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

MURRAY ENERGY CORPORATION, et al.,

Plaintiffs,

v.

Civil Action No. 5:14-cv-00039-JPB

Judge: BAILEY

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

Defendant.

PROPOSED *AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL MINING ASSOCIATION IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to advocate for its members' interests before Congress, the Executive Branch, and the courts. To that end, it regularly files *amicus curiae* briefs in cases raising issues of concern to the Nation's business community.

The National Mining Association is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries.

This case presents a question of significant importance to the Chamber and National Mining Association (collectively "*amici*") and their members: whether the Environmental Protection Agency ("EPA") has fulfilled its statutory mandate under the Clean Air Act that it "shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of [the Clean Air Act] and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in

employment allegedly resulting from such administration or enforcement." Clean Air Act § 321(a), 42 U.S.C. § 7621(a).

The answer to this question has major consequences for *amici*'s members and, as a result, the national economy. In recent years EPA has claimed that its new major, economically significant regulations create jobs, whereas *amici*'s members report significant job losses—especially in the energy sector—based on EPA's regulatory activities. Section 321(a) of the Clean Air Act plays a critical role in forcing EPA to continuously evaluate the employment shifts and losses caused by its regulatory activities in order to encourage more cost-effective regulatory and legislative responses to current environmental challenges.

Amici have participated in many cases addressing the proper interpretation of the Clean Air Act. *See, e.g.*, *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *Michigan v. EPA*, 135 S. Ct. 2699 (2015). Given their membership, *amici* have both a broad perspective on the issues presented and a substantial interest in ensuring that the Clean Air Act is interpreted consistent with Congress's design.

INTRODUCTION AND SUMMARY

EPA's regulatory activities under the Clean Air Act frequently impose significant economic burdens and job losses on many sectors of the economy—including the energy sector. In response to these concerns about job loss and other economic costs, Congress, as part of the 1977 amendments to the Clean Air Act, required that EPA "*shall* conduct *continuing* evaluations of potential loss or shifts of

employment which may result from the administration or enforcement of" the Clean Air Act. Clean Air Act § 321(a), 42 U.S.C. § 7621(a) (emphasis added).

EPA has failed to fulfill this statutory duty, thus depriving Congress, the public, and the agency itself of a significant body of data that would shed light on the impact of environmental regulations on employment. This failure is despite the fact that Members of Congress—in addition to the Chamber via the Freedom of Information Act ("FOIA")—have repeatedly requested the results of such studies from EPA.

Now EPA attempts to skirt enforcement of its statutory duty by arguing that Congress's insistence in Section 321(a) that EPA "shall" conduct such evaluations is optional or discretionary, and thus no one can seek judicial review. EPA boldly argues, moreover, that Plaintiffs—energy companies that allege they have suffered severe economic losses due to EPA's regulatory activities and thus would perhaps most benefit from EPA fulfilling its statutory duty to continually evaluate job loss in the energy sector—do not have Article III standing to seek judicial relief from EPA's *ultra vires* behavior.

This Court correctly rejected both of these arguments in prior orders. *Amici* submit that the EPA must not be permitted to continue to abdicate its statutory mandate to continually assess the economic and employment costs of its regulatory activities under the Clean Air Act.

ARGUMENT

I. SECTION 321(A) HELPS CONGRESS, EPA, AND THE PUBLIC UNDERSTAND THE COSTS OF REGULATION, INCLUDING IN TERMS OF JOB LOSS

For decades Congress has instructed many agencies to evaluate the employment effects of regulations so that Congress can oversee regulatory activities and monitor the impact of regulations on industry and the public. The congressional intent behind these mandates is clear: Congress knew that regulations, such as those implemented under the Clean Air Act, could cause economic hardship, including the loss of jobs. To monitor those adverse impacts and, where needed, ameliorate them by increased agency oversight, adjusted appropriations, or even substantive legislative correction, Congress enacted statutory provisions to require ongoing agency analysis of regulations on employment. EPA's failure and, at times, outright defiance in conducting these congressionally mandated employment-effects evaluations must be addressed.

In the debates over the 1977 amendments to the Clean Air Act, Congress directly confronted the issue of potential job loss and other negative effects on regulated industries when it enacted a provision requiring the Secretary of Labor, in consultation with EPA Administrator, to conduct a study of potential dislocation of employees due to implementation of the laws administered by EPA. *See* Pub. L. No. 95-95, § 403(e), 91 Stat 685 (Aug. 7, 1977). The 1977 legislation also added Section 321(a)'s similar mandate for EPA to "conduct continuing evaluations of potential loss or shift of employment" potentially caused by EPA's regulatory activities. *Id.* § 311 (adding Section 321 to the Clean Air Act).

With specific statutory provisions like Section 321(a), Congress unmistakably intended to track and monitor the effects of the Clean Air Act and its implementing regulations on employment in order to improve the legislative and regulatory processes. The legislative record for these statutory provisions, as well as Supreme Court precedent, confirm this purpose. For example, the House Committee Report accompanying the 1977 amendments noted that the continuing job-loss assessment requirements under Section 321(a) were inserted to address frequent issues that have arisen concerning "the extent to which the Clean Air Act or other factors are responsible for plant shutdowns, decisions not to build new plants, and consequent losses of employment opportunities" H.R. Rep. 95-294, at 316, 1977 U.S.C.C.A.N. 1077, 1395.

Moreover, in *EPA v. National Crushed Stone Association*, 449 U.S. 64 (1980), the Supreme Court analyzed an employment-effects provision in the Clean Water Act, which served as the model for Section 321(a). As the Supreme Court explained, "Congress anticipated that the 1977 regulations would cause economic hardship and plant closings," 449 U.S. at 83, and thus included a job-loss assessment requirement to help Congress (and the agency) better assess the actual impact of such regulatory activity. Quoting Representative Fraser from the legislative record, the Supreme Court emphasized that "'[t]his amendment will allow the Congress to get a close look at the effects on employment of legislation such as this, and will thus place us in a position to consider such remedial legislation as may be necessary to ameliorate those effects.'" *Id.* at 83 n.24.

EPA has refused to fulfill its statutory mandate under Section 321(a) of the Clean Air Act—despite requests from Members of Congress and other entities, including the Chamber.[1] For instance, in 2009, six U.S. Senators requested EPA to provide the results from EPA's Section 321(a) continuing assessment of potential loss or shifts of employment, which may result from EPA's regulatory activities. EPA responded: "EPA has not interpreted [Clean Air Act] section 321 to require EPA to conduct employment investigations in taking regulatory actions." Similarly, in 2012, the Chamber, on behalf of its members, filed a FOIA request with EPA seeking "[a]ll draft, interim, and final reports and/or evaluations prepared by EPA or its contractor(s) pursuant to section 321 of the Clean Air Act." To date, EPA has produced no documents in response to this FOIA request.

In light of EPA's inaction and its repeated claims that proposed regulations would actually create jobs instead of cost jobs, the Chamber commissioned its own economic modeling of employment effects caused by a variety of recent EPA rules. To provide but one example from the NERA Economic Consulting's report to the Chamber, consider the impact of EPA's 2011 Utility Mercury and Air Toxics Standard ("Utility MATS rule"). EPA's partial-economy analysis showed that regulation would create 46,000 temporary construction jobs and 8,000 net new permanent jobs. By contrast, NERA's whole-economy analysis estimated that the

[1] These events are documented, with relevant citations, in Statement of William L. Kovacs, Senior Vice President, U.S. Chamber of Commerce, to House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, at 11-13 (Feb. 18, 2013), https://www.uschamber.com/sites/default/files/documents/files/130228_Testimony_RegulatoryIssues_HouseJudiciarySubcommitteeOnRegReform.pdf.

Utility MATS rule *alone* would have a negative impact on worker incomes equivalent to 180,000 to 215,000 lost jobs in 2015, and the negative worker income impacts would persist at the level of 50,000 to 85,000 such job-equivalents annually thereafter.[2] A subsequent Chamber analysis of the regulation's actual economic effects reported that utility owners attributed the retirement of 163 power plant units to the Utility MATS rule by the time the Supreme Court reached a decision on the rule's legality.[3]

Indeed, the last four decades have seen declines in the copper mining, steel, textile, and coal mining industries—among others. While a variety of factors have played a role in the decline of these industries, a common thread running through all of them has been the role of increased regulatory mandates and costs. Even

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[2] NERA ECONOMIC CONSULTING, IMPACTS OF REGULATIONS ON EMPLOYMENT: EXAMINING EPA'S OFT-REPEATED CLAIMS THAT REGULATIONS CREATE JOBS 26-29 (Feb. 2013) [hereinafter NERA REPORT], https://www.uschamber.com/sites/default/files/documents/files/020360_ETRA_Briefing_NERA_Study_final.pdf. To be sure, *amici* do not suggest that this type of economic modeling to estimate the effects of proposed regulations on employment would satisfy EPA's continuing employment-effects evaluation obligation under Section 321(a) of the Clean Air Act. Plaintiffs have fully briefed EPA's compliance deficiencies in their opposition brief (at 38-47), and those arguments will not be repeated here. Indeed, with respect to EPA's regulation of the brick industry, the Chamber has conducted its own analysis of the actual loss and shift in employment—the type of analysis that is similar to what EPA is required to do under Section 321(a). In light of the stark difference between EPA's estimated costs and the actual costs, the Chamber underscored that "EPA needs to conduct the type of *in-depth employment analyses* required by Section 321(a) of the Clean Air Act, in order to provide Congress and the public with information about the impacts its regulations have had on businesses, workers, and communities." U.S. CHAMBER OF COMMERCE, REGULATORY INDIFFERENCE HURTS VULNERABLE COMMUNITIES 3 (2016), https://www.uschamber.com/report/regulatory-indifference-hurts-vulnerable-communities.

[3] Heath Knakmuhs, *Two Wrongs Make a Blackout*, http://www.energyxxi.org/two-wrongs-make-blackout.

when regulations are not the primary cause of change, based on the experience of *amici*'s members, regulations imposed on an industry can provide the tipping point that leads to plant closures, job loss, and other adverse economic impacts that otherwise might have been avoided or cushioned over time. EPA continues to issue regulations aimed at protecting the environment. It must also fulfill its duty under Section 321(a) of the Clean Air Act to provide Congress and the public with methodologically complete assessments of the actual impact its regulations may have on jobs and communities.

II. THIS COURT CORRECTLY RULED THAT SECTION 321(A) IMPOSES A MANDATORY, NON-DISCRETIONARY DUTY ON EPA

In the motion for summary judgment, Defendant renews (at 20-22) its flawed argument that judicial review is not available because Section 321(a) does not impose a non-discretionary duty on EPA to do anything. Although Defendant attempts to reframe the argument as raising new points, the argument is the same one the Court already considered and rejected—i.e., that for a statute to be non-discretionary it must include a date-certain deadline (and Section 321(a) does not).

In its careful opinion, the Court properly interpreted the plain language of Section 321(a) in light of the statute as a whole and the legislative record that makes crystal clear that EPA "*is mandated to undertake* an ongoing evaluation of job losses and employment shifts due to requirements of the act." Dkt. No. 40, at 11 (quoting H.R. Rep. No. 95-294, at 317, 1977 U.S.C.C.A.N. 1077, 1396). *Amici* do not repeat the Court's sound analysis nor the response provided by Plaintiffs (at 23-25)

in their opposition to Defendant's motion to dismiss. Instead, *amici* focus on two points.

First, the language of Section 321(a) is unambiguously mandatory: EPA "*shall* conduct *continuing* evaluations of potential loss or shifts of employment which may result from the administration or enforcement of" the Clean Air Act. 42 U.S.C. § 7621(a) (emphasis added). As the Court has already noted, "shall" means, well, "shall." But perhaps of similar importance, Section 321(a) expressly provides for a deadline or timeframe for such mandatory evaluations of potential loss or shifts of employment: the required timing is "continuing."

This unambiguous language sets Section 321(a) apart from the statutes analyzed in the various cases Defendant cites (at 21) in the summary judgment motion for the proposition that "courts that have considered the issue in the context of a CAA citizen suit have held that a date-certain deadline is required." Consider, for instance, EPA's reliance on *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987). There, Sierra Club challenged EPA's delay in issuing a regulation where the Clean Air Act provided no deadline for such issuance. The D.C. Circuit held that, in the context of an unreasonable delay claim, "a duty of timeliness must 'categorically mandat[e]' that *all* specified action be taken by a date-certain deadline." *Id.* at 791. For a claim of unreasonable delay in rulemaking, "the only question for the district court to answer is whether the agency failed to comply with that deadline." *Id.*

This case, by contrast, presents no freestanding challenge for undue delay in issuing a regulation. To the contrary, it concerns a statutory mandate that EPA

"shall conduct continuing evaluations." 42 U.S.C. § 7621(a). That is an express, unambiguous requirement on the agency of a continuing nature. Indeed, even applying the non-analogous cases EPA has cited (at 21), Section 321(a) answers all three questions set forth by the First Circuit in *Maine v. Thomas*, 874 F.2d 883 (1st Cir. 1989): (1) EPA Administrator is required to take action; (2) that action is to conduct evaluations of potential job loss or shifts of employment based on EPA's regulatory activities; and (3) the duty must be fulfilled continuously. *Cf. id.* at 888 ("Having discerned who was required to take what action, we believe that the appropriate check is to ask when the duty must be fulfilled.").

EPA has had nearly four decades to attempt to fulfill this ongoing statutory requirement to "conduct continuing evaluations of potential job loss and shifts of employment." 42 U.S.C. § 7621(a). There can be no serious dispute that Section 321(a)'s timing requirement of "continuing evaluations" has not been met. EPA's Catch-22 response, which has the effect of evading its congressionally mandated duty indefinitely, should be rejected. Indeed, to borrow from the Second Circuit in another of the (albeit-dissimilar) cases on which EPA relies (at 21), "we cannot agree with [EPA] that the Administrator may simply make no formal decision to revise or not to revise [a rule], leaving the matter in a bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court. No discernible congressional purpose is served by creating such a bureaucratic twilight zone, in which many of the Act's purposes might become subject to evasion." *Envtl. Def. Fund v. Thomas*, 870 F.2d 892, 900 (2d Cir. 1989).

Second, as discussed in Part I *supra*, the overall statutory scheme and purpose—coupled with the legislative record leading up to the enactment of Section 321(a) in 1977—confirm Section 321(a)'s plain language that EPA has a non-discretionary duty to conduct ongoing evaluations of loss and potential shifts of employment. This continuing evaluation of employment effects was a critical part of the 1977 amendments to improve the regulatory and legislative responses to address the economic impacts of EPA's regulatory activities. Collecting and considering such information is of particular importance in light of the Chamber's own economic analysis, discussed in Part I *supra*, which demonstrates that EPA often claims that its regulatory activities create jobs when, in fact, they lead to substantial job loss and other economic costs. Accurate reporting of the devastating job losses caused by EPA regulations should cause EPA to regulate better to take into account the economic costs. And it would no doubt spur heightened legislative oversight of EPA rulemaking, additional data for the congressional appropriations process with respect to EPA, and, when necessary, substantive legislative action to reverse field.

III. THIS COURT CORRECTLY RULED THAT PLAINTIFFS HAVE STANDING TO SEEK JUDICIAL RELIEF TO FORCE EPA TO FULFILL ITS STATUTORY DUTY

Defendant also renews the already-rejected argument that Plaintiffs lack standing to seek judicial relief because Plaintiffs have not suffered any concrete harm that is fairly traceable to EPA's failure to fulfill its statutory duties and that is redressable by this Court. Again, the Court already extensively and properly rejected these arguments, finding that Plaintiffs have Article III standing under the

Supreme Court's traditional approach and that Plaintiffs likewise have standing under alternative theories of procedural and information standing.

In the motion for summary judgment (at 22-32), Defendant does not raise any argument that would warrant reconsideration of the Court's careful and cogent analysis in its order denying Defendant's second motion to dismiss. *See* Dkt. 71, at 4-17. Plaintiffs, moreover, fully address (at 25-38) Defendant's standing argument in their brief in opposition to summary judgment. Accordingly, *amici* do not cover similar ground here. Instead, *amici* focus on two additional points based on their expertise and their members' substantial experience shouldering the costs of regulation.

First, Defendant's argument (at 23) that Plaintiffs' framing of concrete economic injury is insufficient because it "is based on the vague notion of a 'reduced market for coal' that is undefined and lacks any parameters" drips with irony. Any absence of such evidence is precisely because EPA has failed to fulfill its Section 321(a) duty to "conduct continuing evaluations of potential loss or shifts of employment which may result from" EPA's regulatory activities. In other words, had EPA fulfilled its ongoing duty—a statutory mandate to which EPA has been subject for nearly four decades now—EPA could not baldly claim that there is no evidence that its "war on coal" has not harmed the coal companies that are Plaintiffs in this action. To the contrary, the employment-effects information Plaintiffs seek would disprove Defendant's baseless claims regarding any lack of economic injury.

As detailed in Part I *supra*, moreover, the Chamber commissioned its own study of the economic effects of EPA's regulatory activities. That research documents substantial economic costs and employment losses that far exceed EPA's own flawed estimates that it made at the outset of the regulatory process. In addition to the staggering job losses caused by EPA's Utility MATS rule—a regulation EPA estimated would create jobs—NERA assessed the job-loss effects of three other EPA regulations and reached similar conclusions:

- EPA's Cross State Air Pollution rule would have an impact on worker incomes equivalent to the annual loss of 34,000 jobs per year from 2013 through 2037, compared with EPA's claim of 700 jobs per year gained.
- EPA's Industrial Boiler Maximum Achievable Technology rule would have a negative impact on worker incomes equivalent to 28,000 jobs per year on average from 2013 through 2037, compared to EPA's claim of 2,200 jobs per year gained.
- EPA's planned ozone National Ambient Air Quality Standard (NAAQS) would reduce worker incomes by the equivalent of 609,000 jobs per year on average from 2013 through 2037.[4]

Accordingly, any argument that Plaintiffs have suffered no concrete injury in terms of job loss and other economic injury should not be taken seriously. It is sheer

[4] At the time of the NERA Report's release, EPA had yet to publish an employment impact for the ozone NAAQS. These three case studies are published in the twenty-six page addendum to NERA REPORT, *supra* note 2.

chutzpah for EPA to invoke its four-decade-long abdication of its own obligation to conduct job loss evaluations to claim that industry lacks standing because it cannot prove that EPA's regulations have caused job losses. Indeed, if EPA had been conducting a proper continuing evaluation of such job loss and employment shifts, as required since 1977 under Section 321(a) and as Members of Congress, the Chamber, and Plaintiffs have demanded, EPA could not assert these lack-of-harm arguments now.

Second, Defendant's arguments regarding causation and redressability for purposes of Article III standing should similarly be rejected, as the Court has already done in its order denying Defendant's second motion to dismiss. As the Court noted in its prior order and *amici* further detail in Part I *supra*, "Congress' purpose in enacting the [Section 321(a)] requirement for the evaluations was to provide information which could lead the EPA or Congress to amend the prior EPA actions." Dkt. No. 71, at 11. The relief requested, moreover, "may have the effect of convincing the EPA, Congress, and/or the American public to relax or alter EPA's prior decisions." *Id.*

Even if EPA were to refuse to improve its regulatory activities to account for the actual employment effects of its existing regulations, accurate evaluation of substantial job loss would certainly cause heighted congressional oversight of EPA regulatory activities and provide critical information during the congressional appropriations process with respect to EPA. Indeed, as the Supreme Court noted in the context of a similar statutory mandate in the Clean Water Act, such a

continuing evaluation requirement "will allow the Congress to get a close look at the effects on employment of legislation such as this, and will thus place us in a position to consider such remedial legislation as may be necessary to ameliorate those effects.'" *Nat'l Crushed Stone Ass'n*, 449 U.S. at 83 n.24 (quoting Representative Fraser from legislative record).

The NERA Report, moreover, illustrates that EPA has a history of underestimating the economic costs of its regulations. Indeed, just last year the Supreme Court noted another instance where EPA had failed—indeed, like here, outright refused—to consider costs when regulating. *See Michigan v. EPA*, 135 S. Ct. at 2707 ("EPA strayed far beyond those bounds when it read [the Clean Air Act] to mean that it could ignore cost when deciding whether to regulate power plants."). If EPA were to fulfill its ongoing job-loss assessment obligations under Section 321(a), it would have a wealth of additional information concerning the actual costs of its regulatory activities so as to better estimate the costs of future regulation as well as modify, where permissible, its current regulatory activities.

Accordingly, the judicial relief Plaintiffs request—that EPA be compelled to conduct a proper and continuing evaluation of job losses caused by EPA regulations—would provide critical information for regulatory and legislative reforms that would correct the course of EPA's current regulatory efforts under the Clean Air Act. That was precisely Congress's purpose when it amended the Clean Air Act in 1977 to require Section 321(a)'s continuing employment-effects evaluations. It is time for EPA to fulfill its statutory mandate.

CONCLUSION

Accordingly, Defendant's motion for summary judgment should be denied.

Dated August 22, 2016

Respectfully submitted,

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Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August 2016, I electronically filed the foregoing "**Proposed *Amicus Curiae* Brief of The Chamber of Commerce of The United States of America and National Mining Association in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment"** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties.

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