

Instead, the Fourth Circuit remanded with instructions “to have Murray’s suit dismissed for want of jurisdiction.” Doc. 329 at 17. Dismissal for want of jurisdiction is not only proper without prejudice, the Fourth Circuit has reversed orders dismissing cases for want of jurisdiction with prejudice. *See S. Walk at Broadlands Homeowner’s Assn. v. Openband at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir.2013) (reversing dismissal for want of jurisdiction with prejudice “because a court that lacks jurisdiction has no power to adjudicate and dispose of a claim on the merits.”); *see also Smalley v. Shapiro & Burson, LLP*, 526 Fed. Appx. 231, 238 (4th Cir. 2013) (reversing dismissal because “[t]he 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.”).

Second, even if this Court were to construe the Fourth Circuit’s dismissal instruction as based on sovereign immunity, which there is no evidence of, dismissal with prejudice would still not be proper. While EPA implies that sovereign immunity itself is a ground for dismissal with prejudice, this is not what EPA’s cases hold. The cases cited look to whether, once sovereign immunity is established, the “district court is truly unable to conceive of any set of facts under which a plaintiff would be entitled to relief.” *McLean v. United States*, 566 F.3d 391, 400 (4th Cir. 2009).

EPA cites a handful of sovereign immunity cases where courts concluded that dismissal should be with prejudice based on the facts of the case, which precluded any ability to obtain further relief. *See Frigard v. United States*, 862 F.2d 201, 204 (9th Cir. 1988) (affirming a dismissal with prejudice because “no other court has the power to hear the case, nor can the [plaintiffs] redraft their claims to avoid the exceptions to the FTCA.”); *In re Camp Lejeune N.*

Carolina Water Contamination Litig., No. 1:11-MD-2218-TwT, 2016 U.S. Dist. LEXIS 167216 at *110-11 (N.D. Ga. Dec. 5, 2016) (dismissing with prejudice because “the Government’s actions . . . are covered by the discretionary function exception to the Federal Tort Claims Act. . . and is not a situation where another court would potentially have subject-matter jurisdiction over the Plaintiffs’ claims.”) (emphasis added); *Best Med. Belgium, Inc. v. Kingdom of Belgium*, 913 F. Supp. 2d 230, 237 (E.D. Va. 2012) (dismissing claims brought against the Kingdom of Belgium where the plaintiff did not have a claim within the Foreign Sovereign Immunities Act (FSIA), which was the “sole basis for conferring jurisdiction upon this Court to hear claims against a foreign state” and could not state a claim under the Alien Tort Statute); *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, No. 1:16-cv-00545, 2017 U.S. Dist. LEXIS 66094 at *18-19 (E.D. Va. May 1, 2017) (dismissing with prejudice because a particular type of immunity under the Telephone Consumer Protection Act acts as “a complete bar to any future suit”); *Int’l Fed’n of Prof’l & Tech. Eng’rs v. United States*, 934 F. Supp. 2d 816, 820 (D. Md. 2013) (dismissing with prejudice where the plaintiffs conceded that sovereign immunity was not waived with respect to the litigation).

There are also cases where the Fourth Circuit has dismissed claims on sovereign immunity grounds without prejudice. See *McLean*, 566 F.3d at 401 ((affirming dismissal of a prisoner’s complaint without prejudice for failure to state a claim despite the court lacking jurisdiction under the principles of sovereign immunity); *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 286 (4th Cir. 2001) (concluding that “the doctrine of sovereign immunity bars the citizens from bringing their claims against an official of West Virginia in federal court,” so it vacated the district court’s injunction and remanded “with instructions to dismiss the citizens’ complaint without prejudice so that they may present their claims in the proper forum”); *Plyler*

v. United States, 900 F.2d 41, 42-43 (4th Cir. 1990) (the judgment of the district court was vacated due to the sovereign immunity of the U.S. Public Health Service and the case remanded for dismissal, without prejudice, for lack of jurisdiction); *Davis v. United States*, 722 F.2d 1157, 1158 (4th Cir. 1983) (affirming judgment of the district court, which dismissed the appellant's complaint under the Federal Tort Claims Act without prejudice and sought damages against the government resulting from the alleged violation by an air force base of the Federal Water Pollution Control Act because appellant failed to state a claim upon which relief could be granted under the Federal Tort Claims Act).

Moreover, other circuits have explicitly reversed sovereign immunity dismissals with prejudice to without prejudice. *See Anderson v. Jackson State Univ.*, 675 F. App'x 461, 464 (5th Cir. 2017) (remanding for limited purpose of changing dismissal based on sovereign immunity grounds to one without prejudice), *citing Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1348 (5th Cir. 1985) ("A dismissal for want of jurisdiction bars access to federal courts and is *res judicata* only of the lack of a federal court's power to act. It is otherwise without prejudice to the plaintiff's claims, and the rejected suitor may reassert his claim in any competent court.").

Finally, EPA did not even argue to the Fourth Circuit that dismissal should be with prejudice, thus waiving the argument. Also, EPA failed to oppose Plaintiffs' Motion to Amend, thereby waiving the argument completely. Doc. 352. Further, none of the documents EPA cites as raising the issue of sovereign immunity in this Court sought dismissal with prejudice. *See* Motion at 2-3 (citing ECF 35, 49, 205, and 280). Here, there are clearly grounds to refile, thus meeting the standard for dismissal without prejudice in sovereign immunity cases. In fact, in its Opinion and Order, the Fourth Circuit firmly declined to

consider whether “EPA’s alleged dereliction of its Section 321(a) duty” would constitute “agency action unreasonably delayed,” and would therefore give rise to a claim for unreasonable delay under 42 U.S.C. § 7604(a). Doc. 329. at 15, n.5. In other words, far from squarely foreclosing the prospect of Plaintiffs’ bringing a separate claim under 42 U.S.C. § 7604(a), the Fourth Circuit specifically acknowledged such a possibility. *Id.* While EPA argues that this is a different claim and so it is not barred by a dismissal with prejudice here, that construes the question far too narrowly. The issue is not whether the claim as stated can be refiled, but whether the plaintiff can still seek relief. Here that is clearly the case.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court **DENY** the EPA’s Motion for Reconsideration of Order Granting Plaintiffs’ Order of Dismissal without Prejudice and maintain this Court’s Amended Order dated November 3, 2017 providing for dismissal without prejudice for want of subject matter jurisdiction.

Respectfully submitted,

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Dated: November 28th, 2017

**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

CERTIFICATE OF SERVICE

I, Jacob A. Manning, do hereby certify that the foregoing **Plaintiffs' Response in Opposition to EPA's Motion for Reconsideration of Order Granting Plaintiffs' Motion to Amend Order of Dismissal** was served upon all counsel via the CM/ECF Court System on this the 28th day of November, 2017.

/s/ Jacob A. Manning
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