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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MURRAY ENERGY CORPORATION et al.,
Plaintiff-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)

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEES SEEKING AFFIRMANCE

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April 7, 2017

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTION

Pursuant to Fed. R. App. P. 29(a)(4)(E), CoA Institute states that no party or person other than CoA Institute and its counsel participated in or contributed money for the drafting or submission of this brief.

STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

Amicus Curiae Cause of Action Institute ("CoA Institute"), is a 501(c)(3) nonpartisan, nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.[1] In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. CoA Institute also frequently represents third-party plaintiffs in actions against the federal government in an effort to scale back regulatory abuses and overreach. The Environmental Protection Agency's ("EPA") failure to conduct mandated job loss evaluations and investigations, in this case and others, is an abuse of the rule of law and has serious economic consequences.

CoA Institute supports Plaintiffs in seeking affirmance of the district court's final judgment. CoA Institute files this brief with consent of all parties and pursuant to Fed. R. App. P. 29 and 4th Cir. R. 29.

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[1] *See* CAUSE OF ACTION INST., *About*, www.causeofaction.org/about/.

INTRODUCTION

After decades of failing to fulfill its statutory mandate to evaluate the job loss effects of its actions resulting from the administration or enforcement of the Clean Air Act, and after the District Court ordered it to finally comply, the Environmental Protection Agency is making a last ditch attempt before this Court to evade its responsibilities.

This Court should affirm the district court's order and force the EPA to comply with its statutory obligations. The EPA's failure to conduct these evaluations, its failure to conduct similar evaluations found in a number of other environmental statutes, and its failure to establish appropriate procedures allowing affected parties to request job loss investigations and hearings, illustrates systemic problems with the EPA and reflects a lack of concern regarding the employment effects of its activities. The agency must finally be held accountable for these failures.

ARGUMENT

I. The EPA Must Fulfill its Mandatory Duties Under Section 321 of the Clean Air Act

Section 321(a) of the Clean Air Act ("CAA") plainly establishes the EPA Administrator's ("Administrator") duty to:

> conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the [the CAA] 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).

As the district court below properly recognized, this requirement is a mandatory one, regardless of the lack of date-certain deadlines. App. 160 ("While the EPA may have discretion as to the timing of such evaluations, it does not have the discretion to categorically refuse to conduct **any** such evaluations, which is the allegation of the plaintiffs."); *see* Pls.' Br. at 56–60.

Section 321 was added to the CAA because of congressional concern with the "extent to which the [CAA] or other factors are responsible for plant shutdowns, decisions not to build new plants, and consequent losses of employment opportunities." H.R. Rep. No. 95-294, at 316 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1395.

As the district court noted, "[w]ith specific statutory provisions like Section 321(a), Congress unmistakably intended to track and monitor the effects of the [CAA] and its implementing regulations on employment in order to improve the legislative and regulatory processes." App. 178; *see Envtl. Prot. Agency v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 82 n.24 (1980) (discussing a similar provision in the Clean Water Act that would "allow Congress to get a close look at the effects on employment of legislation such as this, and will thus place [Congress] in a position to consider such remedial legislation as may be necessary to ameliorate those effects.") (citation and quotation marks omitted).

Despite these admonitions and the CAA's clear requirements, the EPA does not conduct ongoing Section 321(a) evaluations. While the EPA claims in this case that it conducts the continuous evaluations mandated by Section 321(a) through the preparation of Regulatory Impact Analyses and related materials, such materials fall short of the mark. Pls.' Br. at 13–15, 28–32. Moreover, former EPA Administrator Gina McCarthy publicly stated that the agency does not, in fact, consider its duty under Section 321 to conduct evaluations and, when necessary, investigations as mandatory but rather discretionary.

> EPA has not interpreted [Section 321] to require EPA to conduct employment investigations in taking regulatory actions. . . . EPA has found no records indicating that any Administration since 1977 has

> interpreted section 321 to require job impacts analysis for rulemaking actions. . . .

App. 135.

The EPA's failure to carry out continuing evaluations of the impact of the CAA and its implementing regulations on employment robs Congress and affected parties of potentially vital information that can be used to "ameliorate" the negative effects. This is especially pertinent given Congress's renewed use of the Congressional Review Act ("CRA"), 5 U.S.C. §§ 801–08. The CRA allows Congress to review and reject regulations promulgated by various agencies. Congress has sixty days from when the agency reports a regulation to exercise its authority under the CRA to overturn an administrative action.

Thus far, in 2017, Congress and the President successfully used the CRA eleven times. *See* Ari Natter, *Congressional Clock Running Out on Repealing Obama's Late Rules*, Bloomberg (Apr. 6, 2017), *available at* https://bloom.bg/2o1qym0. Given such increased congressional interest, it is essential that agency rulemaking reports under 5 U.S.C. § 801(a)(1)(A) be issued in a timely and complete fashion. The EPA's failure to fulfill its statutory duties under Sections 321(a) and 321(b) of the CAA prevents it from timely reporting on other regulatory actions and, thus, deprives Congress of an important opportunity to conduct oversight and regulatory review.

II. Sections 321(a) and 321(b) Delegate Equally Vital Duties

The EPA claims that "the heart of Section 321" is not found in Section 321(a) but in Section 321(b) and related subsections, which are not at issue in this case. Def.'s Br. at 4. Section 321(b) establishes that any employee who is discharged or laid off, threatened with discharge or layoff, or whose employment is adversely affected by CAA requirements or proposed requirements "may request the Administrator to conduct a full investigation of the matter. . . . 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." 42 U.S.C. § 7621(b).

However, as Plaintiffs aptly argue, subsection (b) is no more the heart of Section 321 than subsection (a). Each part of the provision informs the other and creates an independent mandatory requirement for the EPA. *See, e.g.*, Pls. Br. at 30 (noting that the statutory context makes clear that both Sections 321(a) and 321(b) address specific losses of employment). Further, despite the EPA's professed claims regarding the importance of Section 321(b) procedures in the CAA's overall statutory scheme, the agency has never seen fit to promulgate *any*

regulations regarding the process and standards by which it should conduct investigations and hearings under Section 321(b).[2]

Concerned over these omissions, on September 14, 2016, CoA Institute petitioned the EPA to initiate a rulemaking to implement procedures for investigations and hearings under Section 321(b). Letter from CoA Institute to Gina McCarthy, Administrator, EPA (Sept. 14, 2016), *available at* http://coainst.org/2nmUhZG. In the absence of such standards, potential requestors are left without any guidance as to how to proceed under Section 321(b), thus rendering hollow the EPA's protestations regarding the centrality and importance of these provisions.[3] Despite submitting its petition nearly seven months ago, CoA Institute has yet to receive a response from the EPA.

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[2] CoA Institute could find only one reported example of an investigation conducted under Section 321(b), which occurred in 1981, a few years after passage of the CAA amendments. After the announcement of two plant closures operated by Anaconda Copper Company, which would affect approximately 1,500 individuals, employees who worked at the facilities asked the EPA to conduct an investigation under its Section 321 authority to determine the reasons for the closures. A regional EPA office conducted an investigation and issued a report concluding that the two plants at issue would have been closed even if the CAA never came into existence and declining to conduct a public hearing. *See* Role of Clean Air Act Requirements in Anaconda Copper Company's Closure of Its Montana Smelter and Refinery, U.S. Envtl. Prot. Agency, Region VIII (June 24, 1981), *available at* http://bit.ly/2nofjmJ.

[3] The EPA has promulgated such regulations for very similar provisions of the Clean Water Act ("CWA"). 40 C.F.R. § 108; *see also* 33 U.S.C. § 1367(e). No

III. The Failure to Engage in Employment Evaluations Mandated by a Number of Statutes Reveals Systemic Problems with the EPA

Most of the major environmental statutes administered by the EPA have provisions similar to Section 321 of the CAA. Yet, to the best of CoA Institute's knowledge, the EPA has failed to conduct required employment evaluations under any of those statutes. These failures illustrate systemic problems at the EPA regarding compliance with statutorily required congressional mandates and its lack of concern regarding the employment effects of its activities, which drove adoption of those provisions.

1. Section 507(e) of the Clean Water Act, 33 U.S.C. § 1367(e)

Section 507(e) of the CWA requires the EPA to evaluate potential loss or shifts of employment resulting from the issuance of any effluent limitation or order by the EPA and, if requested, to investigate specific allegations related to adverse effects of CWA limitations or orders. As noted by the U.S. Chamber of Commerce, the EPA has *never* conducted an employment study under Section 507(e):

> After extensive research the Chamber cannot identify even one instance under the Clean Water Act in which the Administrator made any effort to conduct an evaluation of its actions on the potential loss or shifts in

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sound reason exists why such regulations are in place for hearings related to the Clean Water Act but entirely absent for hearings related to the CAA.

> employment as a result of its actions. Congress imposed this mandate on the Administrator of EPA on October 18, 1972.

Statement of the U.S. Chamber of Commerce at 8, *EPA's Expanded Interpretation of its Permit Veto Authority Under the Clean Water Act*, U.S. H. Comm. on Transp. & Infrastructure, Subcomm. on Water Resources & Env't (July 15, 2014), *available at* http://uscham.com/2obUWfx.

2. Section 7001(e) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6971(e).

Section 7001(e) of the Resource Conservation and Recovery Act ("RCRA") is virtually identical to CWA Section 507(e). It requires the EPA to evaluate potential loss or shifts of employment due to EPA action under the RCRA and, if requested, to investigate specific allegations that administration or enforcement of the RCRA is having adverse effects on employment. CoA Institute could locate no evidence that the EPA has ever conducted an employment evaluation under Section 7001(e)**.**

3. Section 110(e) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610(e).

Section 110(e) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") requires the President to evaluate potential loss or shifts of employment resulting from the administration or enforcement of the CERCLA's provisions and, if requested, to investigate specific employee allegations related to adverse effects of CERCLA administration or

enforcement. The President, in turn, has delegated this power to the EPA Administrator. Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987), *as reprinted at* 42 U.S.C. § 9615 (Supp. 1991). CoA Institute could locate no evidence that the EPA has ever conducted an employment evaluation under Section 110(e).

In pursuit of any records of investigations launched pursuant to these statutory provisions, CoA Institute submitted a FOIA request on October 6, 2016 seeking records regarding the EPA's efforts to comply with all above statutory requirements. Letter from CoA Institute to Larry Gottesman, National FOIA Officer, EPA (Oct. 6, 2016), *available at* http://coainst.org/2ohhFHs. The EPA has yet to provide any substantive response to CoA Institute's request. The EPA's failure to respond to this request provides another indication of its inability to take seriously its obligations in this area. The agency must be held accountable for these systemic failures. The Court below was correct and only such a ruling can begin to ameliorate a decades-long pattern and practice by the EPA of willfully avoiding this same statutory duty across many statutes and areas within its jurisdiction.

CONCLUSION

For the foregoing reasons, as well as those expressed in Plaintiff's brief, this Court should affirm the final judgment of the district court.

Date: April 7, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,911 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I hereby certify that this brief also complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

Date: April 7, 2017

/s/ Joshua N. Schopf
Joshua N. Schopf

CERTIFICATE OF SERVICE

On April 7, 2017, I served the foregoing Brief of Amicus Curiae 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 electronically with a copy of the foregoing brief by the CM/ECF System.

Date: April 7, 2017

/s/ Joshua N. Schopf
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