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

MURRAY ENERGY CORPORATION, et al.,

Plaintiffs,

v. Civil Action No. 5:14-CV-39

Judge Bailey

GINA McCARTHY, Administrator,
United States Environmental Protection Agency,
in her official capacity,

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S PROPOSED COMPLIANCE PLAN AND SCHEDULE

This Court ordered EPA to provide a plan and schedule for compliance with § 321(a) of the Clean Air Act within two weeks. Instead, EPA proposes to spend the next two years thinking about economics in general, after which it may submit a plan to comply with § 321(a). This is in direct violation of the Court's order and yet another in a long line of tactics to avoid timely recognition of the job losses caused by EPA's war on coal until it is too late to stop them.

EPA's repeated disregard for its non-discretionary duty under § 321(a), failure to comply with the Court's order, and never-ending efforts to inflict irreparable injury on the coal industry justify injunctive relief that will ensure EPA's timely compliance, deter further evasion, and prevent further harm to Plaintiffs while EPA complies. Plaintiffs therefore request that this Court reject EPA's proposed compliance plan and issue a specific injunction that will require EPA to: (1) promptly comply with § 321(a); (2) evaluate and report to this Court the job loss and shifts that may be attributable to EPA's war on coal; and (3) cease publication of any new proposed and final rules in furtherance of the war on coal until EPA has complied with § 321(a).

Such an injunction is the only way to ensure EPA promptly complies with § 321(a) and to abate the ongoing injuries to Plaintiffs from EPA's continuation of the war on coal in the absence of the job loss information required by § 321(a).

I. EPA's "Proposal" Does Not Comply with this Court's Order.

This Court ordered EPA to submit two plans: one plan to comply with § 321(a) generally; and one plan to specifically evaluate the effects of its regulations on the coal industry. *See* Mem. Op. and Order Denying the United States' New Mot. for Summ. J. and Granting Summ. J. in Favor of the Pls. ("Opinion"), at 64 [Doc. 293]. EPA has done neither.

Section 321(a) of the Clean Air Act requires EPA to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement" of the Clean Air Act "and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement." 42 U.S.C. § 7621(a). One of § 321(a)'s distinguishing characteristics is its focus on specific worker dislocations resulting from EPA's actions. As this Court discussed in its opinion and order granting summary judgment, § 321(a) focuses on the "people, workers, communities, [and] industrial plants" that "are to be affected because we have resolved to protect the environment." Opinion at 41 [Doc. 293] (quoting *Economic Dislocation Resulting from Environmental Controls: Hearings Before the Subcomm. on Air & Water Pollution of the S. Comm. on Public Works*, 92d Cong. 1 (1971) ("*Economic Dislocation Hearings*") [Doc. 256-5]). While EPA is elsewhere required to research national, regional, and sector-wide economic impacts, § 321 requires EPA to answer the particular question of whether EPA is contributing to specific worker dislocations and plant and mine closures. *See Economic Dislocation Hearings* at 1 [Doc. 256-5]. No other provision requires this type of "'facility- and

community-specific at-risk assessment' of jobs." Opinion at 55 [Doc. 293] (quoting Expert Report of Anne E. Smith ("Smith Report"), at 10 [Doc. 256-11]).

To comply with § 321(a), EPA must both "track and monitor the effects of the Clean Air Act and its implementing regulations on employment," Opinion at 39 [Doc. 293], and evaluate "the cause of specific job dislocations." *Id.* at 51. In this way, EPA is both prospectively "investigat[ing] . . . threatened plant closures or reductions in employment allegedly due to requirements of the act," and retrospectively evaluating "any actual closures or reductions which are alleged to have occurred because of such requirements." *Id.* at 41 (quoting H.R. REP. NO. 95-294, at 316–17 (1977) [Doc. 256-8]); *see also* Smith Report at 5 [Doc. 256-11] (providing the "core" elements of a § 321(a) program).

Congress did not envision EPA using § 321(a) to push the envelope of the economic literature or create new science, as EPA proposes to do. When "closure is caused by pollution controls [requirements]," Congress found "there should be no difficulty in establishing that fact." Opinion at 43–44 [Doc. 293] (quoting [118 CONG. REC. 10,767 (1972) [Doc. 256-6]). Plaintiffs' expert, Jeffrey Holmstead, has similarly opined that "EPA has the expertise and resources to investigate actual and potential plant and mine closure, job losses and shifts in employment that result from CAA regulatory and enforcement actions." Expert Report of Jeffrey R. Holmstead ("Holmstead Report"), at 13 [Doc. 260].

Dr. Smith provided an example of how this could be done with EPA's current resources. Smith Report at 8–9 [Doc. 256-11]. Dr. Smith also provided historical background on EPA's own Economic Dislocation Early Warning System ("EDEWS"), which was used to identify at-risk workers, track actual worker dislocations, and identify their causes and potential community impacts during her tenure at EPA. As this Court found, the EDEWS program "constantly

monitored worker dislocations resulting from federal, state, and local enforcement actions, private civil actions, state implementation plans, and regulatory deadlines." Opinion at 45 [Doc. 293]. Through this program, EPA was able to identify threatened, actual, and avoided worker dislocations. Pls' Opp'n to Summ. J., at 9 [Doc. 256]. For each threatened and actual dislocation, EPA was able to: (1) determine the total plant employment; (2) determine the number of threatened or actual job losses; and (3) assess the workers and their local communities to determine the impacts of the worker dislocations at issue. *Id.* at 9–10. For example, EPA's system reported the following threatened and actual job losses and their impacts:

- All 950 workers at Rockwell International Corp. in Newton Falls, Ohio: "The impact of closure on the community could be severe." EDEWS Rep. 1975 Q3 [Doc. 257-4]
- All 140 workers at Falcon Coal Co. in Jackson, Kentucky: "[T]he local economy cannot easily absorb the layoffs because (1) Falcon is the largest employer in the area and (2) other mines are experiencing similar difficulties." EDEWS Rep. 1980 Q2 [Doc. 257-5]
- All 469 coal miners and 12–15 corporate staff members at Youghiogheny & Ohio's mine in Allison, Ohio threatened with dislocation in the absence of a preliminary injunction against Eastlake switching fuels to comply with EPA's sulfur dioxide regulations. EDEWS Rep. 1980 Q2 [Doc. 257-5]
- 4,400 out of 4,686 workers at U. S. Steel in Youngstown, Ohio: "Displaced workers will experience difficulty in finding new jobs in the area." EDEWS Rep. 1980 Q2 [Doc. 257-5]

- All 59 workers at West Dudley Mill in West Dudley, Massachusetts: "Laid-off workers are experiencing difficulty in finding new jobs in this rural area that suffers from high unemployment rates." EDEWS Rep. 1980 Q2 [Doc. 257-5]
- 300 out of 1,200 workers at Ethyl Corporation in Pasadena, Texas: "Some of the 300 workers have chosen to retire early and the local economy should be able to absorb the others." EDEWS Rep. 1980 Q3 [Doc. 257-6]
- All 35 workers at Maine Metal Finishing, Inc., in Gorham, Maine: "The unskilled workers might have difficulty finding work in this area." EDEWS Rep. 1981 Q2 [Doc. 257-8]
- All 280 workers at Zapata Haynie Corp. in Readyville, Virginia: "Since this plant is the primary employer in a community already suffering from high unemployment, its closure would have a significant impact on the community." EDEWS Rep. 1981 Q3 [Doc. 257-9]
- 185 out of 5,000 workers at U. S. Steel in Fairless Hills, Pennsylvania: "As U. S. Steel is the primary employer in the community, this curtailment will exacerbate an already serious problem." EDEWS Rep. 1982 Q3 [Doc. 257-11]

The Court did not order EPA to reinstate EDEWS or to adopt Dr. Smith's proposal in its entirety. Instead, EPA was given 14 days to submit its own plan and schedule for complying with § 321(a). Opinion at 64 [Doc. 293]. This Court made clear, however, that "EPA must fully comply with the requirements of § 321(a)" and must submit a plan to both comply with § 321(a) generally and to specifically evaluate the "effects of its regulations on the coal industry" due to "the importance, widespread effects, and the claims of the coal industry." *Id.* at 63–64.

EPA's response makes clear it has no intention of complying. There is nothing in EPA's "proposal" about actually evaluating the impacts of its actions on specific workers, plants, mines, and communities. By EPA's own admission, its proposal does not include "the precise timing, form, and manner" of any evaluation under § 321(a). United States' Response to the Opinion ("Response"), at 11 [Doc. 296]. There is no proposal to track threatened worker dislocations. Nor is there any proposal to "determine whether specific layoffs have already resulted or will in the future result from the war on coal" as this Court ordered. Opinion at 51 [Doc. 293]. Instead, EPA proposes to pivot off the topic of worker dislocations entirely and spend the next two years studying (or, more accurately, asking the EPA Science Advisory Board ("SAB") to study) vague economic questions that have nothing to do with EPA's ability to comply with § 321(a). *See* Response at 9–10 [Doc. 296].

EPA, for example, offers no explanation why it needs to spend two years learning how to "isolat[e]" CAA regulatory impacts from other economic and regulatory factors, conduct "economy-wide modeling," or identify "types of financial data and employment information that would be necessary to conduct more evaluations, at a greater degree of granularity than data currently available to EPA may allow," to comply with § 321(a). *Id.* This Court has already ruled that EPA's "proactive analysis of the employment effects of [its] rulemaking actions" is "simply not what § 321(a) is about." Opinion at 53 [Doc. 293]; *see also id* at 42 (distinguishing § 321(a) from macro-economic studies).

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

Opinion at 59 [Doc. 293]. EPA itself "used to do this" through its EDEWS program. Anne E. Smith Dep. at 156:10–12 (attached as Ex. A). And "[i]f anything, it should be easier to do now than it was back then." *Id.* Dr. John Deskins similarly used publicly available data to evaluate "whether 'EPA's rulemakings contributed to job losses in the coal industry' and whether 'the decline of coal production [can] be attributed solely to other factors such as a decline of exports or cheaper natural gas.'" Opinion at 57–58 [Doc. 293] (quoting Expert Report of John Deskins, Ph.D § 1 [Doc.281-6]). EPA's own expert, Dr. Charles Kolstad, who EPA chose not to use in support of summary judgment apparently because of his helpful testimony to Plaintiffs, also testified at his deposition that EPA can "certainly" determine "which plants have closed" because that is a matter of "public record," and can "go back and . . . get a better idea of the reasons for the closure," in part by examining "documents" "filed" with the state utility commissions "that address some of that already." Charles D. Kolstad Dep. at 126:18–25 [Doc. 263]. Dr. Kolstad further testified that this Court can "ask for a study of which mines were impacted by closed power plants," and that connecting mine impacts to power plants that have stopped burning coal "could be done," and this Court can further "order a report" "identifying what is due to EPA actions versus what is due to other actions." *Id.* at 294:1–295:4.

The most EPA can muster in response is a footnote comment, without citation to any actual evidence, that unnamed "experts," who EPA chose not to introduce at summary judgment, have opined on various challenges EPA may face in implementing § 321(a). Response at 10 n.11 [Doc. 296]. These "challenges," however, are the same arguments EPA raised in its motion in limine to exclude the testimony and report of Dr. Smith (Doc. 267), all of which have already been rejected by this Court. *See* Opinion at 60 [Doc. 293] (finding Dr. Smith's opinions, "to the

extent that this court relied upon those opinions," to be "relevant, reliable, and helpful to the Court"). EPA offers no new evidence to overturn those findings.

In fact, EPA offers no explanation for why it needs SAB review at all. EPA has already had the benefit of a team of experts in this litigation. Now EPA asks this Court to ignore the expert testimony in this case and instead allow EPA to appoint a panel of new experts, outside the Court's review, to think on matters of general economics and modeling for the next 887 days. This is not a good faith plan to comply with § 321(a) or to remedy Plaintiffs' injuries. EPA is not even able to say what it would actually ask the SAB. The best EPA can do is float topics EPA "may refine into charges" at some point. *See* Response at 9 [Doc. 296].

Moreover, while there is nothing in § 321(a) that requires input from the SAB, EPA fails to disclose that it has also already obtained SAB review of its EDEWS program. Sci. Advisory Bd., U.S. EPA, Economics in EPA, at 5, 38 (1980) [Doc. 259-2]. Specifically, after reviewing each of EPA's economic assessment programs, including EDEWS, the SAB found that EPA "can determine how much of a strain environmental requirements impose on an industry, locality, or segment of the population and can thus detect situations in which its regulations are causing hardship." *Id.* at 4.

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

best methods and practices that enjoy widespread acceptance in the environmental economics profession," *id.* at 1, and that "the guidance document contain an objective and reasonable presentation on the measurement of economic impacts, including approaches suitable to estimate impacts of environmental regulations on the private sector." *Id.* at 7.

Incredibly, Dr. McGartland, EPA's chief economist, improperly [redacted] Dr. Charles Kolstad and EPA labor economist Ann Ferris admitted in depositions that these midnight changes to the Guidelines were significant, troubling, and highly irregular. *See* Ann Ferris Dep. at 204:18–24 (attached as Ex. G) (testifying she had "been told that peer review is required for updating the guidelines"); *id.* at 228–229 (testifying it "seems potentially significant in the sense that it was previously identified as a methodology and isn't identified as a methodology in the 2010 document"); Charles D.

Kolstad Dep. at 255:7–19 [Doc. 263] (testifying that the Guidelines are "an important document, and probably things like that should be cleared with the SAB"); *id.* at 255:24–25 ("you would think one would be really careful about doing a switch").

EPA's rejection of SAB-approved language in the guidelines undermines EPA's request to consult the SAB before complying with § 321(a) and providing relief to Plaintiffs. At this point, the SAB has examined EPA's "analytic tools and methodologies appropriate to undertaking the evaluations described in Section 321(a)" on no less than three occasions. Response at 2 [Doc. 296]. The SAB reviewed EPA's 321(a)-compliant system in 1980, and the SAB reviewed EPA guidelines for conducting plant closure and job loss evaluations in 1999 and 2008. EPA offers nothing to explain what more the SAB has to offer on these questions, and EPA certainly offers this Court nothing to show that consulting the SAB is necessary for EPA to comply with § 321(a).

Even with its requested two-year period to ponder the nation's economy with the SAB, EPA's filing makes no commitment to ultimately comply with § 321(a). EPA merely states that this will be the "first step" in a process of inventing an entirely new "approach to conducting the evaluations." *Id.* EPA intends to add further "step[s]" and "interval[s]" that EPA could not come up with "in the time allotted in the October 17 Order." *Id.* In other words, given more time, EPA will conjure even more excuses for deliberation and delay.

Section 321(a) is not a blank check to develop broad economic models or endlessly gather unnecessary financial data. It is a basic requirement that EPA provide "relevant [and] timely information on locations of closures and actual employment dislocations." Opinion at 56 [Doc. 293]. EPA proposes nothing less than to be permitted to continue its unlawful and "cruel" "policy" of refusing to investigate, identify, and assess the worker dislocations resulting from the

administration and enforcement of the Clean Air Act indefinitely. *Id.* at 42 (quoting *Economic Dislocation Hearings* at 6 [Doc. 256-5]). Thus, EPA's proposal entirely belies its counsel's claim that the agency is "committed to performing additional evaluations as soon as possible in light of the October 17 Order," Response at 11 [Doc. 296], gives no hint that EPA appreciates the human costs of further delay, and does not comply with this Court's order.

II. EPA's Continuing Refusal to Comply with § 321(a) is Injuring Plaintiffs.

Since President Barack Obama announced "a sustained all-hands-on-deck effort" to pursue "a new energy economy" in 2008,[1] EPA has aggressively used its authority under the Clean Air Act to reshape the market for coal. *See* Opinion at 29–32 [Doc. 293]. By January 2010, these efforts included a "comprehensive strategy"[2] for the power sector that included a "series of regulatory actions" to affect the "expenditure of investor, shareholder, and public funds" and "the power sector in particular." Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone: Proposed Rule, 75 Fed. Reg. 45,210, 45,227–29 (Aug. 2, 2010) [Doc. 259-6]. These rules were further timed to encourage utilities to invest in fuels other than coal. *See id.* at 45,228 (key to achieving greater reductions is to propose additional regulations during the "the planning and investment horizon for compliance with [earlier] rules"). At the same time, EPA actively pursued Clean Air Act enforcement actions that would allow it to obtain further concessions from utilities to "retire, repower, or retrofit" coal-fired utilities. *See* U.S. Resp. to Pls.' Second Set of Disc. Reqs. 24–32 [Doc. 259-3] (listing 16 consent decrees covering 54 power plants and 142 generating units entered into by EPA since 2009).

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[1] Barack Obama, President-Elect, Remarks in Chicago Announcing Energy and Environment Team (Dec. 15, 2008) [Doc. 259-4].

[2] Memorandum from Lisa P. Jackson, Adm'r, U.S. EPA, to All EPA Employees (Jan. 12, 2010) [Doc. 259-5].

The results have been devastating to the coal industry. Mines have closed, coal companies have gone bankrupt, and miners have lost their jobs. *See* FY 2016 EPA Budget: Hearing Before Subcomms. of the H. Comm. on Energy and Commerce, 114th Cong. 157–64 (2015) [Doc. 259-15]. At summary judgment, Dr. Deskins explained how "EPA's Clean Air Act regulations have and will continue to affect the market for coal," including contributing to a "national reduction in coal production levels between 2008 and 2015 of 24 percent" and significant job losses in the coal industry and in communities dependent on coal. Opinion at 30–31 [Doc. 293]. Plaintiffs' executives further testified in their depositions about the "[d]epressed marketplace, low coal prices, [and] less demand for coal" that are leading to a "destruction of our markets." *Id.* at 32 (quoting Robert Edward Murray Dep. 161:24–162:18 [Doc. 58, Ex. 62]). During the pendency of this case, Murray Energy sought to stay one of the cornerstones of EPA's war on coal—the so-called Clean Power Plan—because of the irreparable injuries that one rule alone was imposing pending the outcome of litigation over the rule's legality, which the Supreme Court granted. *See Murray Energy Corp. v. EPA*, Order 577 U.S. 15A778 (Feb. 9, 2016) (attached as Ex. H).

EPA knew for years that its war on coal would result in widespread worker dislocations in the energy sector. [redacted] At the same time, EPA has gone to extreme lengths to avoid publicly recognizing the job losses from its war on coal. EPA has repeatedly rebuffed Congressional requests that EPA conduct continuing evaluations of the loss and shifts in employment resulting from its actions, both in general and with respect to the war on coal. *See* Opinion at 46–49 [Doc. 293]. Moreover, EPA readily took advantage of the absence of

information on worker dislocations to craft its own story that EPA's actions were having no appreciable effect on workers, claiming the agency's "standards do not require any facility to retire" and "companies making the business decision to retire a facility are making that decision based on multiple factors, including market conditions in the power sector." Bates No. EPAII03203932 (attached as Ex. I). EPA officials even tried to compile "lots of stuff" purportedly showing that job losses resulting from EPA regulations are a "myth." Bates No. EPA6022999 (attached as Ex. J). Meanwhile, EPA focused substantial energy on "developing a communications strategy to use claims about green jobs to defend and promote EPA regulations." Holmstead Report at 13 [Doc. 260]. Thus, instead of investigating job losses, the agency dismissively insisted that legitimate reports and concerns about worker dislocations were nothing more than a "PR scam," Bates No. EPAII02246176 (attached as Ex. K) or "extremely misleading[]" and "outrageous," Bates No. EPAII03203931–32 (attached as Ex. I), while exhorting employees to "push back very hard" on reports submitted by the utilities themselves. Bates No. EPAII04809661 (attached as Ex. L).

The motivation for EPA's refusal to comply with § 321(a) is clear. As this Court found, one of the purposes of § 321 "is to protect industries, employers and employees from the untoward effects of prior EPA actions." Opinion at 33 [Doc. 293]. Compliance with § 321(a) would therefore "provide information which could lead the EPA or Congress to amend" its utility strategy. *Id.* at 29. As this Court also noted, an accurate picture of the worker dislocations and negative community impacts of EPA's reshaping on the nation's power sector could have convinced "the EPA, Congress, and/or the American public to relax or alter EPA's prior decisions." *Id.* at 32. And "[e]ven if EPA were to refuse to improve its regulatory activities to account for the actual employment effects of its existing regulations," an "accurate evaluation of

substantial job loss would certainly cause heightened congressional oversight of EPA regulatory activities and provide critical information during the congressional appropriations process with respect to EPA." *Id.* Accordingly, EPA's refusal to comply deprived Plaintiffs of crucial information about the utility strategy that would have served to "protect" the coal industry and its "employers and employees from the untoward effects of" the utility strategy, *id.* at 33, and insulated EPA from the risk of having to "scale back at least some of its regulatory actions." Holmstead Report at 4 [Doc. 260].

As explained by Mr. Holmstead, the results of EPA's monitoring of threatened and actual losses and shifts in employment would have given Plaintiffs and the public "a powerful tool in regulatory advocacy and congressional oversight." *Id.* EPA's refusal to comply with § 321(a) withheld this "powerful tool" from Plaintiffs, the States, and Congress, to their detriment and the agency's benefit. "[W]hen plant shutdowns are attributed to environmental requirements, 'workers and other people of the community have the right to know the truth.'" Opinion at 43–44 [Doc. 293] (quoting 118 CONG. REC. 10,767 (1972) [Doc. 256-6]). Armed with "the truth" admitted by EPA against the agency's own interests, Plaintiffs and their employees could have better protected themselves and their workers and made more accurate predictions about the future.

III. Plaintiffs Request that the Court Order EPA to Promptly Comply with § 321(a) of the Clean Air Act, Remedy its Refusal to Evaluate the Job Losses from its War on Coal, and Abate the Continuing Harm to Plaintiffs.

This Court "'has broad latitude in fashioning equitable relief when necessary to remedy an established wrong.'" Opinion at 61 [Doc. 293] (quoting *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994)).

In light of this Court's summary judgment opinion and order, EPA's lengthy history of avoiding its responsibility under § 321(a), including this Court's direct order for a plan and

schedule to comply, and the serious and ongoing harm to Plaintiffs from EPA's ability to continue the war on coal without providing the required job loss evaluations, Plaintiffs respectfully request that the Court issue the following injunctive relief:

1. To address EPA's continuing failure to evaluate the loss and shifts in employment resulting from its war on coal:

   a. Prepare and submit to the Court a § 321(a) evaluation of the coal industry as expeditiously as practicable and by no later than March 1, 2017, which evaluation shall:

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

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

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

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

   or

   b. Submit to Plaintiffs, provide to the public on EPA's website, and file with the Court a true, full, accurate, and appropriate account of the coal power plant and coal mine worker dislocations that have already resulted from EPA's administration and enforcement of the Clean Air Act since 2009, which shall:

      (i) identify all of the coal generating unit retirements, fuel switches, and coal power plant closures that resulted from the Transport Rule, the Boiler MACT Rule, the Utility MACT Rule, the 2010 Sulfur Dioxide NAAQS, the 2010 Particulate Matter NAAQS, the 2015 Ozone NAAQS,

applicable state implementation plans, the Clean Power Plan, the carbon NSPS proposals and final carbon NSPS rule for power plants, citizen suits against utilities and independent power providers, and EPA enforcement actions and initiatives, including particularly the Largest Sources Initiative; and

(ii) identify all of the resulting coal mines that have closed and coal miners that have been laid off.

2. To address EPA's continuing violation of § 321(a):

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

or

b. Order EPA to implement a system that identifies at the earliest possible time threatened and actual industrial plant closings or curtailments and the attendant worker dislocations resulting from federal, state, and local enforcement actions, private civil actions, state implementation plans, and regulatory deadlines under the Clean Air Act and that:

(i) identifies the specific plants, their locations, and the number of threatened or actual worker dislocations;

(ii) evaluates the workers and their local communities to determine the threatened and actual impacts of the loss and shifts in employment resulting from the administration and enforcement of the Clean Air Act, including:

a) the ability of workers to find new jobs;

b) the state of the local economy;

c) the importance of the facility to the community;

d) any other local conditions that will be exacerbated by the closure or worker dislocation;

e) whether the closure or worker dislocation will have a disproportionate impact on an environmental justice community or sensitive subpopulation.

Order EPA to track the progress of the threatened closures and curtailments either until the threat is eliminated or the plant actually closes or production is actually curtailed; and

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

3. To remedy the ongoing injury to Plaintiffs from EPA's failure to comply with § 321(a) and to ensure compliance with the Court's orders:

Stay the effective date of pending regulations under the Clean Air Act for the coal industry and coal-fired utilities until EPA complies with the Court's orders; and

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

Plaintiffs submit that this requested relief is equitable and appropriate because EPA can promptly comply with § 321(a), EPA has shown it will not comply absent a specific injunction; and because a stay of EPA's war on coal will ensure compliance by the agency and mitigate the further injuries to Plaintiffs from EPA's past on ongoing non-compliance.

A. EPA Can Promptly Comply with Section 321(a).

This Court has made extensive findings based upon voluminous evidence showing that EPA has the ability, resources, and tools to immediately evaluate the loss and shifts in employment from its war on coal and to continuously evaluate the impact on workers and communities from its administration and enforcement of the Clean Air Act. EPA does not identify any reason why it cannot begin now. EPA has itself conceded that its EDEWS program "tracked plant closures and related job losses" from "1971 . . . into the early 1980s" and that reinstatement and implementation of this system "could constitute performance" with "Section

321(a)." Reply in Supp. of the United States' New Mot. for Summ. J. at 17–18 [Doc. 280]. Indeed, [redacted] *see also* Ann Ferris Dep. at 106 (attached as Ex. G) ("[T]he methodology that was used previously could be reasonably applied."). EPA itself asked this Court to order it to "perform the duty" required by § 321(a). Opinion at 60–61 [Doc. 293] (quoting Mem. in Supp. of Summ. J. at 46 [Doc. 205]).

B. EPA has shown that it will not comply without a specific injunction.

In the case of extended noncompliance, it is proper for "EPA . . . to be directed to take specific steps" "in order to bring about any progress toward achieving the congressional objective[]." *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994).

This Court's Opinion described in detail EPA's lengthy history of obfuscation and refusal to comply with § 321(a). Opinion at 46 [Doc. 293]. EPA claims to have lost almost all records of the original EDEWS program. *Id.* It has broadly and repeatedly repudiated its obligation to continually evaluate loss and shifts in employment before Congress. *Id.* at 46–49. EPA has repeatedly told Congress it believes complying with § 321(a) offers only "limited utility." *See, e.g.*, Letter from Gina McCarthy, Ass. Adm'r, U.S. EPA to Sen. Inhofe (Oct. 26, 2009) [Doc. 260-1]. [redacted] And EPA has fought vociferously in this litigation to avoid its § 321(a) responsibilities, including offering a "new interpretation of

§ 321(a) arising exclusively in this litigation." Opinion at 50 [Doc. 293]. EPA's latest "proposal" represents yet another attempt to avoid its duty to conduct continuing evaluations of potential loss or shifts of employment by bringing in the SAB, where it will be able to consider how to evaluate loss and shifts in employment indefinitely without actually evaluating a thing. It is hard to imagine a more calculated refusal to comply with a non-discretionary duty. EPA's clear reticence to comply coupled with eight years of refusal to comply—even in the face of Congressional and public pressure and this citizen suit—justifies an order detailed enough to ensure compliance.

C. A stay of EPA's war on coal is appropriate to ensure compliance and mitigate the further injuries to Plaintiffs.

"[I]njunctive relief should be designed to grant the full relief needed to remedy the injury to the prevailing party." *Hayes v. N. State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir.1993). This includes the right to issue nationwide injunctions if necessary to afford relief to the prevailing party. *See Virginia Soc. for Human Life v. FEC*, 263 F. 3d 379, 393 (4th Cir. 2001), *abrogated on other grounds as recognized in Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 550 n. 2 (4th Cir. 2012) (citing *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1988)). Nonetheless, injunctive relief should also "not go beyond the extent of the established violation," *Hayes*, 10 F.3d at 217, and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702, (1979). Thus, "an injunction should be carefully addressed to the circumstances of the case." *Virginia Soc. for Human Life*, 263 F. 3d at 393.

When the violation deprives the agency of information it was required to consider, it is proper to enjoin the agency from further action until it has the necessary information. In suits for failure to conduct an environmental impact assessment under the National Environmental

Protection Act ("NEPA"), for example, "the remedy invariably sued for and frequently granted is an injunction which prohibits the particular agency from proceeding with the project in question until an environmental impact statement is filed that meets the requirements of the Act." Frank P. Grad, 4 Treatise on Environmental Law, § 9.04[2][b] (Matthew Bender 2000); *see, e.g.*, *Crutchfield v. United States Army Corps of Eng'rs*, 192 F. Supp. 2d 444, 454 (E.D. Va. 2001) (enjoining continuation of a wastewater project until an environmental assessment could be completed because "it is beyond question that 'NEPA is designed to influence the decision-making process; its aim is to make government officials notice environmental considerations and take them into account.'"); *Massachusetts v. Watt*, 716 F.2d 946, 952–53 (1st Cir. 1983) (explaining that NEPA seeks to "present[] government decision-makers with relevant environmental data before they commit themselves to a course of action[] [because] once large bureaucracies are committed to a course of action, it is difficult to change that course . . .") (emphasis omitted).

Moreover, where the government has failed to provide adequate procedure, it is appropriate to enjoin enforcement until the government cures the deficiency. In *Elliott v. Weinberger*, 371 F. Supp. 960, 974 (D. Haw. 1974), for example, upon finding that the Social Security Administration had not provided adequate notice of its recoupment proceedings and enjoining the Secretary to submit "revised rules, regulations, and procedures which [the Social Security Administration] will adopt," the district court "restrained and enjoined" the Administration "from reducing, terminating, or suspending social security old age and disability benefits accruing to Plaintiffs and their class without affording them an opportunity for a hearing before any reduction, termination, or suspension is effectuated." *Id.* This relief was ultimately affirmed by the Supreme Court in *Califano*, 442 U.S. at 704–706. Similarly, in *Richmond*

Tenants Organization, Inc. v. Kemp, 753 F. Supp. 607, 608 (E.D. Va. 1990), after finding that the Department of Housing and Urban Development ("HUD") was evicting public housing tenants without proper notice and a hearing, the district court enjoined HUD from proceeding with further evictions nationwide, except in "exigent circumstances." This was originally issued as a preliminary injunction, but after granting summary judgment for the plaintiffs, it was converted to a permanent injunction, which was then affirmed by the Fourth Circuit in *Richmond Tenants Organization, Inc. v. Kemp*, 956 F. 2d 1300, 1302 (4th Cir. 1991).

Injunctive relief is also particularly warranted when needed "to combat a persistent pattern of misconduct violative of plaintiff's rights," including where the defendant's "past and present misconduct indicates a strong likelihood of future violations." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990); *citing Green v. McCall*, 822 F.2d 284, 293 (2d Cir. 1987) (permanent injunctive relief appropriate in light of U.S. Parole Commission's repeated failure to comply with preliminary injunction and with its own procedures in past).[3]

In this case, EPA has evaded and delayed compliance with its nondiscretionary duty for years, bobbing and weaving around requests from Congress, filing motion after motion in this case, failing to cooperate in discovery until ordered to do so, and now sidestepping this Court's direct order to provide a plan and schedule for compliance. There is also a strong motivation for continued delay, as EPA seeks to implement and entrench its anti-coal policies before the next

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[3] *See also Allee v. Medrano*, 416 U.S. 802, 815 (1974); *Hague v. CIO*, 307 U.S. 496 (1939); *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985), modified on other grounds, 796 F.2d 309 (9th Cir. 1986). *See also Rizzo v. Goode*, 423 U.S. 362, 375 (1976) ("The numerous incidents of misconduct . . . established beyond peradventure not only a 'persistent pattern' but one which flowed from an intentional, concerted, and indeed conspiratorial effort to deprive the organizers of their First Amendment rights . . . ."); *United States v. Hughes Memorial Home*, 396 F. Supp. 544, 552 (W.D. Va. 1975) (stating that "since equity looks to the future, injunctive relief is . . . appropriate, even in the absence of a showing of past violations, where the defendants" conduct or statements threaten future violations."); *Crutchfield v. United States Army Corps of Eng'rs*, 192 F. Supp. 2d 444, 454 (E.D. Va. 2001).

Administration takes over. EPA has developed numerous rules with the knowledge that they would, individually and combined, devastate the coal industry and cause irreparable harm to those that § 321(a) was designed to protect.

Given the scope of the issues involved, including that § 321(a) requires continuing evaluation of loss and shifts in employment from EPA's entire administration and enforcement of the Clean Air Act and applicable implementation plans, and that EPA's war on coal is affecting coal mining communities across the country, a national injunction is warranted. *See Bresgal*, 843 F.2d at 1170–71 (nationwide injunction appropriate if such broad relief is necessary to give prevailing parties the relief to which they are entitled).

The requested injunction is also not broader than necessary to redress Plaintiffs' injuries. Plaintiffs propose that the injunction remain in effect only until EPA provides the information it was required to produce for the coal industry and such assurances as the Court finds appropriate that EPA will continue to comply with § 321(a) going forward. EPA has the resources and tools to take these steps immediately. For the EDEWS, for example, EPA was able to publish newly compiled evaluations on a quarterly basis. In addition, Plaintiffs propose that the injunction be limited to proposing and finalizing new rules, as those that have already been finalized are subject to separate judicial review. Thus, the requested injunction removes EPA's incentive to continue avoiding compliance with § 321(a) and abates EPA's ability to continue to inflict new and irreparable injury on Plaintiffs and the rest of the coal industry while placing no more burden on the agency than necessary to cure its longstanding refusal to comply with § 321(a) and avoiding conflict with other courts.

IV. Conclusion.

EPA's proposal makes it abundantly clear the Agency has no intention of following the Court's Order or complying with § 321(a). Instead, EPA will continue to drag its feet and inflict pain and financial ruin on Plaintiffs and our Nation's coal miners, even in light of a direct and clear order from this Court to comply. Plaintiffs therefore respectfully request that this Court impose strict deadlines on EPA to comply, order EPA to specifically evaluate the loss and shifts in employment it has contributed to in the coal industry, and enjoin EPA from imposing further regulatory burdens on the use of coal until it has complied, as set forth in Plaintiffs proposal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2016, I electronically filed a redacted copy the foregoing with the Clerk of the Court using the CM/ECF system, which will cause a copy to be served upon counsel of record, and I electronically sent counsel for defendant an unredacted copy using a secure file transfer protocol.

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