Nos. 16-2432(L), 17-1093, 17-1170

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MURRAY ENERGY CORPORATION et al.,
Plaintiffs-Appellees,

-v.-

ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant,

MON VALLEY CLEAN AIR COALITION et al.,
Applicants-in-Intervention-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Case No. 5:14-cv-00039 (Hon. John Preston Bailey)

PRINCIPAL BRIEF OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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STATEMENT OF JURISDICTION

A. Jurisdiction of the district court

Murray Energy Corporation and related companies (collectively, "Murray") filed suit under Section 304(a)(2) of the Clean Air Act ("CAA" or "Act"), which gives district courts jurisdiction to hear claims filed against the Administrator of the United States Environmental Protection Agency ("EPA") "where there is alleged a failure of the Administrator to perform any act or duty under this [Act] which is not discretionary." 42 U.S.C. § 7604(a)(2). Murray claimed that EPA failed to act under Section 321(a) of the CAA, which directs EPA to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the [Act] and applicable implementation plans." *Id.* § 7621(a). The district court lacked jurisdiction for two reasons: Section 321(a) does not impose a nondiscretionary duty, *see infra*, pages 14–31, and Murray did not have standing to challenge EPA's alleged inaction under that provision, *see infra*, pages 31–41.

B. Appellate jurisdiction

On October 17, 2016, the district court granted summary judgment to Murray and directed EPA to propose "a plan and schedule for compliance with § 321(a)." Appendix ("App.") 203. EPA submitted a plan and schedule on October 31, 2016, and on December 16, 2016, before the court issued an order on remedy, the agency filed a timely notice of appeal (Case No. 16-2432) from the summary-judgment

order. App. 220. On January 11, 2017, the district court issued a "final order" that rejected EPA's plan and schedule and directed the agency to take steps proposed by Murray to remedy the violation that the court had found. App. 285–86.

On January 17, 2017, the court administratively closed the case but "retain[ed] jurisdiction over the parties * * * for the purpose of supervising the implementation and enforcement" of the final order. App. 289. On February 3, 2017, EPA filed a timely notice of appeal (Case No. 17-1170) from the district court's orders of January 11, 2017, and January 17, 2017. App. 300. On February 6, 2017, this Court consolidated EPA's two appeals, along with a third appeal (Case No. 17-1093) filed by environmental groups from the January 17, 2017, order, in which the district court also had denied their motion to intervene. App. 290.

This Court has jurisdiction over EPA's appeals under 28 U.S.C. § 1291 or, in the alternative, 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. To be enforced in a CAA nondiscretionary-duty suit, a duty must be discrete and legally required by a date-certain deadline. Does EPA's ongoing duty to "conduct continuing evaluations" under Section 321(a) satisfy these criteria?

2. Did Murray establish Article III standing at the summary-judgment stage by:

(a) Alleging a generic injury to the coal industry from substantive EPA actions that the agency cannot modify based on a Section 321(a) evaluation?

(b) Alleging that EPA violated undefined "procedures" by failing to act under Section 321(a), where Congress did not dictate procedures for evaluations under that subsection and the evaluations are not a procedural prerequisite for the affirmative EPA actions that allegedly harm Murray?

(c) Alleging that Section 321(a)—which does not direct EPA to disclose the results of its evaluations—confers on the public a right to information that EPA might generate in evaluations that it has not conducted, such that the agency's failure to conduct evaluations, without more, confers standing?

3. If the district court had jurisdiction, should it have granted summary judgment to EPA because the 64 documents the agency submitted to the court evaluate "potential loss or shifts of employment which may result from administration and enforcement" of the CAA, as Section 321(a) requires?

4. The CAA's citizen-suit provision confers jurisdiction on the district courts to "order [EPA] to perform" a nondiscretionary duty. Does a court have authority under this provision to prescribe the manner of EPA's performance of the duty and order the agency to take actions not expressly required by Congress?

STATEMENT OF THE CASE

A. Legal background

Since its inception in 1970, EPA has administered and enforced the CAA "to protect and enhance the quality of the Nation's air resources so as to promote the

public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). In 1977, after hearing employers, unions, and public-interest leaders debate whether and to what extent environmental regulations impact employment, Congress enacted Section 321 of the CAA as a means for EPA to "determin[e] the accuracy of * * * allegation[s]" of employment loss or shifts caused by the Act. H.R. Rep. 95-294, 316–17 (1977). The heart of Section 321 is a formal, subpoena-backed procedure—not at issue in this case—through which EPA investigates site-specific allegations of CAA employment effects. *See* 42 U.S.C. § 7621(b), (c). At the end of such an investigation, EPA must release a report and recommendations to the public. *Id.* § 7621(b). Such investigations are made only at the behest of affected *employees*; Congress did not direct EPA to follow these procedures at the behest of *employers*.

Congress also thought it appropriate for EPA to monitor employment effects of the CAA on an ongoing basis. To that end, Section 321(a) provides as follows:

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

42 U.S.C. § 7621(a). Section 321(d) provides that "[n]othing in this section shall be construed to require or authorize the Administrator * * * to modify or withdraw any requirement imposed or proposed to be imposed under [the CAA]." *Id.* § 7621(d).

B. Procedural background

In 2014, Murray sued EPA and alleged that the agency had failed to act under Section 321(a) to "conduct continuing evaluations" of the employment effects of the CAA. App. 47, 52. Murray filed its claim under Section 304(a)(2) of the Act, which confers jurisdiction on district courts to compel EPA to perform a CAA duty "which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). Murray prayed for an injunction (i) ordering EPA to perform Section 321(a) evaluations, and (ii) prohibiting EPA from taking certain regulatory and enforcement actions until it had done so. App. 53.

1. Preliminary proceedings

Early in the case, EPA moved to dismiss for lack of jurisdiction on the ground that Section 321(a) did not impose a nondiscretionary duty, and thus Congress had not waived sovereign immunity to Murray's claim. The district court disagreed and held that EPA's performance of "continuing evaluations" is a nondiscretionary duty. App. 60–67. The agency then asked the court to dismiss Murray's claim for lack of Article III standing, but the court deemed the company's allegations sufficient to establish standing at the pleading stage. App. 74–87.

EPA next moved for summary judgment and argued that it had performed any duty that Section 321(a) imposed. EPA proffered an initial set of 53 documents that, while not prepared expressly to comply with this provision, revealed that EPA was

conducting the evaluations described in Section 321(a). These documents included regulatory impact analyses, economic-impact assessments, and reports to Congress on the CAA's employment effects. EPA asked the court to enter summary judgment in its favor or, in the alternative, if the court were to decide that the documents did not show that the agency had conducted Section 321(a) evaluations, that summary judgment be entered in Murray's favor. *See In re McCarthy*, 636 Fed. App'x 142, 143 (4th Cir. 2015) (reciting this procedural history).

Murray "opposed the [summary-judgment] motion, including EPA's proffer that [the company] be granted summary judgment if the documents were found not to satisfy Section 321(a)." *In re McCarthy*, 636 Fed. App'x at 143. Instead, Murray asked the court to hold EPA's motion in abeyance pending extensive discovery that the company had propounded on the agency. Murray sought information about not only evaluations of job losses and shifts, but also such disparate topics as "actions [EPA] ha[s] taken * * * to affect capital markets," App. 307, and the agency's "use of supplemental environmental projects in settlement[s] * * * to reduce the consumption of power from coal-fired power plants." App. 314. Murray contended that all this information, along with deposition testimony from agency officials, was "necessary to prove [EPA's] failure [to act], demonstrate the resulting injury to Plaintiffs, and justify appropriate injunctive relief." App. 91.

The district court summarily agreed with Murray and ordered EPA to "comply with all of the * * * pending discovery requests" and "produce requested witnesses for deposition." App. 115. EPA petitioned this Court for a writ of mandamus to halt discovery, but the petition was denied without comment. App. 119. EPA and the Department of Justice then embarked on a massive discovery-response effort that required the services of hundreds of federal employees and contractors, for which EPA obligated more than $1 million in agency funds. App. 331–32. These persons participated in the review of roughly 2.4 million documents collected from EPA that were potentially responsive to Murray's varied requests. *See* App. 327–32 (listing interim figures). The agency ultimately produced approximately 200,000 of these documents. *Ibid.* (same). After being forced to submit to discovery so that Murray could prove its own injury, EPA propounded its own discovery on the company to explore the same topic.

In the midst of discovery, Murray noticed the deposition of the Administrator of EPA. The district court ordered her to testify due to "an apparent conflict between EPA's position in its summary judgment motion and its position before Congress" that it had not conducted any evaluations for the express purpose of complying with Section 321(a). *In re McCarthy*, 636 Fed. App'x at 143. EPA again petitioned this Court for a writ of mandamus, and the petition was granted. This Court precluded the Administrator's deposition, in part because there is "no contradiction in EPA's

position[ ]" that it may conduct the evaluations referenced in Section 321(a) without doing so for the express purpose of complying with that provision. *Id.* at 144.

2. Summary judgment

At the close of discovery, EPA filed a renewed motion for summary judgment. The agency first asked the district court to reconsider its ruling that Section 321(a) imposes a nondiscretionary duty. Next, EPA argued that Murray had not "set forth * * * specific facts" sufficient to establish standing at the summary-judgment stage. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (*Defenders*). Finally, EPA renewed its request for an up-or-down merits ruling that the documents it proffered demonstrated performance under Section 321(a). In light of the "continuing" nature of EPA's performance under Section 321(a), the number of relevant documents had grown from 53 to 64. Murray again opposed the entry of summary judgment (even in its own favor) and requested a trial. *See* App. 199.

The district court entered summary judgment for Murray over the company's objection. The court held that Section 321(a) creates a nondiscretionary duty, App. 147–60, and that Murray had shown standing due to "economic," "procedural," and "informational" injuries. App. 160–78. On the merits, the court found that EPA had not performed Section 321(a) evaluations. Relying on legislative history addressing Section 321 generally and the testimony of a former EPA employee who did not implement the statute during her employment, the court decided that the first clause

of Section 321(a) requires EPA to conduct retrospective, site-specific evaluations of job losses to which the CAA may have contributed. App. 178–85. The court held that the documents that EPA proffered to show performance under the statute did not meet those criteria. The court also found the government's litigating position to be inconsistent with out-of-court statements of agency officials regarding Section 321(a), App. 185–93, despite this Court's "fail[ure] to see the contradiction." *In re McCarthy*, 636 Fed. App'x at 144. In awarding Murray summary judgment, the district court did not cite any of the 200,000 documents EPA produced in discovery.

3. Remedy

After deciding that EPA had "abuse[d its] discretion" by failing to perform its (purportedly nondiscretionary) duty under Section 321(a), the court ordered EPA to submit a "plan and schedule for compliance" with the statute and invited Murray to critique that plan. App. 202–03. The court then entered an injunction that generally tracked—and, in some respects, exceeded—the relief sought by Murray.

The injunction has two parts. First, by July 1, 2017, EPA must "submit to the [c]ourt a § 321(a) evaluation of the coal industry and other entities affected by the rules and regulations affecting the coal mining and power generating industries." App. 285. The agency must not only identify "the number of employees potentially affected," but also "the reasonably foreseeable effects on families and industries reliant on coal," and "those subpopulations at risk of being unduly affected by job

loss and shifts and environmental justice impacts," and "the communities that may be impacted." App. 285–86. In addition to a prospective analysis, EPA must submit to the court a retrospective analysis of CAA impacts on "coal mines and coal-fired power generators that have closed or reduced employment since January 2009." App. 285. Then, by December 31, 2017, EPA must "submit evidence to the [c]ourt demonstrating that EPA has adopted measures" to comply with Section 321(a), including "rulemakings, guidance documents, and internal policies." App. 286.

The court denied Murray's request for an order halting certain regulatory and enforcement actions by EPA pending compliance with Section 321(a). After having forced EPA to submit to discovery in part so that Murray could justify that request for relief, the court agreed with the agency "that the plain reading of § 321(d) * * * precludes such relief." App. 286.

On January 17, 2017, the district court entered an order closing the case but "retain[ing] jurisdiction * * * for the purpose of supervising the implementation and enforcement" of its injunction. App. 289. On January 25, 2017, Murray moved for approximately $3.9 million in attorney fees and costs, alleging that EPA had "consistently acted to prolong the time and enlarge the expense of this case." App. 293. The district court denied the fee motion without prejudice to reinstatement after resolution of these appeals. App. 298–99.

SUMMARY OF ARGUMENT

The district court's judgment should be reversed for four reasons. First, the court lacked jurisdiction to consider Murray's nondiscretionary-duty claim because Section 321(a) does not impose such a duty. Second, Murray failed to establish Article III standing. Third, on the merits, the court erred by holding that EPA had not complied with Section 321(a). Fourth, the court exceeded its remedial power by imposing substantive obligations on EPA that have no basis in the statute.

1. Murray filed suit under Section 304(a)(2) of the CAA, which gives district courts jurisdiction to compel "any act or duty * * * which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). This Court construes this waiver of sovereign immunity narrowly to cover specific, clear-cut defaults by EPA. The text, structure, and history of Section 304 demand that the nondiscretionary-duty clause be read *in pari materia* with the cause of action in the Administrative Procedure Act to compel "agency action unlawfully withheld." 5 U.S.C. § 706(1). To invoke these causes of action, a plaintiff must identify legally required action that is ***discrete*** and subject to a ***date-certain deadline***. Congress ratified the latter requirement in 1990, when it amended Section 304 without disturbing the nondiscretionary-duty clause, which courts already had interpreted to require a firm deadline for agency action.

Section 321(a)'s "continuing evaluations" are neither discrete nor subject to a date-certain deadline, so they cannot be compelled in a nondiscretionary-duty suit.

The unsuitability of Murray's claim for judicial resolution is evident from the text of the statute. Because Section 321(a) does not impose any nondiscretionary duty enforceable under the CAA, the court lacked jurisdiction to hear Murray's claim.

2. The district court also lacked jurisdiction for a separate reason: Murray did not establish Article III standing at the summary-judgment stage. Its allegation that the coal industry in general is harmed economically when EPA takes actions under the CAA does not demonstrate injury (i) particularized to Murray, (ii) traceable to EPA's purported failure to do Section 321(a) evaluations, or (iii) redressable by an order compelling EPA to do the evaluations. Nor could the company have suffered a "procedural" injury by virtue of EPA's alleged failure to act. Section 321(a) does not dictate procedures for employment evaluations, and the evaluations themselves are not procedural prerequisites to the EPA regulations or enforcement actions that Murray decries.

3. The district court erroneously granted summary judgment to Murray on the ground that EPA failed to "conduct [the] continuing evaluations" in Section 321(a). 42 U.S.C. § 7621(a). An "evaluation" may be anything from a formal report to an informal memo to, as in this case, a collection of documents on employment effects that EPA generates in the normal course of business. That these documents were not prepared for the express purpose of compliance with Section 321(a) does not alter the fact that they address "potential loss or shifts of employment which may result

from the [CAA's] administration or enforcement." *Ibid.* The court also flatly misread the first clause of Section 321(a) to require retrospective, site-specific evaluations.

4. Finally, the district court exceeded its narrow authority under Section 304(a) of the CAA "to order the Administrator to perform [an] act or duty" required by law. 42 U.S.C. § 7621(a). Instead of simply ordering EPA to comply with Section 321(a), the court issued a detailed injunction directing EPA to conduct a host of evaluations not required by the statute. The court thereby rewrote Section 321(a) to reach what it deemed an equitable result. That was outside the bounds of the court's authority, so, at a minimum, this Court must vacate the injunction and remand for entry of a straightforward one that tracks the plain language of Section 321(a).

STANDARD OF REVIEW

Sovereign immunity and Article III standing are issues of law that this Court reviews de novo. *McBurney v. Cuccinelli*, 616 F.3d 393, 398–99 (4th Cir. 2010). A grant of summary judgment is reviewed de novo, drawing all inferences in favor of the non-movant. *Okoli v. City of Baltimore*, 648 F.3d 216, 220 (4th Cir. 2011). While the scope of an injunction is reviewed for abuse of discretion, the question whether an injunction comports with statutory limitations is a legal issue reviewed de novo. *See PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 125 (4th Cir. 2011).

ARGUMENT

I. The CAA's citizen-suit provision does not waive federal sovereign immunity to a claim that EPA failed to act under Section 321(a).

Section 304(a)(2) of the CAA gives district courts jurisdiction to hear a claim that EPA failed "to perform an[ ] act or duty * * * which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). In *Monongahela Power Co. v. Reilly*, 980 F.2d 272 (4th Cir. 1992), this Court construed this sovereign-immunity waiver "narrowly" to cover only a claim alleging that EPA failed to perform a "specific," "clear-cut," "ministerial" duty. *Id.* at 276 n.3 (citations omitted). Every other court of appeals to consider the question has reached the same conclusion. *See Nat. Res. Def. Council, Inc. v. Thomas*, 885 F.2d 1067, 1073 (2d Cir. 1989) (*NRDC*); *Maine v. Thomas*, 874 F.2d 883, 888 (1st Cir. 1989); *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (*Thomas*); *City of Seabrook v. Costle*, 659 F.2d 1371, 1374 (5th Cir. 1981); *Mtn. States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980); *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1353 (9th Cir. 1978).

The circuits' uniform judgment is not surprising because there are compelling textual, historical, and practical reasons to interpret Section 304(a)(2) narrowly. As explained below, the only CAA "acts or duties" enforceable under this provision are those that are (i) legally required, (ii) discrete, and (iii) subject to a date-certain deadline. Because Section 321(a) does not impose any duty of this kind on EPA, the district court should have dismissed this suit for lack of jurisdiction.

A. Section 304(a)(2) of the CAA only authorizes suits to compel EPA to perform discrete, legally required duties with date-certain deadlines.

"[S]overeign immunity shields the Federal Government and its agencies from suit" unless Congress waives that immunity. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). Because sovereign immunity circumscribes the judicial power, the precise terms of a statute waiving immunity "define th[e] court's jurisdiction to entertain the suit." *Ibid.* (citation omitted). A sovereign-immunity waiver "must be unequivocally expressed in statutory text," and it "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996). Thus, this Court must construe the phrase "act or duty * * * which is not discretionary" in Section 304(a)(2) of the CAA as narrowly as the text permits. 42 U.S.C. § 7604(a)(2).

1. The CAA's citizen-suit provision carries forward traditional limitations on judicial review of agency inaction that Congress codified in the APA.

The CAA does not define an "act or duty * * * which is not discretionary," 42 U.S.C. § 7604(a)(2), but its meaning can be discerned from traditional principles of administrative law. The common law of judicial review of agency action—or, as alleged here, inaction—developed to preserve the separate spheres of authority of the Executive and Judicial Branches. Under that law, "judicial review was achieved through use of the so-called prerogative writs—principally writs of mandamus," by which a court could order a government official to take a specific action that was ***legally required*** by an Act of Congress. *Norton v. S. Utah Wilderness Alliance*, 542

U.S. 55, 63 (2004) (*SUWA*). On the other hand, a court could not direct an official's exercise of discretion in the conduct of ongoing duties. *See id.* at 63. Furthermore, "the traditional * * * mode of operation of the courts" was to review ***discrete*** agency action (or inaction) using a "case-by-case approach," unless "Congress explicitly provide[d] for * * * correction of the administrative process at a higher level of generality." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990) (*NWF*).

In 1946, Congress codified these background principles of judicial review in Chapter 7 of the Administrative Procedure Act ("APA"). Pub. L. No. 79-404, § 10, 60 Stat. 243 (June 11, 1946). *See SUWA*, 542 U.S. at 63. Section 706(1) of the APA authorizes the courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). In *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), the Supreme Court "consider[ed] what limits the APA places upon judicial review of agency inaction." *Id.* at 61. It unanimously held that a plaintiff can only sue to compel action that is "legally required" and "discrete." *Id.* at 63.

The first limitation, that action must be *legally required*, "carried forward the traditional practice prior to [the APA's] passage," *SUWA*, 542 U.S. at 63, in which a court intervened only if "the duty sought to be enforced is clear and indisputable." *United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 582 (1899). "The limitation to *required* agency action rules out judicial direction of * * * agency action that is not demanded by law." *SUWA*, 542 U.S. at 65. Thus, to be judicially enforceable, a

statute must contain a "specific, unequivocal command" directing a government official to perform "a precise, definite act * * * about which [the] official ha[s] no discretion whatsoever." *Id.* at 63 (brackets, citations, and quotation marks omitted).

The second limitation, that action must be *discrete*, keeps courts from hearing "programmatic" challenges to agencies' "[g]eneral deficiencies in compliance" with "broad statutory mandates." *SUWA*, 542 U.S. at 64, 66. The criterion of discreteness, which also derives from pre-APA judicial practice, *id.* at 63, reflects the reality that courts are ill-equipped to manage the "continuing (and thus constantly changing) operations" of federal agencies. *NWF*, 497 U.S. at 890. *See, e.g.*, *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 196 (4th Cir. 2013) (*Bald Head Island*) (dismissing suit to compel "continuing implementation" of agency's duty). This is so whether or not a statute includes "a categorical imperative," like the word "shall," to signal a legal requirement. *See SUWA*, 542 U.S. at 66 (rejecting claim to compel action under a statute requiring that "the Secretary *shall continue* to manage [roadless areas of public lands] * * * so as not to impair the suitability of such areas for preservation as wilderness," 43 U.S.C. § 1782(c) (emphasis added)). Absent an unequivocal instruction from Congress, a court cannot "simply enter a general order compelling compliance with [a broad statutory] mandate," nor can it order an agency to follow that mandate in a manner not expressly prescribed by statute. *SUWA*, 542 U.S. at 65-66. *Cf. Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*,

Inc., 435 U.S. 519, 544 (1978) (reciting "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure").

There is no evidence in the text or history of the CAA's citizen-suit provision that Congress meant to depart from these background principles of judicial review of agency inaction. The language of Section 304(a)(2)—"failure * * * to perform any act or duty," 42 U.S.C. § 7604(a)(2)—harkens back to the APA's term "failure to act," which falls under the umbrella term "agency action." 5 U.S.C. § 551(13). As the Supreme Court observed when construing another judicial-review provision of the CAA, 42 U.S.C. § 7607(b)(1), core administrative-law terms like "final action" (or, as here, "agency action") "bear the same meaning" in both statutes. *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 478 (2001); *see Indpt. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (Roberts, J.) (applying APA's definition of "agency action" to the same CAA provision). In fact, Congress explicitly intended for Section 304 of the CAA to "encompass the full range of inaction covered by the [APA]." S. Rep. 101-228, at 374 (1990). Accordingly, this Court should follow the District of Columbia Circuit in construing Section 304(a)(2) *in pari materia* with its APA counterpart. *See, e.g.*, *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011) (using APA's definition of "agency action" in suit under Section 304(a)(2)).

This Court has, in essence, already done so. In *Monongahela Power*, it read Section 304(a)(2) "narrowly" to encompass only specific, unambiguous duties, and

this Court deferred to EPA's reasonable interpretation of a particular CAA provision as not creating such a duty. 980 F.2d at 276 & n.3. Particularly in light of the strict construction required for waivers of sovereign immunity, there is no cause for this Court to expand the scope of CAA nondiscretionary-duty claims beyond the clear limits that the Supreme Court has imposed on analogous claims under the APA.

2. Section 304(a)(2) can only be used to enforce date-certain deadlines.

A third limitation on Section 304(a)(2) claims is that they can only be used to compel a legally required and discrete act if the statute sets a ***date-certain deadline*** for action. This limitation follows from the structure and the history of the CAA.

Section 304(a) provides two separate remedies for agency inaction: a suit to compel a nondiscretionary duty and a suit to compel "agency action unreasonably delayed." 42 U.S.C. § 7604(a). This bifurcation parallels the distinction in the APA between suits to "compel agency action *unlawfully withheld*" and suits to "compel agency action * * * *unreasonably delayed*." 5 U.S.C. § 706(1) (emphases added). Neither claim can lie unless discrete agency action is required. *See SUWA*, 542 U.S. at 63 n.1. *Which* claim lies depends on whether Congress prescribed a date-certain deadline for agency action. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) (clarifying distinction between these claims in the APA context).

If the statute imposes a date-certain deadline, an agency's failure to act by that deadline is per se "unreasonable." *See Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 263

(2d Cir. 1992) ("When the Administrator misses a statutorily-imposed deadline, his failure is not reviewed on a 'reasonableness' basis," because "there is no room for debate—[C]ongress has prescribed a categorical mandate that deprives EPA of all discretion over the timing of its work."). Where no deadline is mandated, however, an agency retains discretion with respect to the timing of its action, and a court must assess "on a case-by-case basis" whether the delay has become so egregious that it is "arbitrary and capricious." *Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 590 (1989) (Scalia, J., concurring in part and concurring in the judgment). The statutory underpinning of an unreasonable-delay claim is the general APA directive that agencies "conclude matters 'within a reasonable time.'" *Gen. Motors Corp. v. United States*, 496 U.S. 530, 539 (1990) (quoting 5 U.S.C. § 555(b)); *see also ibid.* (observing that a claim for unreasonable delay would lie if the CAA did not impose a specific deadline for EPA action).

The history of the CAA affirms the equivalence between a nondiscretionary-duty suit brought under Section 304(a)(2) and an unlawfully-withheld suit brought under the APA. When Congress first authorized CAA citizen suits in 1970, it made Section 304(a)(2) the sole means of challenging EPA inaction. Pub. L. No. 91-604, § 12(a), 84 Stat. 1706 (Dec. 31, 1970). The Senate's version of the bill would have permitted suits to compel "*any* duty" legally required of EPA. S. 4358, 91st Cong. § 304(a)(1)(B) (1970) (emphasis added). This language would have allowed suits to

compel both discretionary and nondiscretionary duties. But the conferees appended the restrictive clause "which is not discretionary" in order "to limit suits * * * to a chosen few." *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 663 (D.C. Cir. 1975). Those "chosen few" were instances of "clear-cut * * * defaults" by EPA that traditionally could have been remedied through writs of mandamus. *Thomas*, 828 F.2d at 791 (citation omitted); *see also Heckler v. Ringer*, 466 U.S. 602, 616 (1984) ("The common-law writ of mandamus * * * is intended to provide a remedy for a plaintiff * * * if the defendant owes him a clear nondiscretionary duty."). *Cf.* 42 U.S.C. § 7622(f) (CAA provision stating that "nondiscretionary dut[ies]" it imposes on the Secretary of Labor "shall be enforceable in a mandamus proceeding").

As a result, a plaintiff who sued EPA to compel a "discretionary" duty had to plead an unreasonable-delay claim under the APA instead of proceeding under the CAA. This led to a serious practical problem. Parties unsure whether required EPA action was "discretionary" had to plead both claims, and the problem could not be solved merely by pleading in the alternative. In the seminal case of *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987), the District of Columbia Circuit held that, whereas the *district courts* had exclusive jurisdiction to hear claims under Section 304(a)(2) to compel nondiscretionary duties, the *courts of appeals* had exclusive jurisdiction to hear APA claims to compel action unreasonably delayed. *Id.* at 792–96. This "unusual, bifurcated jurisdictional scheme" left parties and courts confused

about the appropriate forum for relief. *Id.* at 794; *see also* S. Rep. 101-228, at 374 ("[T]he availability of judicial review of a failure to act has been unclear.").

Congress stepped into the breach in 1990 and amended Section 304(a) to add a distinct cause of action for unreasonable delay. Pub. L. No. 101-549, § 707(f), 104 Stat. 2399, 2682 (Nov. 15, 1990), *codified at* 42 U.S.C. § 7604(a). This amendment squarely "abrogated *Thomas*'s jurisdictional holding and shifted to the district court the power to compel EPA to act." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 n.6 (D.C. Cir. 2015). As a result, the citizen-suit provision now provides a judicial remedy for "the full range of inaction covered by the [APA]." S. Rep. 101-228, at 374. Just as important for present purposes is the means by which Congress added the cause of action for unreasonable delay. It could have tacked this cause of action onto the end of Section 304(a)(2), so as to mirror Section 706(1) of the APA. Instead, Congress left Section 304(a)(2) undisturbed and placed the unreasonable-delay remedy at the end of Section 304(a), with a longer notice period to give EPA more time to act before it could be sued. *Compare* 42 U.S.C. § 7604(a) (180 days for unreasonable delay), *with id.* § 7604(b)(2) (60 days for nondiscretionary duty).

Congress's decision not to disturb Section 304(a)(2) in 1990 is meaningful in light of the District of Columbia Circuit's *other* holding in *Sierra Club v. Thomas* that a nondiscretionary-duty claim lies only where the CAA includes a "date-certain deadline" for EPA action. *Thomas*, 828 F.2d at 792. This ruling had already been

embraced by two other circuits when Congress was debating the amendments to the Act. *See NRDC*, 885 F.2d at 1075; *Maine*, 874 F.2d at 888. The fact that Congress undertook "a comprehensive reexamination and significant amendment" of Section 304 at this time, yet left Section 304(a)(2) intact, is strong "evidence that Congress affirmatively intended to preserve" the courts' interpretation of that clause. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381–82 (1982); *see generally Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of a[ ] * * * judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

There is little doubt that Congress was aware in 1990 of the requirement of a date-certain deadline adopted in *Sierra Club v. Thomas*. *See, e.g.*, 136 Cong. Rec. E3673 (Oct. 26, 1990) (comments of Rep. Oxley on Conf. Rep.) ("[S]uits under the existing section 304(a)(2) * * * are limited to claims that [EPA] has failed * * * to take a statutorily specified action by a statutorily specified deadline."). Congress was urged to "reverse *Sierra Club v. Thomas*" by revising Section 304(a)(2) to allow "district courts [to] enforce mandatory duties without specific deadlines." *Hearing on S. 1490 Before Subcomm. on Envtl. Prot. of S. Comm. on Env't & Pub. Works*, 101st Cong., part 2, at 429 (Sept. 26, 1989) (letter from Cal. Atty. Gen.). Instead, as discussed above, Congress left Section 304(a)(2) untouched while adding a separate cause of action for unreasonable delay.

At the same time, Congress chose its words carefully elsewhere in the CAA with the knowledge that only "*deadlines* * * * provid[e] cause for a citizen suit to compel action when there has been a failure to perform a non-discretionary duty." S. Rep. 101-228, at 238 (emphasis added). For example, the conferees rejected text from the Senate bill that would have "established a timeframe for EPA response to citizen petitions" within 12 months, which deadline would have been enforceable as a nondiscretionary duty. 136 Cong. Rec. S16,953 (Oct. 27, 1990) (Statement of Senate Managers); *see* S. 1630, 101st Cong., § 609(e) (as reported by S. Comm. on Env't & Pub. Works, Dec. 20, 1989); S. Rep. 101-228, at 374 (noting amendment). The conferees' decision to strike the Senate's 12-month deadline "reflect[ed] the[ir] judgment * * * that EPA's conduct is better addressed by the more flexible case-by-case approach inherent in 'unreasonable delay' suits." 136 Cong. Rec. S16,953.

Conversely, when Congress wanted to ensure that a duty would be enforceable under Section 304(a)(2), but the text of a provision left some doubt as to whether a deadline was firm, Congress would make explicit that EPA's duty "shall be treated as nondiscretionary * * * for purposes of Section [304](a)(2)." 42 U.S.C. § 7617(f) (section requiring EPA to prepare an economic impact assessment for certain rules and standards "[b]efore publication of notice of proposed rulemaking," 42 U.S.C. § 7617(b)). In short, rather than abrogate the extant judicial interpretation of Section 304(a)(2), Congress ratified that interpretation and legislated accordingly.

This history merely confirms what the language of Section 304(a)(2) suggests: a bright line between nondiscretionary-duty and unreasonable-delay claims drawn based on the existence *vel non* of a date-certain deadline. For its contrary holding, the district court relied on dicta in two inapposite, nonprecedential decisions. The first was a case that considered, but did not decide, whether a date-certain deadline is required to sue EPA under the Clean Water Act's citizen-suit provision, 33 U.S.C. § 1365. App. 158–59; *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563 (N.D. Tex. 1997). The second was an unpublished ruling dismissing a claim under the citizen-suit provision of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 6972. App. 159. The district court there found an EPA duty discretionary "based on the combination of the absence of a date-certain deadline and CERCLA's legislative history," without considering whether the lack of a date-certain deadline alone would be dispositive. *Sierra Club v. Johnson*, 2009 WL 2413094, at *3 (N.D. Cal. Aug. 5, 2009). It is telling that these two cases—both of which concerned citizen-suit provisions with no remedies for unreasonable delay—were the sole judicial support for the court's holding that a date-certain deadline is unnecessary to sue under Section 304(a)(2).[1]

[1] If any district-court ruling addressing another citizen-suit provision is relevant here, it is *Natural Resources Defense Council, Inc. v. EPA*, 770 F. Supp. 1093 (E.D. Va. 1991), which dismissed claims filed under the nondiscretionary-duty clause of the Clean Water Act's citizen-suit provision. One of the statutes at issue stated that

The court's holding is wrong, and affirming it would create an "oft-dreaded," lopsided circuit split. *United States v. Hashime*, 722 F.3d 572, 573 (4th Cir. 2013) (Gregory, J., concurring in denial of hearing en banc). This Court instead should reverse and hold that a CAA nondiscretionary-duty suit lies only where Congress has imposed a date-certain deadline for legally required and discrete agency action.

B. Section 321(a) does not impose a nondiscretionary duty on EPA.

As just discussed, to be enforceable under Section 304(a)(2) of the CAA, an "act or duty" must be (i) legally required, (ii) discrete, and (iii) subject to a date-certain deadline. The "continuing evaluations" described in Section 321(a) of the Act do not satisfy the latter two criteria. Recall that Section 321(a) provides, in full:

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

EPA "shall * * * from time to time * * * revise criteria for water quality accurately reflecting the latest scientific knowledge." 33 U.S.C. § 1314(a)(1). The court held that, notwithstanding the word *shall*, the duty imposed was discretionary because it did not mandate action within a "specific time period," and it gave EPA "discretion to determine the method and substance of [its] reviewing process." 770 F. Supp. at 1104–05. Because this duty could only be enforced through an unreasonable-delay suit (which the Clean Water Act did not authorize), the court allowed the plaintiff to amend its complaint to state an unreasonable-delay claim under the APA. *Id.* at 1108. This Court later affirmed the dismissal of this nondiscretionary-duty claim "for the reasons expressed by the district court in its thorough and well-reasoned opinion." *Nat. Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1406 (4th Cir. 1993).

42 U.S.C. § 7621(a). In declaring EPA's Section 321(a) duty to be nondiscretionary, the district court focused mainly on the word "shall," which ordinarily, though not invariably, precedes legally required action. *See* App. 154–58. The United States does not contest before this Court that the first clause of Section 321(a) imposes a requirement on EPA to "conduct continuing evaluations." But that does not end the inquiry; to be judicially enforceable, a duty must also be discrete and subject to a date-certain deadline. The duty imposed by Section 321(a) is neither.

1. EPA's performance of "continuing evaluations" under Section 321(a) is not a discrete agency action.

Section 321(a)'s "continuing evaluations" are not a "circumscribed, discrete agency action" that a court can compel. *SUWA*, 542 U.S. at 62. As the district court observed, a "continuing" duty is ongoing and "uninterrupted." App. 157–58; *see* James C. Fernald, *Funk and Wagnall's Standard Handbook of Synonyms, Antonyms & Prepositions* 137 (1947) (explaining that "*continuous* refers to uninterrupted and unbroken continuity, that which goes on unceasingly and indefinitely" (emphases altered)). A "continuing" duty is the polar opposite of a "discrete" one. *See Roget's Int'l Thesaurus* 606 (7th ed. 2010) (listing "discontinuous" and "noncontinuous" as synonyms for "discrete"). A "continuing" duty thus cannot be enforced under the CAA, whether or not it is legally required. *See SUWA*, 542 U.S. at 59 (dismissing failure-to-act claim under the APA premised on statute providing that the agency "shall continue" to act); *Bald Head Island*, 714 F.3d at 196 (dismissing failure-to-act

claim under the APA that sought to compel the "continuing implementation" of "ongoing" agency action).

Section 321(a)'s second clause does not prescribe a discrete legal requirement either. That clause allows EPA to make site-specific "investigati[ons]" of the CAA's employment effects when "appropriate." 42 U.S.C. § 7621(a). "'[A]ppropriate' is the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (citation omitted). It is Congress's way of saying that an action is not legally required, and that the agency may exercise discretion when deciding whether to act.

Apart from not being required, the investigations under the second clause are not discrete. Once initiated, a specific investigation might be an "identifiable action or event," *NWF*, 497 U.S. at 899, but that does not transform an ill-defined class of EPA investigations into a generic "agency action" enforceable in a citizen suit. The prayer for relief in Murray's complaint, which ignores the second clause of Section 321(a) entirely, seeks evaluations of the entire "coal industry," App. 53, rather than investigations of specific "threatened plant closures or reductions in employment." 42 U.S.C. § 7621(a). This lawsuit plainly requests judicial review of EPA's overall conduct under the statute, rather than discrete agency action.

This litigation confirms the wisdom of the discreteness requirement for suits contesting agency inaction. The district court struggled to decide whether EPA was

complying with Section 321(a), because the court could not even discern what the statute requires. *In re McCarthy*, 636 Fed. App'x at 144 ("[N]o court, including the district court here, has ever explicated what Section 321(a) requires."). As a result, the court and the parties spent two years engaged in a wide-ranging review of EPA's historical and ongoing evaluation of employment effects. This included *discovery* the district court deemed necessary to decide whether EPA *failed to act*. At the end of that process, which included two trips to this Court for interim relief, the district court issued an injunction ordering systemic changes to EPA operations that, while closely tracking Murray's requested remedies, were not specifically mandated by Congress or sought from the agency outside this case. The court continues to retain jurisdiction to "supervis[e] the implementation" of Section 321(a). App. 289.

None of this was contemplated by Congress when it authorized citizen suits to enforce nondiscretionary duties of the EPA Administrator. An alleged flaw in the agency's overall performance under Section 321(a) "cannot be laid before the courts for wholesale correction." *NWF*, 497 U.S. at 893. It is hard to see how a contrary rule could operate in practice. If EPA has a "continuing"—literally, uninterrupted—duty to conduct Section 321(a) evaluations, the agency perpetually will be subject to suits (and amended complaints) alleging that, at any given moment, it failed to perform that duty. As this case illustrates, such litigation would "inject[ ] the judge into day-to-day agency management." *SUWA*, 542 U.S. at 67. The hazards of that

path are yet another reason why the district court should not have heard Murray's claim that EPA failed to act under Section 321(a).

2. Section 321(a) does not impose a date-certain deadline for EPA action.

Even if EPA's "continuing" performance of Section 321(a) evaluations could somehow be classified as a "discrete" duty, jurisdiction still would not lie because the statute does not impose a date-certain deadline for conducting evaluations. The district court held that Section 321(a) "does contain a date certain for the mandatory duty: the required timing is 'continuing.'" App. 157. But that makes a mockery of the term "date certain." A continuing duty applies on *all* dates, not a single "fixed or appointed day." "Date certain," *Black's Law Dictionary* (10th ed. 2014).

To the extent that Murray had any viable claim under Section 304(a), it would be that EPA has unreasonably delayed in acting under Section 321(a). *Cf. Am. Lung Ass'n*, 962 F.2d at 263 (observing that "'unreasonable delay' [can] be a meaningful standard for judicial review" where "a statute requires agency action at indefinite intervals"). But Murray did not plead such a claim, nor could it have, because it did not provide EPA the requisite 180 days of notice before filing the complaint. App. 36 (amended complaint dated May 23, 2014, stating that notice was provided on January 21, 2014); *see Monongahela Power*, 980 F.2d at 275 n.2. Therefore, if this Court agrees with EPA that a date-certain deadline is a requirement to sue under

Section 304(a)(2), it need not decide whether alleged agency inaction under Section 321(a) could be challenged in an unreasonable-delay suit.

II. Murray failed to establish Article III standing to challenge EPA's alleged nonperformance of Section 321(a) evaluations.

Article III of the Constitution limits federal-court jurisdiction to "cases" and "controversies." U.S. Const., Art. III, § 2. The doctrine of standing, which is rooted in the courts' "traditional understanding of a case or controversy," aims to "limit[ ] the category of litigants empowered to maintain a lawsuit * * * to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The Supreme Court has held that "'the 'irreducible constitutional minimum' of standing consists of three elements." *Ibid.* The "first and foremost" of these elements is an "injury in fact" that is "concrete and particularized" and "actual or imminent." *Id.* at 1547–48 (brackets and quotation marks omitted). The remaining two elements, which often overlap, require that the injury in fact be "fairly traceable to the challenged conduct of the defendant, and * * * likely to be redressed by a favorable judicial decision." *Id.* at 1547. Plaintiffs bear the burden of establishing standing, *see ibid.*, and at the summary-judgment stage, they "can no longer rest on * * * mere allegations, but must set forth by affidavit or other evidence specific facts" to support their claims. *Defenders*, 504 U.S. at 561.

Murray did not establish standing to contest EPA's performance under Section 321(a). The company did not "set forth * * * specific facts" to underpin its claim of

economic injury due to EPA actions, *Defenders*, 504 U.S. at 561, nor did it explain how such injury could be traced to the agency's alleged noncompliance with Section 321(a) or redressed by a favorable decision. Murray's other grounds for standing—"procedural" or "informational" injury—likewise fall short of Article III standards.

A. Murray's alleged economic injury was not supported by specific facts, not traceable to inaction under Section 321(a), and not redressable by the district court.

Murray's principal standing argument is that it has suffered economic injury. The company alleges "[t]hat the actions of EPA have caused a reduced market for coal," and that if the agency used Section 321(a) to catalogue "threatened business closures and consequent unemployment," that information could then be used "to convince the EPA, Congress, and/or the American public that the actions of the EPA have been harmful and must be changed." App. 163. This claim does not satisfy any of the three elements of standing.

Economic injuries can be cognizable under Article III, but a court must look behind a party's claims "to filter the truly afflicted from the abstractly distressed." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000) (en banc). That is another way of stating the requirement that harm must be "particularized" to qualify as an injury in fact. *Spokeo*, 136 S. Ct. at 1548. Murray alleges that the coal industry as a whole is economically distressed, but the company did not provide any "specific facts" showing that *it specifically* has been

harmed. *Defenders*, 504 U.S. at 561. Individual coal companies like Murray and its co-plaintiffs cannot establish standing by citing nonspecific injury to their industry and asking the district court to assume that one of them must be among the injured. *Cf. Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (rejecting "statistical probability" theory of standing). For an injury to be particularized, it "must affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548.

The district court conceded the "absence of * * * evidence" of economic harm to Murray and its co-plaintiffs, but the court excused that deficiency on the ground that such evidence could come only from the very Section 321(a) evaluations that this suit was designed to compel. App. 164. But there is no reason to believe that EPA could learn more than Murray knows about its own economic health. Article III does not demand that Murray fastidiously quantify the extent of its economic injury, but it must provide *some* support for its allegations. The purported dearth of Section 321(a) evaluations did not, for example, keep the company's expert from filing a declaration addressing "how EPA's * * * regulations have and will continue to affect the market for coal." App. 169. Whether government regulations impact the market for coal may be a worthy field of inquiry for policymakers, but it is not the relevant inquiry for standing. Murray must show harm from a failure to comply with Section 321(a); indeed, the company itself sought discovery in this case on

the theory that it could simultaneously "prove [EPA's] failure" to act under Section 321(a) and "demonstrate the resulting injury." App. 91.

Even accepting Murray's claim that it suffered economic injury due to EPA's actions under the CAA, that injury cannot be fairly traced to EPA's nonperformance under Section 321(a) or redressed by an order compelling that performance. Murray offers only speculation that the agency would have implemented the Act differently had it conducted more Section 321(a) evaluations, or that it will change its practice in the future based on a court order compelling more evaluations. That speculation is wholly unfounded. The courts are "loath to find standing when redress depends largely on policy decisions yet to be made by government officials." *US Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000); *see also ASARCO Inc. v. Kadish*, 490 U.S. 605, 614–615 (1989) (opinion of Kennedy, J.). Even if EPA *could* implement the CAA differently based on Section 321(a) evaluations, the idea that it *would* do so is too conjectural to confer standing.

But Murray's standing problem is far worse than that. There is ***no possibility*** that EPA will alter existing or proposed CAA requirements based on Section 321(a) evaluations because, as the district court belatedly recognized, App. 286, Congress forbade EPA from doing so. *See* 42 U.S.C. § 7621(d) ("Nothing in this section shall be construed to require or authorize the Administrator * * * to modify or withdraw any requirement imposed or proposed to be imposed under this chapter."). Because

EPA cannot remedy Murray's injury by performing Section 321(a) evaluations, the company's chain of causation and redressability runs through Congress, and "it is not even conceivable that [plaintiffs] could have standing if redress of their injuries hinged on action by Congress." *Utah v. Evans*, 536 U.S. 452, 513 (2002) (Scalia, J., dissenting). "Congress certainly considers executive branch reports" like the ones that Murray and the district court seem to anticipate that EPA will produce under Section 321(a). *Physician's Educ. Network, Inc. v. Dep't of Health, Educ. & Welfare*, 653 F.2d 621, 627 (D.C. Cir. 1981). But "Congress is a political body, and it responds to political influences as well," which "makes it extraordinarily difficult to demonstrate" that compelling EPA to produce reports "could or would provide relief for the injury claimed" in this case. *Ibid.*

In short, Murray cannot premise its standing on abstract possibilities of action by policymakers. To hold otherwise would vitiate Article III's traceability and redressability requirements in every case filed against a federal agency, because a plaintiff could always allege that its success in court might alter legislative or electoral outcomes. For these reasons, Murray does not have standing to sue here.

B. Congress did not grant Murray a "procedural right" to compel EPA to conduct employment evaluations under Section 321(a).

The district court also concluded that Murray suffered "procedural" injury by virtue of EPA's alleged noncompliance with Section 321(a). The court's discussion of procedural harm is somewhat opaque, but it appears to embrace two independent

theories of procedural standing: (1) EPA violated required procedures in the course of (not) taking the action under review; and (2) Section 321(a) grants Murray a right to information generated through employment evaluations, and EPA's alleged failure to generate that information, without more, gives Murray standing to sue. Neither of these theories holds water.

1. Section 321(a) does not prescribe any procedures for substantive EPA actions, the violation of which could give rise to a procedural injury.

A plaintiff can assert a procedural injury by alleging that an agency violated applicable procedures in the course of taking an action under review. In such a case, the plaintiff need not establish that the agency would have acted differently had it followed the procedures required. *See Defenders*, 504 U.S. at 572 & n.7. But this procedural-rights construct does not fit a claim, like the one here, that challenges agency *inaction*. Murray's claim is not that EPA failed to follow proper procedures when conducting Section 321(a) evaluations, but rather that EPA failed to conduct the evaluations at all. Nor does Murray argue that Section 321(a) evaluations are a procedural prerequisite to the regulatory actions that allegedly harm the company. If that were Murray's argument, then it would have to file a suit directly in a court of appeals to contest those actions on procedural grounds. *See* 42 U.S.C. § 7607(b).

Even assuming *arguendo* that Murray could mount a "procedural" attack on EPA's performance under Section 321(a), Murray would not meet even the relaxed Article III standards for procedural injury. First, a deprivation of a procedural right

"in *vacuo*" is not enough to assert injury in fact; a plaintiff must also identify "some concrete interest affected by the deprivation." *Summers*, 555 U.S. at 496. The only concrete injury that Murray identifies is harm to its economic interest, but, as noted earlier, that harm is not sufficiently particularized to qualify as an injury in fact.

Second, while the strictures of traceability and redressability are relaxed where procedural rights are at stake, *Defenders*, 504 U.S. at 572 n.7, those requirements are not eliminated. There still must be "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed" the plaintiff. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). But Section 321(d) forecloses the possibility that an order compelling Section 321(a) evaluations will prompt EPA (the injury-causing party) to reconsider the actions that allegedly harm Murray. And, a theory of redress premised on legislative action is not sufficient to show standing even for procedural injury. *See Guerrero v. Clinton*, 157 F.3d 1190, 1194–95 (9th Cir. 1998) (holding that injury from allegedly incomplete reporting to Congress was not redressable, even under relaxed standard for procedural injury, because the court could not order Congress to act in response to complete reports).

2. Section 321(a) does not give Murray a legally enforceable right to compel EPA to generate information in new employment evaluations.

In an effort to avoid its redressability problem, Murray asserted to the district court that the deprivation of information that might be generated in Section 321(a) evaluations constitutes an independent injury in fact that confers standing. It is true

that, while "there is no general common law right to information from agencies," *Salt Inst. v. Leavitt*, 440 F.3d 156, 158 (4th Cir. 2006), a plaintiff can, in some cases, base its standing on "'inability to obtain information' that Congress ha[s] decided to make public." *Spokeo*, 136 S. Ct. at 1549 (citation omitted). This is not such a case, however. Congress did not direct EPA to make Section 321(a) evaluations public, and even if it had, Murray could not premise standing on EPA's failure to conduct *new* evaluations that the company did not even request.

Murray argues that Section 321(a) gives it a right to the information in EPA's "continuing evaluations." But, "[b]y its terms, this statute creates no legal rights in any third parties." *Salt Inst.*, 440 F.3d at 159. Section 321(a) directs EPA to *conduct* these "evaluations," but it says nothing about their *dissemination*. Congress knows how to impose a disclosure requirement when it wants information to be public. It did so in the very next subsection, which orders EPA to compile "report[s], findings, and recommendations" and make them "available to the public" at the conclusion of an investigation. 42 U.S.C. § 7621(b). Plus, shortly after Section 321(a) went into effect, Congress enacted a nearly identical information-gathering requirement in a different statute to which it appended the following sentence: "The results of such evaluations and each investigation shall promptly be made available to the public." Pub. L. No. 95-620, § 743(a), 92 Stat. 3342 (Nov. 9, 1978), *codified at* 42 U.S.C. § 8453(a). The omission of that sentence, or anything remotely similar, in Section

321(a) belies Murray's claim of a judicially enforceable right to information. The district court observed that Murray has a right to get information on Section 321(a) evaluations via the Freedom of Information Act ("FOIA"), App. 177, but that only underscores that Section 321(a)—the sole "statute upon which [plaintiffs] rely" for "a legal right to access to information," *Salt Inst.*, 440 F.3d at 159—does not give Murray a right to information in Section 321(a) evaluations.

At the very least, Section 321(a) does not give Murray a right to compel EPA to conduct *new* evaluations that will generate *new* information. "'[I]nformational injury,' in its broadest sense, exists day in and day out, whenever federal agencies are not creating information a member of the public would like to have." *Found. on Econ. Trends v. Lyng*, 943 F.2d 79, 85 (D.C. Cir. 1991). Any disclosure mandate imposed by Section 321(a) could only be triggered by completion of an evaluation. *See Friends of Animals v. Jewell*, 828 F.3d 989, 992–994 (D.C. Cir. 2016) (rejecting allegation of injury based on deprivation of information due to agency inaction).

Finally, even if Section 321(a) evaluations were required to be disclosed, that would not confer standing on Murray to sue for the information therein. *See Nader v. Fed. Election Comm'n*, 725 F.3d 226, 229 (D.C. Cir. 2013) ("It is not enough * * * to assert that disclosure is required by law."). In line with Article III's demand for a particularized injury, the Supreme Court has recognized informational harm only in situations where plaintiffs requested and were denied specific information. *See Fed.*

Election Comm'n v. Akins, 524 U.S. 11, 16 (1998) ("Respondents filed a complaint with the FEC."); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989) ("WLF has specifically requested, and been refused, the names of candidates under consideration."); *ibid.* (indicating that FOIA plaintiffs must show "that they sought and were denied specific agency records"). *Cf. Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–375 (1982) (finding standing only for a "tester who has been the object of a misrepresentation" regarding the availability of housing).

The plaintiffs in this case did not make any such request. Murray could have asked EPA to investigate specific claims of loss and shifts of employment using the power Congress gave EPA in Section 321(a)'s second clause. *See* 5 U.S.C. § 555(b) ("[I]nterested person[s] may appear before an agency * * * for the presentation * * * of an issue, request, or controversy * * * in connection with an agency function."). Instead, Murray took EPA to court. The company cannot bypass the administrative process and manufacture an Article III "case" or "controversy" simply by blaming EPA for not creating information the company did not seek from the agency. Under Murray's theory of informational harm—which would apply equally to any member of the public—even an *employee* could bypass the formal investigatory process set forth in Section 321(b) and sue EPA for failure to evaluate the CAA's impact on his or her employment. That cannot be what Congress intended in Section 321(a).

In conclusion, Murray did not suffer an informational injury, just as it did not suffer procedural injury or particularized economic injury. Its suit therefore should have been dismissed for lack of jurisdiction.

III. EPA should have been granted summary judgment because it conducted the "continuing evaluations" described in Section 321(a).

If this Court concludes that Murray established Article III standing *and* that Section 321(a) creates a duty "which is not discretionary with the Administrator," 42 U.S.C. § 7604(a)(2), it should reverse the district court's judgment because the 64 documents EPA proffered reveal that the agency performed any such duty.

Most of these documents fall into three categories. First, as mandated by a series of executive orders postdating enactment of Section 321(a), EPA prepares a Regulatory Impact Analysis for every significant CAA regulation. *See* Exec. Order 13563 (Jan. 18, 2011); Exec. Order 12291 (Feb. 17, 1981). Second, Congress gave EPA a nondiscretionary duty to compile Economic Impact Assessments for several CAA standards and rules. *See* 42 U.S.C. § 7617. Third, EPA has periodically done a "comprehensive analysis" of the CAA's costs and benefits, including its impact on "employment," in a report to Congress. *Id.* § 7612(a).

Individually and collectively, EPA's documents evaluate the "potential loss or shifts of employment which may result from the administration or enforcement" of the CAA. 42 U.S.C. § 7621(a). For example, one analysis for a CAA rule imposing standards for hazardous air pollutants devoted 10 pages to analyzing "Employment

Impacts." App. 334–43. EPA provided "a conceptual framework for considering" employment effects, and it endeavored to quantify—to the extent possible given "limited empirical literature"—"the potential employment impacts" of the rule, both on a "macroeconomic" level and with respect to particular sectors of the economy. App. 334; *see also* App. 334 n.53 (stating that this analysis was "part of EPA's ongoing effort" to perform Section 321(a) evaluations).

The district court held that documents like this one do not satisfy EPA's duty to conduct continuing evaluations under Section 321(a), for three reasons. First, the court held that the statute requires the agency to retrospectively evaluate the "actual outcomes" of CAA implementation on employment. App. 194 (quoting Murray's witness Dr. Anne Smith). But that turns the statute on its head: Congress directed EPA to evaluate only "*potential* loss or shifts of employment." 42 U.S.C. § 7621(a) (emphasis added); *see also ibid.* (allowing EPA to investigate "*threatened* plant closures or reductions in employment" (emphasis added)). A "second look" at the CAA's employment impacts might be useful, App. 190, but it is not required by Section 321(a).

The court's next concern with EPA's evaluations was that they are too general. Based on legislative history and testimony from Murray's expert witness—who had no firsthand experience with Section 321(a) implementation—the court discerned a statutory mandate that EPA's "continuing evaluations" be "facility- and community-

specific." App. 194 (quoting Dr. Anne Smith). But that conflates the two clauses of Section 321(a). Whereas the "continuing evaluations" in the first clause are preceded by the word "shall," the site-specific "investigations" in the second clause—which were plainly the topic of the legislative history on which the court relied—need only be conducted "where appropriate." 42 U.S.C. § 7621(a). The reference in the second clause to site-specific *investigations* does not restrict the first clause to site-specific *evaluations*. *Cf. S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379–80 (2006) (rejecting an argument "that pairing a broad statutory term with a narrow one shrinks the broad one").

The text of the first clause of Section 321(a)—the only clause even plausibly at issue in this case—gives EPA extraordinary discretion when evaluating potential employment effects of the CAA. To "evaluate" is to "examine and judge concerning the worth, quality, significance, amount, degree, or condition." *Webster's Third New Int'l Dictionary* 786 (1993). An "evaluation" can be anything from a formal report to an internal memo to a wholly undocumented assessment. The only content-based requirement for EPA's evaluations is that they address the "potential loss or shifts of employment which may result from the administration or enforcement of the [Act] and applicable implementation plans." 42 U.S.C. § 7621(a). EPA's evaluations do so, and whether they do so to Murray's satisfaction is not at issue in this case. *See Kennecott Copper*, 572 F.2d at 1355 (explaining that Section 304(a)(2) of the CAA

"was not designed to permit review of the performance of [the agency's] functions" (citation omitted)).

Lastly, the district court again concluded that EPA's position in this litigation that it conducts the evaluations in Section 321(a) is inconsistent with certain out-of-court statements by agency officials. App. 185–89. This Court has already rejected that criticism as unfounded, *In re McCarthy*, 636 Fed. App'x at 144, but even if it were valid, the issue in this case is not whether agency officials *believed* they were performing the evaluations described in Section 321(a) but whether EPA in fact *did so*. The 64 documents that the agency proffered are ample evidence that it performed under Section 321(a). Thus, if the district court had jurisdiction over this matter, it should have granted summary judgment to EPA.

IV. The district court exceeded its jurisdiction by prescribing the manner of EPA's compliance with Section 321(a) and ordering the agency to conduct evaluations not required by law.

Even if this Court upholds the district court's jurisdiction over this matter and decides that EPA failed to act under Section 321(a), reversal is still required because the district court's injunction goes far beyond the remedial authority granted by the CAA's citizen-suit provision. At a minimum, then, this case should be remanded so that the district court can enter a new injunction that "order[s] the Administrator to perform" Section 321(a) evaluations, while still allowing EPA to exercise the full measure of discretion afforded by the statute. 42 U.S.C. § 7604(a).

Section 304(a) of the CAA confers jurisdiction "to order the Administrator to perform an act or duty" deemed "not discretionary." 42 U.S.C. § 7604(a). There is no other remedy listed in the statute, and this Court must "presume that Congress 'provided precisely the remedies it considered appropriate,' and * * * refrain from inferring others." *Trejo v. Ryman Hospitality Props., Inc.*, 795 F.3d 442, 450 (4th Cir. 2015) (citation omitted). It is necessary to interpret Section 304(a)'s remedies strictly, so as not to unsettle the CAA's "comprehensive legislative scheme" or its "integrated system of procedures for enforcement." *Ibid.* (citation omitted); *see Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 425 (2011) (reciting the CAA's "multiple avenues for enforcement"). A court entering judgment against EPA, then, must limit the substance of its remedy to an order instructing the agency to comply with the plain terms of the provision in question. If the court here had jurisdiction, that would mean a straightforward order that simply directs EPA to conduct the continuing evaluations described in Section 321(a). *Cf. SUWA*, 542 U.S. at 64 (observing that the APA "empowers a court only to compel an agency * * * 'to take action upon a matter, without directing *how* it shall act'" (citation omitted)).

To be sure, the remedy authorized by Section 304(a) of the CAA is equitable in nature, and when the court has power to grant equitable relief, it ordinarily may exercise "all the inherent equitable powers" of traditional equity jurisdiction. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). But, "where a cause of action is

authorized against the *federal government*, the available remedies are not those that are 'appropriate'" or equitable in a given case, "but only those for which sovereign immunity has been expressly waived." *Lane*, 518 U.S. at 197 (citation omitted and emphasis added). *See also U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 627 (1992) (adopting narrowest permissible reading of remedies available against the United States under Clean Water Act). A strict reading of the CAA's citizen-suit provision limits a court to directing EPA to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement" of the Act. 42 U.S.C. § 7621(a).

Such an injunction would be no more or less ambiguous than Section 321(a) itself. It would preserve the latitude that Congress expressly gave EPA to evaluate loss and shifts of employment in whichever manner and form it deems proper. *See T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808, 815–16 (2015) (refusing to dictate the form of government's action where statutory language did not "impose[ ] any requirement that the reasons [for action] be given in any particular form"). As discussed earlier, *supra* page 43, an "evaluation" can take any number of forms, and a finding by the district court that EPA had not performed evaluations in the past is not a sound basis to impose extra-statutory constraints on evaluations in the future.

Section 321(a) contains no "required procedures of decisionmaking," *Bennett v. Spear*, 520 U.S. 154, 172 (1997), or even a directive to memorialize an evaluation

once it is completed. By contrast, Section 321(b) establishes a procedure by which EPA must investigate allegations by "employee[s]," culminating in preparation and publication of a "report, "findings of fact," and "recommendations" stemming from the investigation. *Id.* § 7621(b). Congress's decision to establish procedures for an investigation under subsection (b), but not for an evaluation under subsection (a), can only mean that EPA has open-ended discretion in conducting evaluations under subsection (a).[2] *See Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 680 (4th Cir. 2005) (reasoning that Congress must have intentionally omitted text from subsection because that text appeared a few lines later in the following subsection).

The injunction in this case far exceeded the narrow scope of the district court's remedial authority. Rather than hew to the text of Section 321(a), the court issued a 325-word injunction that instructs EPA to evaluate not only "employment loss and shifts," 42 U.S.C. § 7621(a), but also which "families" and "communities" may be

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[2] Legislative history is consistent with the notion that Section 321(a) gives EPA procedural discretion. The Senate's bill would have placed the agency's "continuing evaluations" in the same subsection as the "investigations" prompted by employee allegations. S. 252, 95th Cong., § 42 (as reported by S. Comm. on Pub. Works, May 10, 1977). At conference, however, the Senate conferees acceded to the House bill, which divided Section 321 into different subsections and thereby clarified that the detailed investigatory procedures set forth in Section 321(b) were required only if an employee requested that EPA investigate. H.R. Rep. 95-564, at 180–81 (1977) (Conf. Rep.). Notably, though, even the rejected bill would not have *mandated* that EPA use formal procedures when conducting its ongoing evaluations. *See* S. Rep. 95-127, at 101 (1977) (stating that the Administrator "is well within his authority in using" formal hearing procedures to investigate matters at employers' request).

"potentially affected" by CAA implementation, and "those subpopulations at risk of being unduly affected by job loss and shifts and environmental justice impacts." App. 285–86. And, whereas the statute requires only "evaluations of *potential* loss or shifts of employment," 42 U.S.C. § 7621(a) (emphasis added), the court ordered EPA to prepare a *retrospective* evaluation of all "coal mines and coal-fired power generators that have closed or reduced employment since January 2009." App. 285.

The court's injunction tracks Murray's remedy pleading rather than the U.S. Code. *Compare* App. 285–86 *with* App. 3610–12. By "prescribing specific tasks for [the agency] to complete" rather than limiting itself to the words of Congress, the court impermissibly deprived EPA of its authority "to exercise its discretion and utilize its expertise in complying with [a] broad statutory mandate[ ]." *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006). The tasks in the court's injunction continue to impose a substantial and unwarranted burden on EPA. *See* Motion to Expedite Consideration of Appeal and Set Briefing Schedule 3–4 (Doc. 17-1, filed Feb. 7, 2017). Even if this Court disagrees with the government's jurisdictional and merits arguments, therefore, it still should vacate the district court's injunction and remand for entry of relief that tracks the text of Section 321(a).

CONCLUSION

For the foregoing reasons, this Court should reverse the final judgment of the district court. Because that court lacked jurisdiction, this Court should remand with

an instruction to dismiss the complaint. In the alternative, this Court should remand with an instruction to enter summary judgment for EPA. Or, barring that, this Court should vacate the district court's injunction and remand with an instruction to enter a straightforward injunction tracking the language of Section 321(a) of the CAA.

Respectfully submitted,

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STATUTORY ADDENDUM

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42 U.S.C. § 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

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

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

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

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

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

42 U.S.C. § 7621. Employment effects

(a) Continuous evaluation of potential loss or shifts of employment

The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement.

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

Any employee, or any representative of such employee, who is discharged or laid off, threatened with discharge or layoff, or whose employment is otherwise adversely affected or threatened to be adversely affected because of the alleged results of any requirement imposed or proposed to be imposed under this chapter, including any requirement applicable to Federal facilities and any requirement imposed by a State or political subdivision thereof, may request the Administrator to conduct a full investigation of the matter. Any such request shall be reduced to writing, shall set forth with reasonable particularity the grounds for the request, and shall be signed by the employee, or representative of such employee, making the request. The Administrator shall thereupon investigate the matter and, at the request of any party, shall hold public hearings on not less than five days' notice. At such hearings, the Administrator shall require the parties, including the employer involved, to present information relating to the actual or potential effect of such requirements on employment and the detailed reasons or justification therefor. If the Administrator determines that there are no reasonable grounds for conducting a public hearing he shall notify (in writing) the party requesting such hearing of such a determination and the reasons therefor. If the Administrator does convene such a hearing, the hearing shall be on the record. Upon receiving the report of such investigation, the Administrator shall make findings of fact as to the effect of such requirements on employment and on the alleged actual or potential discharge, layoff, or other adverse effect on employment, and shall make such recommendations as he deems appropriate. Such report, findings, and recommendations shall be available to the public.

(c) Subpenas; confidential information; witnesses; penalty

In connection with any investigation or public hearing conducted under subsection (b) of this section or as authorized in section 7419 of this title (relating to primary nonferrous smelter orders), the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents, and he may administer oaths. Except for emission data,

upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner, or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In cases of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Limitations on construction of section

Nothing in this section shall be construed to require or authorize the Administrator, the States, or political subdivisions thereof, to modify or withdraw any requirement imposed or proposed to be imposed under this chapter.

CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f), this brief contains 12,339 words. This brief complies with the typeface and type style requirements because it has been prepared in 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word 2013.

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CERTIFICATE OF SERVICE

On February 21, 2017, I served a copy of the foregoing brief on the United States Court of Appeals for the Fourth Circuit using the Appellate CM/ECF System. All parties to these consolidated cases are represented by registered CM/ECF users and will be served by the CM/ECF System.

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