her expert report are inadmissible. *E.g.*, *Edens*, 112 F. App'x at 877. In addition, the United States has moved to exclude Smith's opinions regarding Section 321(a) because they are improper, unhelpful, and Smith lacks the qualifications to offer them. *See* ECF No. 267 at 4–8. Plaintiffs have not met their burden of demonstrating otherwise. Even if this Court admits Smith's testimony, this Court needs no assistance from an economist to decide a pure issue of law: whether or not the 64 exhibits attached to the Updated DeMocker Declaration constitute performance under Section 321(a).

IV. IF PLAINTIFFS PREVAIL, THE ONLY RELIEF AUTHORIZED BY CONGRESS IS AN ORDER REQUIRING EPA TO PERFORM THE ALLEGED DUTY IN SECTION 321(a).

If this Court finds that EPA has not performed a non-discretionary duty imposed by Section 321(a), the Court should order EPA to perform that duty and nothing more. Plaintiffs' other requested relief — enjoining EPA's ability to promulgate new regulations or to enforce existing regulations — is barred as matter of law by sovereign immunity, the jurisdictional requirements for challenging agency actions, and the plain language of the CAA itself. U.S. Br. at 46–49. The United States' opening brief established the foregoing with the support of eight Supreme Court cases, two Fourth Circuit cases, cases from the D.C. and Ninth Circuits, and the plain language of Section 321(d). *Id.*

Plaintiffs fail to address any of these authorities. At most, Plaintiffs argue that this Court has the authority to order EPA to perform any alleged duty in Section 321(a) with some degree of specificity. *See* Opp'n at 48 (discussing *Alaska Ctr. for the Env't*).[28] However, their argument should be rejected because they misrepresent *Alaska Center for the Environment* by omitting the Ninth Circuit's praise that the district court "acted with great restraint in requiring only the steps undeniably necessary to the development of [water quality standards] in Alaska to be accomplished by deadlines far more lenient than those contained within the CWA itself," and "was careful *to leave the substance and manner of achieving . . . compliance entirely to the EPA*." 20 F.3d at 986–87 (emphasis added). Plaintiffs' failure should come as no surprise: they have no legal basis to seek an injunction of EPA's administration and enforcement of the CAA

[28] Plaintiffs' fact-based arguments have no bearing the United States' legal arguments. Opp'n at 49–50. They rely on the unsworn, and therefore inadmissible, reports of purported experts Smith and Considine, *e.g.*, *Edens*, 112 F. App'x at 877, both of which should also be excluded as a matter of law, ECF No. 267 at 8–10, ECF No. 269 at 7–11. This Court should also reject Plaintiffs' reliance on testimony from the continued depositions of James DeMocker and Al McGartland conducted pursuant to the Court's July 20, 2016 Order [ECF No. 251]. Plaintiffs have mischaracterized the testimony without context. *See* Exs. 1–2 (providing more complete excerpts). Furthermore, the United States objected that the testimony did not pertain to "the late production of documents," and is therefore outside the scope of the Court's Order, as well as for other reasons stated in the United States' Objections to Plaintiffs' Amended Notice of Rule 30(b)(6) Deposition, attached hereto as Ex. 3.

to "preserv[e] the status quo." Opp'n at 50.[29] Accordingly, this Court should complete the task that Congress assigned to it and either enter judgment for EPA or against EPA with an order to perform the alleged duty and nothing more.

CONCLUSION

For the foregoing reasons, EPA respectfully requests that summary judgment be entered in its favor on one or more of three alternative grounds: (1) that Section 321(a) does not include a non-discretionary duty, (2) that Plaintiffs have failed to demonstrate standing, or (3) that EPA has performed any non-discretionary duty imposed by Section 321(a). Alternatively, if this Court finds that Plaintiffs have met their burden to establish subject-matter jurisdiction and that EPA has not performed any non-discretionary duty imposed by Section 321(a), then EPA asks the Court to enter judgment in favor of Plaintiffs and order EPA to perform the duty and nothing more. There is no genuine issue of material fact necessitating a trial. This case should be concluded now.

DATED: September 9, 2016

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[29] Accordingly, this Court should also reject Plaintiffs' contentions, Opp'n at 48–50, that they will be able to provide sufficient evidence at trial to justify their request for injunctive relief. Moreover, Plaintiffs' expectation that "the evidence at trial" will "show that Plaintiffs' ongoing and irreparable injuries" somehow justify "an injunction preserving the status quo" is not credible given their failure — and indeed refusal — to provide such evidence for purposes of summary judgment.

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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 9th day of September, 2016, a redacted copy of the foregoing Reply in Support of the United States' New Motion for Summary Judgment was filed under seal with the Clerk of the court, using the CM/ECF system, which will cause a copy to be served upon counsel of record.

I further certify that on the 9th day of September, 2016, unredacted copies of the foregoing Reply in Support of the United States' New Motion for Summary Judgment was served on Plaintiffs' counsel via secure FTP server.

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