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

MURRAY ENERGY CORPORATION, et al., Plaintiffs, v. GINA McCARTHY, in her official capacity as Administrator of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	Case No. 5:14-cv-00039-JPB Judge Bailey

UNITED STATES' EMERGENCY MOTION FOR PROTECTIVE ORDER PRECLUDING THE DEPOSITION OF EPA ADMINISTRATOR MCCARTHY

Pursuant to Fed. R. Civ. P. 26(c), the United States, on behalf of Defendant Gina McCarthy, Administrator, Environmental Protection Agency ("EPA"), respectfully moves for a protective order precluding the deposition of Administrator McCarthy. The United States respectfully requests that the Court enter an expedited briefing schedule on this motion so that it can be decided in advance of the noticed deposition date, November 24, 2015.[1]

As set forth in the supporting Memorandum of Law filed herewith, Administrator McCarthy qualifies as a high-ranking official whose deposition should be barred absent

[1] The United States respectfully requests that the Court rule upon its motion on an expedited basis, not later than November 4, 2015. A ruling within that timeframe is appropriate so that the parties have time to seek further relief or review, if necessary, or to make other arrangements for needed discovery, prior to the November 30 deadline for discovery to be complete. The United States is prepared to file its reply brief on an expedited basis as necessary to ensure that the Court is able to resolve its motion within that timeframe.

extraordinary circumstances. Plaintiffs have failed to carry their burden to establish the extraordinary circumstances necessary to warrant Administrator McCarthy's deposition.

In accordance with Fed. R. Civ. P. 26(c)(1), counsel certifies that the United States has in good faith conferred with counsel for Murray Energy in an effort to resolve this dispute without Court action.

DATED: October 16, 2015

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CERTIFICATE OF SERVICE

I, Erin M. Carter, hereby certify that on this 16th day of October, 2015, I electronically filed the foregoing EMERGENCY MOTION FOR PROTECTIVE ORDER PRECLUDING THE DEPOSITION OF EPA ADMINISTRATOR MCCARTHY with the Clerk of the Court using the CM/ECF system, which will cause a copy to be served upon counsel of record.

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

MURRAY ENERGY CORPORATION, et al., Plaintiffs, v. GINA McCARTHY, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, acting in her official capacity, Defendant.	)	**Civil Action No. 5:14-CV-00039** Judge Bailey

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR PROTECTIVE ORDER PRECLUDING THE DEPOSITION OF EPA ADMINISTRATOR MCCARTHY

Pursuant to Fed. R. Civ. P. 26(c), the United States, on behalf of Defendant Gina McCarthy, Administrator, Environmental Protection Agency ("EPA"), respectfully moves for a protective order precluding the deposition of Administrator McCarthy. The United States respectfully requests that the Court enter an expedited briefing schedule on this motion so that it can be decided in advance of the noticed deposition date, November 24, 2015.[1]

INTRODUCTION

High-ranking government officials, such as Administrator McCarthy, are not subject to deposition absent extraordinary circumstances, which exist only when the party seeking the

[1] The United States respectfully requests that the Court rule upon its motion on an expedited basis, not later than November 4, 2015. A ruling within that timeframe is appropriate so that the parties have time to seek further relief or review, if necessary, or to make other arrangements for needed discovery, prior to the November 30 deadline for discovery to be complete. The United States is prepared to file its reply brief on an expedited basis as necessary to ensure that the Court is able to resolve its motion within that timeframe.

deposition establishes that such officials can provide essential information that cannot be obtained through other means. Such a showing is necessary to avoid encroachment on constitutional separation of powers and to prevent the disruption of governmental affairs. Plaintiffs have not met their burden to demonstrate extraordinary circumstances sufficient to justify the EPA Administrator's deposition. Specifically, Plaintiffs have failed to demonstrate that Administrator McCarthy possesses knowledge essential to their case that is unavailable from another source. Indeed, to the extent Administrator McCarthy possesses potentially relevant information, that information is obtainable from many other sources, including the upcoming Rule 30(b)(6) deposition of EPA, the ongoing depositions of other EPA witnesses, EPA's substantial document production, and written responses to Plaintiffs' discovery requests.[2] Accordingly, this Court should issue a protective order precluding the deposition of Administrator McCarthy, which is currently noticed for November 24, 2015. Ex. 1 (Plaintiffs' Deposition Notice of Gina McCarthy).

LEGAL STANDARD

Rule 26(c) of the Federal Rules of Civil Procedure provides the Court with broad discretion, for good cause shown, to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26 (c)(1); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (holding that courts have "broad discretion . . . to

[2] The United States maintains that discovery is neither necessary nor helpful in resolving the single claim in this mandatory duty case, which turns on the resolution of two purely legal questions: (1) whether EPA has or has not performed the evaluations described in Section 321(a) of the Clean Air Act, 42 U.S.C. § 7621(a), and (2) if the Court finds that EPA has not performed such evaluations, the scope of relief to which Plaintiffs are entitled. *See* ECF No. 88 (Memorandum In Support of the United States' Motion for Entry of Protective Order). Accordingly, it is the United States' position that Plaintiffs' written discovery requests and depositions are not necessary to decide the case.

decide when a protective order is appropriate and what degree of protection is required"). This discretion includes orders forbidding the requested discovery altogether. Fed. R. Civ. P. 26(c)(1)(A); *Fonner v. Fairfax Cnty.*, 415 F.3d 325, 331 (4th Cir. 2005) (holding that district court did not abuse its discretion in issuing a protective order precluding an individual's deposition).

ARGUMENT

I. Depositions of Senior Government Officials, Such as Administrator McCarthy, Are Barred Absent Extraordinary Circumstances.

It is well-established that high-level government officials should not ordinarily be required to testify concerning their official actions. *See United States v. Morgan*, 313 U.S. 409, 422 (1941); *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991); *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). Two rationales underlie this doctrine. First, as the Supreme Court recognized in *Morgan*, parties litigating against federal agencies are precluded from examining the processes by which high-ranking agency officials exercise discretion and make decisions. 313 U.S. at 422. Insulating the deliberative processes of high-level public officials from judicial scrutiny helps preserve constitutional separation of powers. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977) (noting that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government"). As the Court of Appeals for the Eleventh Circuit has recognized, compelling the testimony of high-ranking agency officials "would have serious repercussions for the relationship between two coequal branches of government." *In re United States (Jackson)*, 624 F.3d 1368, 1373-74 (11th Cir. 2010) (observing that "compelling the [Food and Drug Administration] Commissioner's testimony by telephone for 30 minutes disrespected the separation of powers").

Second, as a practical matter, if high-level government officials could be subject to deposition in every civil action involving their agency, the officials would be impeded from exercising their duties. *See In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (noting that "[h]igh ranking government officials have greater duties and time constraints than other witnesses"). In *Community Federal Savings & Loan v. Federal Home Loan Bank Board*, 96 F.R.D. 619, 621 (D.D.C. 1983), the court explained the well-recognized basis for protecting high-ranking government officials from depositions:

> [P]ublic policy requires that the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases. Considering the volume of litigation to which the government is a party, a failure to place reasonable limits upon private litigants' access to responsible governmental officials as sources of routine pre-trial discovery would result in a severe disruption of the government's primary function.

In light of the strong policies against requiring such testimony, courts have generally precluded the deposition of high-ranking government officials. Indeed, the Fourth Circuit and other federal appellate courts have issued writs of mandamus to prevent the compulsion of testimony by high-level government officials. *See United States Bd. of Parole v. Merhige*, 487 F.2d 25, 29 (4th Cir. 1973) (United States Parole Board members); *In re United States (Jackson)*, 624 F.3d at 1372-73 (EPA Administrator); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (Vice President); *In re United States (Reno & Holder)*, 197 F.3d 310, 314 (8th Cir. 1999) (Attorney General and Deputy Attorney General); *In Re FDIC*, 58 F.3d at 1060 (FDIC Board of Directors members); *In re United States (Kessler)*, 985 F.2d 510, 513 (11th Cir. 1993) (FDA Commissioner); *In re U.S (Bernanke)*, 542 F. App'x 944, 948 (Fed. Cir. 2013) (Chairman of the Federal Reserve Board). Given the extraordinary nature of mandamus as a remedy, *see In re Cheney*, 544 F.3d at 312, these decisions emphasize the courts' strong predilection against compelling the testimony of senior government officials.

The rare and narrow exception to this rule is when the party seeking the deposition can demonstrate the existence of extraordinary circumstances. *See Simplex Time Recorder Co.*, 766 F.2d at 586 ("[T]op executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions."); *Merhige*, 487 F.2d at 29 (finding members of Parole Board should be subject to deposition only under "exceptional circumstances"); *In re Office of Inspector Gen., R.R. Retirement Bd.*, 933 F.2d 276, 278 (5th Cir. 1991) (advising that the district court "shall remain mindful of the requirement that exceptional circumstances must exist *before* the involuntary depositions of high agency officials are permitted") (emphasis added); *In re United States (Reno & Holder)*, 197 F.3d at 313; *In re United States (Kessler)*, 985 F.2d at 512. The burden of establishing such extraordinary circumstances falls on the party seeking to take the official's testimony. *In re United States (Reno & Holder)*, 197 F.3d at 314; *In re U.S (Bernanke)*, 542 F. App'x at 948 (holding that even where the "government is a movant, the party seeking deposition bears the burden of proving extraordinary circumstances").

Here, there can be no doubt that Administrator McCarthy qualifies as a high-ranking official whose deposition should be barred absent extraordinary circumstances. Administrator McCarthy, as head of the EPA, is a cabinet-rank official who reports directly to the President.[3] *See Peoples v. U.S. Dep't of Agric.*, 427 F.2d 561, 567 (D.C. Cir. 1970) ("[S]ubjecting a cabinet officer to oral deposition is not normally countenanced."). Requiring her deposition implicates constitutional separation of powers concerns. *In re USA (Jackson)*, 624 F.3d at 1375 (finding that compelling the testimony of the EPA Administrator, compared to the FDA Commissioner,

[3] See https://www.whitehouse.gov/administration/cabinet stating that Administrator Gina McCarthy (among others) has "the status of Cabinet-rank." (last accessed on Oct. 16, 2015)

posed a greater threat to the separation of powers because the EPA Administrator was a higher-ranking official). Additionally, Administrator McCarthy's daily responsibilities are numerous and highly demanding, so subjecting her to a deposition would be disruptive to her activities and the activities of EPA as a whole. As a result, a showing of "extraordinary circumstances" is a *prerequisite* to justify her deposition, and, as discussed below, Plaintiffs have failed to carry their burden to establish the extraordinary circumstances necessary to warrant disrupting Administrator McCarthy's performance of her duties with an unnecessary deposition.

II. Plaintiffs Have Not Established Extraordinary Circumstances Sufficient to Justify Administrator McCarthy's Deposition.

Plaintiffs have not shown, and cannot show, that extraordinary circumstances exist to justify deviation from the well-established prohibition on deposing high-level government officials, such as Administrator McCarthy. To determine if the requisite extraordinary circumstances exist, courts consider whether there has been a showing that the official has unique personal information essential to the case that could not be obtained from any less burdensome source. *In re United States (Reno & Holder)*, 197 F.3d at 314 (quashing subpoena issued to the Attorney General, finding that defendant failed to "show[] that there are no other sources for the information he seeks"); *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007) (affirming the issuance of a protective order precluding the deposition of the Mayor of Boston where plaintiff failed to demonstrate that the sought-after information was unavailable from other sources); *Low v. Whitman*, 207 F.R.D. 9 (D.D.C. 2002) (issuing a protective order where the information sought from the EPA's Deputy Chief of Staff was readily available from other witnesses). As the court in *In re United States (Reno & Holder)* explained, exceptional circumstances require a showing "*both* that the discovery sought [from the high-level government official] is relevant and necessary and that it cannot otherwise be obtained. . . .

Without establishing this foundation, 'exceptional circumstances' cannot be shown sufficient to justify a subpoena [to high-level government officials]." 197 F.3d at 314. (internal citation omitted) (emphasis added).

Here, Plaintiffs have failed to establish that Administrator McCarthy possesses knowledge that is both unique and necessary to their case and cannot be obtained from another source. Indeed, as expressed during the meet-and-confer process, Plaintiffs appear to have flipped the standard on its head, asserting that because they have not yet established that Administrator McCarthy *does not possess unique information*, their right to take her deposition is presumed. *See* Ex. 2, (Oct. 12, 2015 email from J. Lazzaretti).[4] That is not the standard. Rather, by requiring extraordinary circumstances, courts place the burden on the party seeking the deposition to establish that the high-ranking employee has unique information otherwise unavailable. As we explain in detail below, any information Plaintiffs seek from Administrator McCarthy's deposition is available from other sources.

In an apparent attempt to bypass their burden, Plaintiffs suggest that the Administrator's status as the nominal defendant in this case and the nature of her position as the head of EPA are sufficient to justify her deposition. Specifically, Plaintiffs assert that the Administrator can be deposed because "[s]he is the named defendant, the only person specifically tasked with complying with section 321(a)" and because a "key component of this case is the Administrator's regulatory and enforcement initiatives against the coal industry" "stem[ming] from Ms. McCarthy's overall administration and enforcement of the Clean Air Act, which is

[4] After Plaintiffs served Administrator McCarthy's deposition notice on October 7, 2015, the parties met-and-conferred telephonically that same day. During that telephone conference, the United States explained why the Administrator's deposition was improper and requested that Plaintiffs withdraw without prejudice her deposition notice. *See* Ex. 2, (Oct. 9, 2015 email from R. Gladstein). Plaintiffs refused. *See* Ex. 2, (Oct. 12, 2015 email from J. Lazzaretti).

again a subject on which Ms. McCarthy is uniquely qualified to testify." Ex. 2 (Oct. 12, 2015 email from J. Lazzaretti). None of these assertions qualifies as an extraordinary circumstance that would justify deviation from the well-established principle that high-level officials cannot be deposed. On the contrary, the circumstances here are ordinary in every aspect of the word.

The Administrator's status as the nominal defendant in her official capacity in this matter, as required by 42 U.S.C. § 7604(a)(2), does not remove her from the general rule barring the deposition of high-level officials. *See Cmty. Fed. Sav.*, 96 F.R.D. at 621 ("In the absence of such extraordinary circumstances, however, an agency official—even if nominally a party—is generally not to be required to submit to an oral discovery deposition . . ."). Moreover, the fact that the Administrator has ultimate authority over the administration and enforcement of the Clean Air Act, including the provision at issue here, cannot amount to the requisite "extraordinary circumstances" because those general responsibilities are possessed by every EPA Administrator. Indeed, if such a limited showing were required, the Administrator (as well as other cabinet-level officials) could be compelled to testify in any civil action related to the numerous statutes she is responsible for administering, which would severely disrupt her execution of her official duties. *See In re U.S. (Kessler*), 985 F.2d at 512 ("If the [FDA] Commissioner was asked to testify in every case which the FDA prosecuted, his time would be monopolized by preparing and testifying in such cases.").

Furthermore, the fact that Section 321(a) directs that the Administrator to carry out a specific task is not unique. Nearly every requirement in the Clean Air Act (and other environmental statutes, including the Clean Water Act) is directed to the Administrator. *See e.g.* 42 U.S.C. § 7409 (directing the Administrator to promulgate national primary and secondary

ambient air quality standards).[5] Such direction certainly does not mean that the Administrator is the only person who performs those duties. Indeed enforcement and administration of the Clean Air Act (and other environmental statutes) is a monumental task that is accomplished by the Agency as a whole, with the aid of countless assistants, deputies, directors, and staff at EPA Headquarters and in regional offices across the country who have been delegated responsibility to carry out the Administrator's duties. All that Plaintiffs have shown at this point is that the Administrator occupies a unique position as the head of the agency. But even if the Administrator may be "uniquely situated" or "uniquely qualified" to testify about EPA's overall administration and enforcement of the Clean Air Act, such qualifications do not establish that she has unique *knowledge* essential to Plaintiffs' case that is unavailable from a less-burdensome source.

Equally unavailing is Plaintiffs' claim that Administrator McCarthy should be deposed because she "appears to be the only person presently at the agency in a position to speak on what she has done or not done to comply with Section 321(a)." Ex. 2 (Oct. 12, 2015 email from J. Lazzaretti). Plaintiffs' belief that Administrator McCarthy "appears" to have unique knowledge is insufficient to warrant her deposition; rather, Plaintiffs must *establish* that the information she actually does possess is both unavailable and necessary to their case. Plaintiffs lack, and indeed do not offer, any basis for their claim that Administrator McCarthy is the only person at EPA who can speak to what the Administrator, in her official capacity, has done to comply with Section 321(a). Plaintiffs appear to suggest that Administrator McCarthy has independently taken actions with regard to Section 321(a). But that is not how a federal agency functions. EPA

[5] This is also true for non-environmental statutes that also direct the head of the executive agency to administer and enforce those laws. *See, e.g.* 42 U.S.C. § 7491(a)(2) (directing the Secretary of the Interior to identify Class I areas where visibility is an important value).

Administrators do not act in a vacuum. As noted above, their actions are taken in coordination with subordinate officials and employees who are available as less-burdensome sources from whom Plaintiffs may seek discovery. Plaintiffs cannot circumvent these sources by merely contending that the Administrator is the only person who can speak to a particular issue; rather, they must depose these subordinate officials and employees to exhaust those sources *before* they can credibly make such a contention. Yet, Plaintiffs have not done so here.

Similarly, the fact that Administrator McCarthy has testified before Congress about EPA's compliance with Section 321(a), *see* Ex. 2 (Oct. 12, 2015 email from J. Lazzaretti), does not establish that she is the sole person at EPA with such knowledge. Most agency heads must testify before Congress on a wide range of topics. If such testimony created a presumption that agency heads could be deposed, every litigant suing a federal agency would be able to depose the head of that agency, as opposed to such depositions being an extraordinarily rare exception. If anything, the existence of a public record of her testimony on the very topics about which Plaintiffs seek discovery eliminates the need for the separate and burdensome exercise of a deposition in this individual case. Moreover, the Administrator's testimony before Congress reflects the Agency's collective knowledge, gathered from subordinate officials and employees, as to the topic at hand. Accordingly, the fact that an Administrator testified on a particular point falls far short of establishing that the Administrator has any unique knowledge that is unattainable from another source. *See In re U.S. (Reno & Holder)*, 197 F.3d at 314 (holding that to compel testimony of high ranking officials it must be established "*both* that the discovery sought is relevant and necessary and that it cannot otherwise be obtained").

Moreover, the information Plaintiffs appear to seek from Administrator McCarthy's deposition about EPA's compliance with Section 321(a) of the Clean Air Act, *see* Ex. 2 (Oct. 12,

2015 email from J. Lazzaretti), is readily available from multiple, less-burdensome sources. These sources include Plaintiffs' upcoming Federal Rule of Civil Procedure 30(b)(6) deposition of the EPA, the ongoing depositions of lower-ranking EPA employees listed in EPA's Initial Disclosures or otherwise identified by EPA in interrogatory responses, and EPA's responses to Plaintiffs' discovery requests.

Specifically, Plaintiffs will have the opportunity to question EPA about its interpretation of and compliance with Section 321(a) during Plaintiffs' Rule 30(b)(6) deposition of EPA's designee(s).[6] Indeed, courts have issued protective orders precluding the deposition of high-ranking officials where the information could be obtained through a Rule 30(b)(6) deposition of the appropriate government agency. *See, e.g., Furey v. Wolfe*, No. 10-1820, 2011 WL 597038, at *6 (E.D. Pa. Feb. 18, 2011) (granting a protective order and noting that the information sought from the high-ranking official could be obtained through a Rule 30(b)(6) designee). Here, the same topics on which Plaintiffs seek to depose Administrator McCarthy are included among the fifty-four (54) broad topics listed in their Rule 30(b)(6) deposition notice, including, "[EPA's] past and current interpretations of Section 321(a)," "[EPA's] past and current compliance with Section 321(a)," "steps [EPA] ha[s] taken to ensure compliance with Section 321(a)," and "[t]he role of the Administrator in complying with Section 321(a)." Ex. 3, Amended Notice of Fed. R. Civ. P. 30(b)(6) Deposition of the United States Environmental Protection Agency *Duces Tecum* dated June 3, 2015.

[6] However, Plaintiffs will not be entitled to delve into privileged matters, including EPA's pre-decisional internal deliberations, which are protected by the deliberative process privilege. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). Of course, that would also be the case if Plaintiffs deposed Administrator McCarthy. *See Morgan*, 313 U.S. at 422.

The information Plaintiffs seek is also available from other lower-ranking EPA employees whom EPA has identified as persons with relevant knowledge in EPA's Initial Disclosures and in response to Plaintiffs' interrogatories. At the time of the filing of this Motion, two of those employees have already been deposed and the deposition of several others have been noticed and are in the process of being scheduled, including Johnathan Lubetsky, with whom the Administrator discussed Section 321(a), as identified in EPA's June 12, 2015 Objections and First Supplemental Responses to Plaintiffs' First Set of Interrogatories (Ex. 4). Because the information Plaintiffs seek from Administrator McCarthy is available from the Rule 30(b)(6) designee(s) and other individual EPA employee depositions, Plaintiffs cannot justify their exceptional request to depose the Administrator on the same issues.

In addition to other witness' testimony, Plaintiffs can obtain the information they seek from EPA's responses to Plaintiffs' First and Second Sets of Interrogatories, Document Requests, and Requests for Admission.[7] In response to Plaintiffs' first set of discovery requests, EPA has produced approximately 97,000 responsive, non-privileged documents to Plaintiffs as of October 9, 2015. Ex. 5, Oct. 16, 2015 Declaration of Bethanne Walinskas at ¶ 7. EPA expects to produce approximately 35,000 more documents by the filing of this motion and continues to review and produce responsive, non-privileged documents. *Id.* These documents,

[7] The United States has expended substantial resources in complying with Plaintiffs' discovery requests. EPA has collected documents from more than sixty (60) custodians for this case. *See* Ex. 6, Oct. 16, 2015 Declaration of Sara Hertz Wu at ¶ 5. By the end of October, EPA will have obligated more than $1 million dollars to obtain support contract attorneys, and there are approximately 90 contract attorneys who are currently reviewing documents for privilege and production. *Id.* at ¶ 6. As of October 12, 2015, it is estimated that 217 employees from the Department of Justice, EPA, and three contractor firms have spent approximately 12,451 hours (the equivalent of 311 40-hour weeks) reviewing the documents that have been collected for this litigation. Ex. 5, Declaration of Bethanne Walinskas, at ¶ 6.

which were identified using Plaintiffs' agreed-upon search terms, are a substantial source of the information Plaintiffs seek from the Administrator.

Finally, EPA has provided substantive responses to Plaintiffs' First Set of Interrogatories (and will soon provide substantive responses to Plaintiffs' Second Set of Interrogatories) addressing many of the same topics on which Plaintiffs seek to depose Administrator McCarthy. Ex. 4, United States' Objections and First Supplemental Responses to Plaintiffs' First Set of Discovery Responses dated June 12, 2015. For instance, in those responses, EPA provided information about its compliance with Section 321(a) and the Administrator's interpretation of Section 321(a). *Id.* at Supplemental Responses to Interrogatories Nos. 5 and 7. The United States also identified, provided, and described documents that demonstrate EPA's performance of the evaluations described in Section 321(a) in its April 10, 2015 Motion for Summary Judgment [ECF Nos. 75-80, 90].

In sum, Plaintiffs have failed to meet their burden to demonstrate that Administrator McCarthy has information that is relevant, necessary, and unavailable from any other source. Indeed, Plaintiffs can obtain the information they seek from the Administrator from less-burdensome sources, but instead noticed the deposition of the Administrator before completing a single deposition. As such, Plaintiffs have failed to establish the extraordinary circumstances necessary to justify Administrator McCarthy's deposition. Requiring Administrator McCarthy to submit to a deposition in this case would substantially interfere with her important duties as the head of EPA, and would encroach upon the separation of powers, and this Court should exercise its discretion consistent with well-established case law to bar her deposition.

CONCLUSION

For the reasons set forth above, and for good cause shown, the United States respectfully requests that the Court require expedited briefing as set forth above and thereafter enter a protective order precluding the deposition of EPA Administrator Gina McCarthy.

DATED: October 16, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Erin Carter, hereby certify that on this 16th day of October, 2015, I served the UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR PROTECTIVE ORDER PRECLUDING THE DEPOSITION OF EPA ADMINISTRATOR MCCARTHY with the Clerk of Court using the CM/ECF system, which will cause a copy to be served upon counsel of record.

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