

Motion via telephone conference. During that call, the United States requested that Plaintiffs consent to stay Administrator McCarthy's deposition pending the Court's decision on the Emergency Motion and, if the Motion is denied after November 4, 2015, to agree to a stay of an additional twenty (20) days from the date of denial.² Plaintiffs have indicated that they do not agree to stay the Administrator's deposition.³

In support of its Motion to Stay, the United States sets forth as follows:

1. On October 7, 2015, Plaintiffs noticed the deposition of Gina McCarthy, Administrator, EPA, for November 24, 2015.
2. The United States objected to Administrator McCarthy's deposition, and after attempting to resolve the discovery dispute through the meet-and-confer process, the United States filed its Emergency Motion on October 16, 2015, pursuant to Fed. R. Civ. P. 26(c).
3. As explained in the United States' Emergency Motion and the supporting memorandum of law (Doc. No. 148), high-ranking government officials, such as Administrator McCarthy, are not subject to deposition absent extraordinary circumstances, which exist only when the party seeking the deposition establishes that such officials can provide essential

² In light of the Court's October 27, 2015 order (Doc. No. 153) extending the close of fact discovery from November 30, 2015 to January 31, 2016, the United States now seeks a stay of thirty (30) days instead of its original proposal to Plaintiffs of twenty (20) days.

³ Plaintiffs agreed that if the United States' Emergency Motion is not decided by the noticed date of the deposition, November 24, 2015, then Plaintiffs will not seek sanctions if the Administrator did not appear on that date, *see* Ex. 1 (Oct. 23, 2015 email from J. Lazzaretti to P. Jacobi); *see also* Fed. R. Civ. P. 37(d)(2) ("A failure described in [the section of Rule 37 that permits sanctions for a party's failure to appear at deposition] is not excused on the ground that the discovery sought was objectionable, *unless the party failing to act has a pending motion for a protective order under Rule 26(c).*") (emphasis added). Plaintiffs also agreed that if the Emergency Motion is denied, and the noticed deposition date is not feasible for the Administrator, then Plaintiffs would work with the United States to reschedule her deposition to a date and time convenient to the Administrator. *See id.* However, Plaintiffs did not agree to stay the deposition for a set period days from the date of such denial, as requested. *See id.*

information that cannot be obtained through other means. *See United States v. Morgan*, 313 U.S. 409, 422 (1941); *United States Bd. of Parole v. Merhige*, 487 F.2d 25, 29 (4th Cir. 1973) (finding members of Parole Board should be subject to deposition only under “exceptional circumstances”); *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) (“[T]op executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.”); *In re United States (Reno & Holder)*, 197 F.3d 310, 314 (8th Cir. 1999) (explaining that extraordinary 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”).

4. Administrator McCarthy qualifies as a high-ranking official whose deposition is barred absent extraordinary circumstances. Administrator McCarthy, as head of the EPA, is a cabinet-rank official who reports directly to the President. *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 United States (Jackson)*, 624 F.3d 1368, 1375 (11th Cir. 2010) (finding that compelling the testimony of the EPA Administrator, compared to the FDA Commissioner, 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.

5. As set forth in detail in the United States’ Emergency Motion, Plaintiffs have failed to carry their burden to establish the extraordinary circumstances necessary to justify the

disruption of Administrator McCarthy's performance of her official duties with an unnecessary deposition. *See* United States' Mem. of Law in Support of Emergency Motion at 5-12.

6. In its Emergency Motion, the United States respectfully requested that the Court enter an expedited briefing schedule on the Motion, and also requested that the Court rule upon the motion on an expedited basis, not later than November 4, 2015. United States' Mem. of Law in Support of Emergency Motion at 1, n. 1. On October 28, 2015, the Court entered an expedited briefing schedule (Doc. No. 154), ordering that Plaintiffs' opposition to the Emergency Motion be filed by October 30, 2015 and the United States' reply be filed no later than November 4, 2015.

7. If the Court denies the Emergency Motion, the United States respectfully requests that the Court stay Administrator McCarthy's deposition for a period of thirty (30) days from the date of such denial.

8. A stay of thirty (30) days is appropriate to allow time to seek further relief or review, if necessary, or for the parties to make logistical arrangements, including scheduling, and to otherwise prepare for the deposition.

9. The United States further requests that the Court enter an expedited briefing schedule and rule upon this Motion to Stay on an expedited basis, not later than November 6, 2015. The United States proposes the following briefing schedule: Plaintiffs' opposition be filed not later than November 4, 2015, and the United States' reply, if any, be filed not later than November 5, 2015.

WHEREFORE, pursuant to Fed. R. Civ. P. 26(c), and for good cause shown, the United States respectfully requests that if the Court denies the United States' Emergency Motion for

Protective Order, that Administrator McCarthy's deposition be stayed for a period of thirty (30) days from the date of such denial.

DATED: October 29, 2015

Respectfully Submitted,

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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,)
)
Defendants.)
_____)

Civil Action No. 5:14-CV-39
Judge Bailey

CERTIFICATE OF SERVICE

I, Erin Carter, hereby certify that on this 29th day of October, 2015, I served the UNITED STATES' MOTION TO STAY ADMINISTRATOR MCCARTHY'S DEPOSTION 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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