No. 15-2390

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re GINA MCCARTHY

GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,

Defendant-Petitioner,

v.

MURRAY ENERGY CORPORATION; MURRAY AMERICAN ENERGY, INC.; THE AMERICAN COAL COMPANY; AMERICAN ENERGY CORPORATION; THE HARRISON COUNTY COAL COMPANY; KENAMERICAN RESOURCES, INC.; THE MARION COUNTY COAL COMPANY; THE MARSHALL COUNTY COAL COMPANY; THE MONONGALIA COUNTY COAL COMPANY; OHIOAMERICAN ENERGY INC.; THE OHIO COUNTY COAL COMPANY; and UTAHAMERICAN ENERGY, INC.,

Plaintiffs-Respondents.

On Petition for a Writ of Mandamus in Case No. 5:14-cv-00039-JPB (N.D.W. Va.)

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

JOHN C. CRUDEN
Assistant Attorney General

AARON P. AVILA
LAURA J.S. BROWN
MATTHEW LITTLETON
Attorneys, Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, DC 20044
(202) 514-4010
matthew.littleton@usdoj.gov

OF COUNSEL:

MATTHEW C. MARKS
Office of General Counsel
United States Environmental Protection Agency

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION AND SUMMARY OF ARGUMENT

On November 12, 2015, two days after the EPA petitioned this Court for a writ of mandamus directing the district court to enter a protective order barring the deposition of EPA Administrator Gina McCarthy, the district court issued an order (Attach. 14, hereinafter "Order") denying the EPA's motion for a protective order and compelling the Administrator's deposition. This supplemental brief explains why (1) mandamus is the only means for the EPA to obtain adequate relief from the court's order; (2) the agency's right to the writ is clear and indisputable; and (3) the circumstances warrant issuance of the writ. *See Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 380–81 (2004).

There is no reason to believe that Administrator McCarthy's deposition could provide essential information about the EPA's alleged noncompliance with Section 321(a) of the Clean Air Act, and contrary to the reasoning of the district court, an agency's noncompliance with a statutory obligation does not constitute "a clear showing of misconduct or wrongdoing" that could justify deposing a Cabinet-rank officer. *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991). Moreover, the district court failed to adequately explain why information that Murray seeks from Administrator McCarthy could not be obtained from another source. A writ of mandamus is needed to remedy the district court's clear abuse of discretion.

ARGUMENT

I. Mandamus is the only adequate means for the EPA to obtain relief.

The district court's order compelling Administrator McCarthy's deposition is not a final, appealable order under 28 U.S.C. § 1291. *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 119 (4th Cir. 1994). Furthermore, this Court has decided that the usual path to judicial review of an order compelling discovery—"resist that order, be cited for contempt, and then challenge the propriety of the discovery order in the course of appealing the contempt citation," *id.* at 121—"would not provide an adequate legal remedy" for the Administrator, a Cabinet-rank officer, *United States v. Hemphill*, 369 F.2d 539, 543 (4th Cir. 1966). Mandamus thus remains the proper route for relief in the wake of the district court's refusal to enter a protective order.

II. The EPA's right to a writ of mandamus is clear and indisputable.

The agency's petition for a writ of mandamus established four propositions:

1. Administrator McCarthy cannot be deposed absent a showing of extraordinary circumstances (Pet. 10);

2. As a matter of law, the Administrator's testimony cannot provide Murray with information essential to prosecute its case (Pet. 11–15);

3. Murray has not made a clear showing of misconduct or wrongdoing that could justify compelling the Administrator's deposition (Pet. 15–16); and

4. Murray has not shown that the evidence it seeks cannot be obtained from another source (Pet. 16–18).

The district court acknowledged the first proposition, Order at 5, but it failed to identify any extraordinary circumstances. Its rejection of the other propositions "amount[ed] to a judicial 'usurpation of power'" and "a 'clear abuse of discretion'" correctable by the writ of mandamus. *Cheney*, 542 U.S. at 380 (citation omitted).

A. The district court erred by compelling the Administrator's deposition based on the court's disagreement with the EPA's merits argument.

In ruling on the EPA's motion for a protective order, the district court should have determined whether Administrator McCarthy's deposition would give Murray *new* information essential to its case that could not be obtained from another source. Pet. 11–18. But the court did not point to new information that could be disclosed in the deposition that would be relevant (much less essential) to Murray's claim, nor did the court explain why the information sought could not be obtained elsewhere.

Instead, the court looked to *existing* evidence and held that the "extraordinary circumstance" justifying the deposition of the Administrator was an inconsistency between the court's view of that evidence and the government's litigation position:

> The fair reading of [the EPA's past] statements, many of which were made by Administrator McCarthy, *is that the EPA has never made any evaluations of job losses under §321(a)*. This is directly contrary to the position of the EPA in this case. In its [summary judgment motion], the EPA states: "EPA is entitled to summary judgment because it has conducted 'continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans,' as required by Section 321(a) of the Clean Air Act . . . ."

> The plaintiffs are entitled to explore these divergent positions. The Administrator clearly has personal knowledge of the facts, the dichotomy in positions constitutes extraordinary circumstances, and *the apparent refusal of the Administrator to comply with the terms of Section 321(a)* provides sufficient prima facie evidence of wrongdoing such that the plaintiffs will be able to probe her deliberative processes.

Order at 18-19 (emphases added); *see also id.* at 12 n.2 & 14 n.3 (characterizing previous statements by the Administrator as "admission[s]" of nonperformance).

The allegedly "divergent positions" referenced in the passage are the agency's legal arguments that (i) the district court lacks jurisdiction because Section 321(a) does not impose a nondiscretionary duty, but regardless, (ii) the EPA should prevail on the merits because it exercised discretion to perform any such duty. Contrary to the district court's view, there is nothing inconsistent about these positions. Nearly all the "statements" cited by the court were assertions by Administrator McCarthy that Section 321(a) does not require the EPA to conduct employment investigations in taking regulatory actions; in other words, that Section 321(a) does not impose a duty. *Id.* at 11–17. The court rejected that argument early on in this case, Attach. 1, but that does not mean that the agency was guilty of "wrongdoing," Order at 19.

With respect to the EPA's argument on the merits, the government has been clear throughout this case as to its position that Section 321(a) evaluations need not be denominated as such, nor need they have been prepared for the express purpose of complying with Section 321(a). The district court's apparent disagreement with

that position, *id.* at 18, does not demonstrate misconduct on the part of the EPA. At most, it shows that the court is prepared to rule against the agency on the merits.

The court's reasons for compelling the deposition of Administrator McCarthy are seriously flawed and deeply troubling. Its finding that the EPA "apparent[ly]" did not perform a nondiscretionary duty might form a basis for ruling against the EPA on the merits and requiring it to undertake that duty, but it is not a ground for impugning "the integrity of the administrative process" or forcing the deposition of the Administrator. *United States v. Morgan*, 313 U.S. 409, 422 (1941). Put another way, even a "refusal of the Administrator to comply with" a nondiscretionary duty would not "provide[ ] sufficient prima facie evidence of wrongdoing such that the plaintiffs will be able to probe her deliberative processes." Order at 19. That logic would permit depositions of high-ranking officers whenever a plaintiff is expected to prevail on its claim. The discovery rules were not intended to be punitive; they "should be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

In short, the district court exceeded its authority to manage discovery and clearly abused its discretion when it permitted Murray to depose the Administrator based on a determination that the company would "apparent[ly]" prevail on its nondiscretionary-duty claim. Order at 19.

B. The district court failed to explain how the Administrator's testimony could provide evidence that Murray could not obtain elsewhere.

Even assuming that the Administrator's deposition could supply Murray with essential evidence, or that the district court's disagreement with the government's legal position could pass for "a clear showing of misconduct or wrongdoing" by the EPA, *Franklin*, 922 F.2d at 211, the court still failed to explain why Murray cannot obtain its evidence from another source. When a party requests the deposition of a high-ranking agency officer, the party must do more than show that the deposition would be "the most efficient means of discovery." Order at 8 (quoting *Am. Broad. Cos., Inc. v. U.S. Info. Agency*, 599 F. Supp. 765, 769 (D.D.C. 1984) ("*ABC*")).[*] To compel a high-ranking government official's deposition, the court must thoroughly explain *why* "there is no viable alternative to the deposition." Order at 19.

The district court made much of the fact that the Clean Air Act assigned the Administrator responsibility for Section 321(a) that she has not formally delegated

[*] The district court's reliance on the *ABC* decision was inappropriate. Plaintiffs there alleged that certain documents they sought under the Freedom of Information Act were "agency records" rather than the agency director's "personal papers." 599 F. Supp. at 766. Unlike Murray, the plaintiffs in *ABC* "[we]re at a disadvantage in having to litigate over documents which they have never seen." *Id.* at 768. In that unusual circumstance, the court permitted a limited deposition of the director, who had been "the sole person responsible for the creation of the documents." *Id.* at 769.

The district court's reliance on *Byrd v. District of Columbia*, 259 F.R.D. 1 (D.D.C. 2009), *see* Order at 9, was improper because that case applied an incorrect standard for decision. Instead of requiring *plaintiffs* to demonstrate extraordinary circumstances, *Byrd* placed the burden on *the government* to demonstrate "that the need for the protective order [wa]s 'sufficient to overcome plaintiffs' legitimate and important interests in trial preparation.'" 259 F.R.D. at 7 (citation omitted).

to subordinates. *Id.* at 9–10. That Congress gave "the Administrator" responsibility, however, does not mean that she bears "personal responsibility for compliance with Section 321(a)." *Id.* at 10. After all, "the Administrator" has general responsibility for the Clean Air Act, 42 U.S.C. § 7601(a)(1), as well as a variety of other statutes, and in many instances she retains formal responsibility for finalizing EPA actions. But if that were sufficient to compel her deposition in a case challenging any such action, then "h[er] time would be monopolized by preparing and testifying in such cases." *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993). Further, the notion that the EPA Administrator is obliged to personally "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of [the Act]" is absurd. 42 U.S.C. § 7621(a). Under Murray's view of that obligation, the Administrator would have time for little else.

As an incident of her official role, the Administrator has been asked to testify before Congress and sign responses to congressional information requests relating to Section 321(a). Again, if that were enough to compel her deposition, she would also be subject to depositions in a host of other matters in litigation. To be sure, the Administrator has admitted to discussing Section 321(a) with others (including two EPA attorneys), which is hardly a surprise given the aforementioned congressional testimony and the instant litigation. But even if those conversations could possibly affect the resolution of this case (which they cannot), Murray failed to show that it

could not learn about the conversations by deposing the non-attorney with whom the Administrator spoke. Indeed, Murray is set to depose that individual, Jonathan Lubetsky, in a few weeks.

In sum, the district court's order offered no cogent rationale for compelling a deposition of Administrator McCarthy. The EPA's entitlement to the writ remains clear and indisputable.

III. Issuance of a writ of mandamus is appropriate under the circumstances.

The EPA's petition explained why a writ of mandamus is appropriate under the circumstances, Pet. 18–19, and nothing in the district court's order altered that conclusion. To the contrary, the order only confirmed that discovery in this case has been a complete waste of time and effort. Much of the evidence on which the court relied to conclude "that the EPA has never made any evaluations of job losses under § 321(a)," Order at 18, was available to plaintiffs well before discovery began. *See* Attach. 3, at 5, 9–10 (Murray's summary judgment brief discussing this evidence). The district court has clearly abused its discretion by letting the sword hang over the EPA's head while the agency continues to invest enormous amounts of time and resources responding to Murray's irrelevant and intrusive discovery requests.

The government has already spent over $1 million and nearly 12,500 hours responding to those requests, and as things now stand, the EPA is poised to review hundreds of thousands more documents, submit to depositions of two more officers

and a Rule 30(b)(6) witness, undertake burdensome expert discovery, litigate any pre-trial issues, and endure a trial set for April 2016, before the district court issues a final ruling, the contours of which have been telegraphed by its most recent order. There is no legitimate reason to add the deposition of a Cabinet-rank officer to the government's already loaded discovery plate in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of mandamus and direct the district court to enter a protective order prohibiting any deposition of Administrator McCarthy. If the Court needs more time to consider the petition beyond November 30, 2015, it should administratively stay her deposition.

Respectfully submitted,

/s/ Matthew Littleton
MATTHEW LITTLETON
Attorney, Appellate Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, DC 20044
Tel: (202) 514-4010
Fax: (202) 353-1873
matthew.littleton@usdoj.gov

90-5-2-4-20081
November 16, 2015