

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

_____)	
MURRAY ENERGY CORPORATION,)	
et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 5:14-cv-00039
)	
GINA MCCARTHY, in her official)	
capacity as Administrator, United States)	
Environmental Protection Agency,)	
)	
Defendant.)	
_____)	

UNITED STATES’ MOTION TO CLARIFY
THE COURT’S SEPTEMBER 16, 2014 ORDER

The United States, on behalf of Gina McCarthy in her official capacity as Administrator of the United States Environmental Protection Agency (“EPA”), respectfully moves this Court to clarify its September 16, 2014 Order Denying Motion [Doc. 40], which denied EPA’s Motion to Dismiss the Complaint and Motion to Strike Prayer for Injunctive Relief [Doc. 34]. Specifically, EPA requests that the Court clarify the basis for its holding that it has subject matter jurisdiction over Plaintiffs’ claim, either as a claim for the withholding of a nondiscretionary duty under Section 304(a)(2) of the Clean Air Act (CAA), 42 U.S.C. § 7604(a)(2), or as a claim for unreasonable delay under Section 304(a) of the CAA, 42 U.S.C. § 7604(a).¹ In support of this request, the United States states as follows:

¹ “[A] district court retains the power to reconsider and modify its interlocutory judgments[] . . . at any time prior to final judgment when such is warranted.” *Ramonas v. W. Va. Univ. Hospitals-East*, CIVIL ACTION NO. 3:08-CV-136, 2009 U.S. Dist. LEXIS 98481, *7-8 (N.D. W. Va. 2009) (first alteration in original) (quoting *American Canoe Ass’n., Inc. v. Murphy Farms, Inc.*, 326 F.3d 505, 514-15 (4th Cir. 2003)).

1. In EPA's June 30, 2014 Motion to Dismiss the Complaint and Motion to Strike Prayer for Injunctive Relief [Doc. 34] and Memorandum in Support [Doc. 35], EPA argued that CAA Section 321 does not establish a duty that is not discretionary with the Administrator, and that the Court therefore lacked subject matter jurisdiction under Section 304(a)(2) because EPA had not waived sovereign immunity for Plaintiffs' claim. EPA's Memorandum in Support at 9-21. EPA argued, in the alternative, that to the extent the Court found that Section 321 creates a mandatory duty for EPA to act, Plaintiffs' claim is one for unreasonable delay under Section 304(a). *See id.* at 12-13. In its August 11, 2014 Reply [Doc. 39], EPA again argued that any finding of a mandatory duty under Section 321 required classification of Plaintiffs' claim as one for unreasonable delay. Reply at 11-12.

2. In the Court's September 16, 2014 Order Denying Motion [Doc. 40], the Court held that Plaintiffs' "allegations are sufficient to provide this Court with jurisdiction to hear this case under § 304 of the [CAA]." Order Denying Motion at 13-14. EPA is unable to discern from the Order whether the Court was asserting jurisdiction for the failure to perform of a nondiscretionary duty under Section 304(a)(2) or for unreasonable delay under Section 304(a) of the CAA. Although the Court held that Section 321 of the CAA "express[es] a mandatory duty," Order Denying Motion at 10, both claims arise where the Administrator has a mandatory duty. Clarification of the basis for the exercise of jurisdiction is appropriate because the two types of claims are separate and distinct causes of action.²

Wherefore, the United States respectfully requests that the Court clarify the basis for its subject matter jurisdiction over the Plaintiffs' claim under Section 304 of the CAA.

² *See Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 262-63 (2d Cir. 1992) (distinguishing between the standard for evaluating the two types of claims).

DATED: October 9, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Betsy Steinfeld Jividen, hereby certify that on this 9th day of October, 2014, I electronically filed the foregoing UNITED STATES' MOTION TO CLARIFY THE COURT'S SEPTEMBER 16, 2014 ORDER with the Clerk of the Court using the CM/ECF system, which will cause a copy to be served upon counsel of record.

/s/ Betsy Steinfeld Jividen

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