

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
WHEELING**

MURRAY ENERGY CORPORATION, et al.,)

Plaintiffs,)

v.)

SCOTT PRUITT, Administrator,)

United States Environmental Protection Agency,)

in his official capacity,)

Defendant.)

Civil Action No. 5:14-cv-39
JUDGE BAILEY

MOTION TO AMEND ORDER OF DISMISSAL

Pursuant to Federal Rule of Civil Procedure 59 and 60, Plaintiffs, Murray Energy Corporation, *et al.* respectfully request that this Court amend its Order of Dismissal, Doc. 349 (October 2, 2017) (“Order”) to provide that dismissal is without prejudice for want of subject matter jurisdiction.

On June 29, 2017, the U.S. Court of Appeals for the Fourth Circuit issued its opinion instructing this Court “to have Murray’s suit dismissed for want of jurisdiction.” Doc. 348 at 17. The Fourth Circuit issued its mandate on August 21, 2017. Doc. 342. On September 27, 2017, Plaintiffs timely petitioned the U.S. Supreme Court for a writ of certiorari. Doc. 349. On October 2, 2017, this Court issued its Order stating that “this civil action be, and the same is hereby, **DISMISSED WITH PREJUDICE** and retired from the active docket of this Court.” Doc. 348 at 2.

Generally, “[a] dismissal for lack of standing—or any other defect in subject matter jurisdiction—must be one without prejudice, because a court that lacks jurisdiction has no

power to adjudicate and dispose of a claim on the merits.” *S. Walk at Broadlands Homeowner's Assn. v. Openband at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir.2013) (citations omitted); *see also Phillips v. SSA*, 537 F.App’x 268, 269 (4th Cir.2013) (“since the dismissal of an action for lack of subject matter jurisdiction is not a decision on the merits, such dismissal should be without prejudice.”); *Smalley v. Shapiro & Burson, LLP*, 526 Fed. Appx. 231, 238 (4th Cir. 2013) (“The district court did not have jurisdiction to enter a judgment on the merits, so the matter must be vacated and remanded to the district court with instructions that it be dismissed without prejudice for want of jurisdiction.”).

There are Fourth Circuit decisions that potentially depart from the general rule in specific circumstances, but none support dismissal with prejudice here. *See, e.g., Nivens v. Gilchrist*, 444 F.3d 237, 247 (4th Cir.2006) (affirming dismissal with prejudice on *Younger* abstention grounds while noting that dismissal would still have no *res judicata* effect); *Roland v. United States Citizenship & Immigration Servs.*, 850 F.3d 625, 628 (4th Cir.2017) (affirming dismissal with prejudice of certain immigration status determinations without discussing whether dismissal should have been with or without prejudice).

In this litigation, the Fourth Circuit held that “Section 304(a)(2) does not authorize the instant suit by Murray against the EPA, and that the district court thus lacked jurisdiction over the suit.” Doc. 329 at 14. The Fourth Circuit remanded with instructions “to have Murray’s suit dismissed for want of jurisdiction.” Doc. 329 at 17. At the same time, the Fourth Circuit noted that it was not considering whether “EPA’s alleged dereliction of its Section 321(a) duty” would separately give rise to a claim for “agency action unreasonably delayed” under 42 U.S.C. § 7604(a). *Id.* at 15, n.5.

Since the Fourth Circuit’s opinion determined that this Court lacked subject matter

jurisdiction, did not address the merits of the case, and noted another potential claim over which the courts might have subject matter jurisdiction, dismissal should not have been with prejudice.

As a result, to the extent that this Court determines that an order of dismissal should be entered while Plaintiffs' petition for certiorari remains pending, Plaintiffs respectfully request that the current Order be amended to make dismissal without prejudice for want of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court's Order of Dismissal dated October 2, 2017 be amended to provide for dismissal without prejudice for want of subject matter jurisdiction.

Respectfully submitted,

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Dated: October 26, 2017

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CERTIFICATE OF SERVICE

I, Jacob A. Manning, do hereby certify that the foregoing **Motion to Amend Order of Dismissal with Prejudice** was served upon all counsel via the CM/ECF Court System on this the 26th day of October, 2017.

/s/ Jacob A. Manning _____
Counsel for Plaintiffs