



*United States Department of Justice*

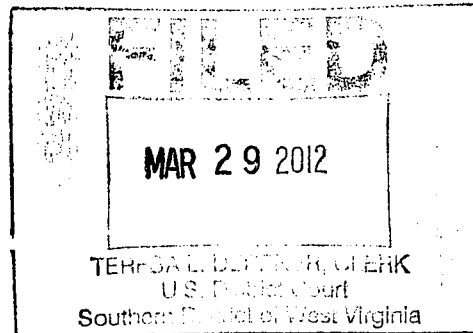
*United States Attorney  
Southern District of West Virginia*

*Robert C. Byrd United States Courthouse  
300 Virginia Street, East  
Suite 4000  
Charleston, WV 25301  
1-800-659-8726*

*Mailing Address  
Post Office Box 1713  
Charleston, WV 25326  
304-345-2200  
FAX: 304-347-5104*

February 20, 2012

Tim C. Carrico, Esquire  
Carrico Law Offices  
1412 Kanawha Boulevard, East  
Charleston, West Virginia 25301



Re: United States v. Gary May

Dear Mr. Carrico:

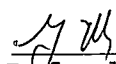
This will confirm our conversations with regard to your client, Gary May (hereinafter "Mr. May"). As a result of these conversations, it is agreed by and between the United States and Mr. May as follows:

1. **CHARGING AGREEMENT.** Mr. May agrees to waive his right pursuant to Rule 7 of the Federal Rules of Criminal Procedure to be charged by indictment and will consent to the filing of a one-count information to be filed in the United States District Court for the Southern District of West Virginia, a copy of which is attached hereto as "Plea Agreement Exhibit A."

2. **RESOLUTION OF CHARGES.** Mr. May will plead guilty to a violation of 18 U.S.C. § 371 (conspiracy to defraud the United States) as charged in said information.

3. **MAXIMUM POTENTIAL PENALTY.** The maximum penalty to which Mr. May will be exposed by virtue of this guilty plea is as follows:

- (a) Imprisonment for a period of five years;

  
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Defendant's  
initials

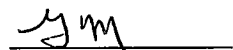
Tim C. Carrico, Esquire  
February 20, 2012  
Page 2

Re: Gary May

- (b) A fine of \$250,000, or twice the gross pecuniary gain or twice the gross pecuniary loss resulting from defendant's conduct, whichever is greater;
- (c) A term of supervised release of three years;
- (d) A mandatory special assessment of \$100 pursuant to 18 U.S.C. § 3013; and
- (e) An order of restitution pursuant to 18 U.S.C. §§ 3663 and 3664, or as otherwise set forth in this plea agreement.

4. **SPECIAL ASSESSMENT.** Prior to the entry of a plea pursuant to this plea agreement, Mr. May will tender a check or money order to the Clerk of the United States District Court for \$100, which check or money order shall indicate on its face the name of defendant and the case number. The sum received by the Clerk will be applied toward the special assessment imposed by the Court at sentencing. Mr. May will obtain a receipt of payment from the Clerk and will tender a copy of such receipt to the United States, to be filed with the Court as an attachment to this plea agreement. If Mr. May fails to provide proof of payment of the special assessment prior to or at the plea proceeding, the United States will have the right to void this plea agreement. In the event this plea agreement becomes void after payment of the special assessment, such sum shall be promptly returned to Mr. May.

5. **PAYMENT OF MONETARY PENALTIES.** Mr. May agrees not to object to the District Court ordering all monetary penalties (including the special assessment, fine, court costs, and any restitution that does not exceed the amount set forth in this plea agreement) to be due and payable in full immediately and subject to immediate enforcement by the United States. So long as the monetary penalties are ordered to be due and payable in full immediately, Mr. May further agrees not to object to the District Court imposing any schedule of payments as merely a minimum schedule of payments and not the only method, nor a limitation on the methods, available to the United States to enforce the judgment.

  
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Tim C. Carrico, Esquire  
February 20, 2012  
Page 3

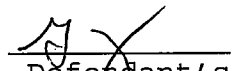
Re: Gary May

6. **TERMINATION OF PROSECUTION.** The conviction and final disposition of Mr. May pursuant to this plea agreement will conclude the prosecution of Kim May by the United States in the Southern District of West Virginia for offenses she may have committed relating to a scheme and artifice to defraud American Electric Power Service Corporation, Inc., by submitting a fraudulent claim for damage to real and personal property.

7. **COOPERATION.** Mr. May will be forthright and truthful with this office and other law enforcement agencies with regard to all inquiries made pursuant to this agreement, and will give signed, sworn statements and grand jury and trial testimony upon request of the United States. In complying with this provision, Mr. May may have counsel present except when appearing before a grand jury. Further, Mr. May agrees to be named as an unindicted co-conspirator and unindicted aider and abettor, as appropriate, in subsequent indictments or informations.

8. **USE IMMUNITY.** Unless this agreement becomes void due to a violation of any of its terms by Mr. May, and except as expressly provided for in paragraph 10 below, nothing contained in any statement or testimony provided by Mr. May pursuant to this agreement, or any evidence developed therefrom, will be used against him, directly or indirectly, in any further criminal prosecutions or in determining the applicable guideline range under the Federal Sentencing Guidelines.

9. **LIMITATIONS ON IMMUNITY.** Nothing contained in this agreement restricts the use of information obtained by the United States from an independent, legitimate source, separate and apart from any information and testimony provided pursuant to this agreement, in determining the applicable guideline range or in prosecuting Mr. May for any violations of federal or state laws. The United States reserves the right to prosecute Mr. May for perjury or false statement if such a situation should occur pursuant to this agreement.

  
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Tim C. Carrico, Esquire  
February 20, 2012  
Page 4

Re: Gary May

10. **STIPULATION OF FACTS AND WAIVER OF FED. R. EVID. 410.** The United States and Mr. May stipulate and agree that the facts comprising the offenses of conviction include the facts outlined in the "Stipulation of Facts," a copy of which is attached hereto as "Plea Agreement Exhibit B." The Stipulation of Facts does not contain all facts relevant to this matter.

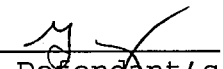
Mr. May agrees that if he withdraws from this agreement, or this agreement is voided as a result of a breach of its terms by him, and he is subsequently tried on any of the charges in the information, the United States may use and introduce the Stipulation of Facts in the United States' case-in-chief, in cross-examination of him or of any of his witnesses, or in rebuttal of any testimony introduced by him or on his behalf. Mr. May knowingly and voluntarily waives, see United States v. Mezzanatto, 513 U.S. 196 (1995), any right he has pursuant to Fed. R. Evid. 410 that would prohibit such use of the Stipulation of Facts. If the Court does not accept the plea agreement through no fault of the defendant, or the Court declares the agreement void due to a breach of its terms by the United States, the Stipulation of Facts cannot be used by the United States.

The United States and Mr. May understand and acknowledge that the Court is not bound by the Stipulation of Facts and that if some or all of the Stipulation of Facts is not accepted by the Court, the parties will not have the right to withdraw from the plea agreement.

11. **AGREEMENT ON SENTENCING GUIDELINES.** Based on the foregoing Stipulation of Facts, the United States and Mr. May agree that United States Sentencing Guidelines § 2C1.1 applies to this case and that Mr. May's base offense level is 12.

The United States and Mr. May acknowledge and understand that the Court and the Probation Office are not bound by the parties' agreement concerning the United States Sentencing Guidelines set forth above and that the parties shall not have the right to withdraw from the plea agreement due to a disagreement with the Court's calculation of the appropriate guideline range.

12. **WAIVER OF APPEAL AND COLLATERAL ATTACK.** Mr. May knowingly

  
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Tim C. Carrico, Esquire  
February 20, 2012  
Page 5

Re: Gary May

and voluntarily waives the right to seek appellate review of any sentence of imprisonment or fine imposed by the District Court, or the manner in which the sentence was determined, on any ground whatsoever including any ground set forth in 18 U.S.C. § 3742, so long as that sentence of imprisonment or fine is below or within the Sentencing Guideline range corresponding to offense level 10. The United States also waives its right to seek appellate review of any sentence of imprisonment or fine imposed by the District Court, or the manner in which the sentence was determined, on any ground whatsoever including any ground set forth in 18 U.S.C. § 3742, so long as that sentence of imprisonment or fine is within or above the Sentencing Guideline range corresponding to offense level 13.

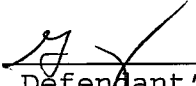
Mr. May also knowingly and voluntarily waives the right to challenge his guilty plea and his conviction resulting from this plea agreement, and any sentence imposed for the conviction, in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255.

The waivers noted above shall not apply to a post-conviction collateral attack or direct appeal based on a claim of ineffective assistance of counsel.

13. **WAIVER OF FOIA AND PRIVACY RIGHT.** Mr. May knowingly and voluntarily waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without any limitation any records that may be sought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a, following final disposition.

14. **FINAL DISPOSITION.** The matter of sentencing is within the sole discretion of the Court. The United States has made no representations or promises as to a specific sentence. The United States reserves the right to:

- (a) Inform the Probation Office and the Court of all relevant facts and conduct;

  
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Defendant's  
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Tim C. Carrico, Esquire  
February 20, 2012  
Page 6

Re: Gary May

- (b) Present evidence and argument relevant to the factors enumerated in 18 U.S.C. § 3553(a);
- (c) Respond to questions raised by the Court;
- (d) Correct inaccuracies or inadequacies in the presentence report;
- (e) Respond to statements made to the Court by or on behalf of Mr. May;
- (f) Advise the Court concerning the nature and extent of Mr. May's cooperation; and
- (g) Address the Court regarding the issue of Mr. May's acceptance of responsibility.

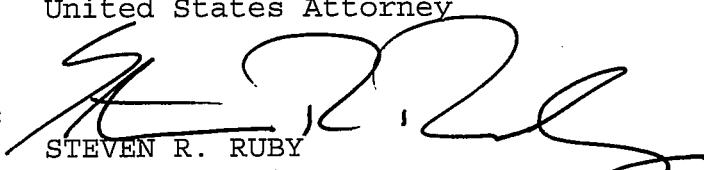
15. **VOIDING OF AGREEMENT.** If either the United States or Mr. May violates the terms of this agreement, the other party will have the right to void this agreement. If the Court refuses to accept this agreement, it shall be void.

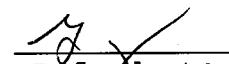
16. **ENTIRETY OF AGREEMENT.** This written agreement constitutes the entire agreement between the United States and Mr. May in this matter. There are no agreements, understandings or recommendations as to any other pending or future charges against Mr. May in any Court other than the United States District Court for the Southern District of West Virginia.

Acknowledged and agreed to on behalf of the United States:

R. BOOTH GOODWIN II  
United States Attorney

By:

  
STEVEN R. RUBY  
Assistant United States Attorney

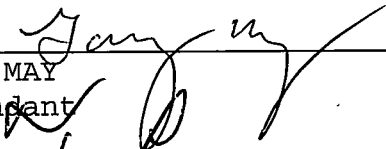
  
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Tim C. Carrico, Esquire  
February 20, 2012  
Page 7


Re: Gary May

SRR/srr

I hereby acknowledge by my initials at the bottom of each of the foregoing pages and by my signature on the last page of this seven-page agreement that I have read and carefully discussed every part of it with my attorney, that I understand the terms of this agreement, and that I voluntarily agree to those terms and conditions set forth in the agreement. I further acknowledge that my attorney has advised me of my rights, possible defenses, the Sentencing Guideline provisions, and the consequences of entering into this agreement, that no promises or inducements have been made to me other than those in this agreement, and that no one has threatened me or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.

  
\_\_\_\_\_  
GARY MAY  
Defendant

2-27-2012  
\_\_\_\_\_  
Date Signed

  
\_\_\_\_\_  
TIM C. CARRICO  
Counsel for Defendant

2/27/12  
\_\_\_\_\_  
Date Signed

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY

UNITED STATES OF AMERICA

v.

CRIMINAL NO. \_\_\_\_\_

GARY MAY

I N F O R M A T I O N

The United States Attorney Charges:

Background

At all relevant times:

1. Performance Coal Company, Inc. ("Performance"), was a corporation engaged in the business of operating an underground coal mine near Montcoal, Raleigh County, West Virginia, known as the Upper Big Branch mine ("UBB" or the "Mine"), the products and operations of which affected interstate commerce. As such, Performance was an "operator" within the meaning of 30 U.S.C. § 802(d), and Performance and UBB and persons employed at Performance and UBB were subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the "Mine Act") and to the regulations promulgated thereunder. Performance was a wholly owned subsidiary of Massey Energy Company.

2. The Mine Safety and Health Administration ("MSHA") was an agency of the United States and of the United States

PLEA AGREEMENT EXHIBIT A



Department of Labor (DOL), and was responsible for the enforcement of the Mine Act and the promulgation and enforcement of federal regulations related to mine safety and health, codified in Title 30 of the Code of Federal Regulations.

3. Among the mine safety and health requirements promulgated and enforced by MSHA and applicable to UBB were the following:

a. Certain areas of the Mine were required to receive a quantity of ventilating air (measured in cubic feet per minute) that was sufficient to dilute, render harmless, and carry away flammable, explosive, noxious, and harmful gases, dusts, smoke, and fumes. 30 CFR 75.325.

b. In any part of the Mine where coal was actively being extracted (a "working face"), an approved ventilation control device (typically specialized, heavy material called "line curtain," which is used to direct the flow of air in mines) had to extend to within 10 feet of the deepest point of mine penetration. 30 CFR 75.330. This requirement is designed in part to ensure that enough air reaches the deepest point of mining to prevent dangerous buildups of explosive gases and dusts, as well as the inhalation of coal dust, a health hazard.

c. Certain significant changes in the Mine's ventilation could be made only if all persons not involved in making the change had been removed from the Mine; and only if electric power had been removed from, and mechanized equipment was shut down in, the areas of the Mine affected by the change. 30 CFR 75.324. This requirement was intended, in part, to prevent explosions from unexpected effects of the ventilation change.

d. Coal dust and loose coal fragments were required to be kept cleaned up and not allowed to accumulate. 30 CFR 75.400. This requirement was intended to prevent accumulations of combustible material that could fuel an explosion.

e. Rock dust – incombustible, pulverized limestone spread in coal mines to prevent explosions – was required to be applied in most areas of the Mine to within at least 40 feet of any working face. 30 CFR 75.402. At every location in the Mine where rock dust was required, at least 65% of the total dust present (rock dust, coal dust, and other dust) was required to be incombustible. 30 CFR 75.403. In certain areas of the mine, at least 80% of the total dust present was required to be incombustible. Id.

f. In all parts of the Mine where persons worked or traveled, the roof of the Mine was required to be supported or controlled in accordance with the Mine's MSHA-approved roof-control plan, to prevent the roof from falling. 30 CFR 75.220. Roof falls can cause serious injury and death.

g. Every machine used to extract or load coal was required to be equipped with a methane monitor that monitored levels of explosive methane gas and that automatically de-activated the machine if a methane concentration of 2% or more developed. The methane monitor also was required to de-activate the machine if the monitor was not operating properly. 30 CFR 75.342.

h. Mine personnel were required to examine various areas of the Mine at regular intervals to confirm, among other things, that ventilation requirements were being met and that no hazardous conditions existed. Any hazardous conditions discovered were required to be corrected, with both the hazard and the corrective action recorded in an examination record book that was available for MSHA officials to inspect. 30 CFR 75.360-64.

i. Levels of respirable dust were required to be tested in various locations at regular intervals in order to determine compliance with legal limits on such dust. 30

CFR 70.100-.200. Respirable dust can cause black lung disease.

4. As part of MSHA's regulatory and enforcement efforts, and pursuant to its statutory authority, MSHA mine inspectors made periodic, unannounced inspections of the Mine to ensure compliance with mine health and safety laws and to impose penalties for violations of those laws. Violators were subject to civil and criminal penalties under the Mine Act. During these inspections, MSHA mine inspectors would and did issue citations, which penalized a violation of mine health and safety laws but allowed the Mine to continue operating, and orders, which were rarer than citations and, in addition to penalizing a violation of mine health and safety laws, required the Mine or a part of the Mine to stop operating until the violation was corrected. It was prohibited for any person to give advance notice of an MSHA inspection.

5. Mine safety and health laws were routinely violated at UBB, in part because of a belief that that following those laws would decrease coal production. These violations included violations of the laws described in paragraph 3. If these routine mine safety and health violations were detected by MSHA, the resulting citations and orders could result in coal production being stopped until the violations were corrected, in

addition to monetary penalties. Furthermore, the issuance of citations and orders by MSHA, particularly certain kinds of serious citations and orders, moved the Mine closer to being classified as a mine with a pattern or potential pattern of violations. That classification would have resulted in increased scrutiny of the Mine by MSHA and in MSHA's issuance of additional serious citations and orders.

#### The Defendant

6. Defendant GARY MAY ("MAY") began working at UBB in or about February 2008 as a Mine Foreman. In or about October 2009, MAY was promoted to Mine Superintendent, and he held that position through and including April 5, 2010. During his time as Mine Foreman at UBB, MAY exercised control and authority over, at various times, at least three room-and-pillar mining sections and a longwall mining section. During his time as Superintendent at UBB, MAY exercised control and authority over a portion of the Mine that included, at various times, two room-and-pillar mining sections and an area that was being prepared for longwall mining on or around April 5, 2010, when an explosion at UBB interrupted that preparation.

#### The Conspiracy

7. Beginning no later than February 2008 and continuing through and including April 5, 2010, MAY, together with others

known and unknown, unlawfully, willfully, and knowingly combined, conspired, confederated, and agreed together with each other to defraud the United States and an agency thereof, to wit, to hamper, hinder, impede, and obstruct by trickery, deceit, and dishonest means, the lawful and legitimate functions of DOL and its agency, MSHA, in the administration and enforcement of mine health and safety laws at UBB.

Object of the Conspiracy

8. The objects and purposes of the conspiracy were to hamper, hinder, impede, and obstruct the lawful government functions of DOL and MSHA in the administration and enforcement of mine health and safety laws at UBB.

Manner and Means

9. It was a part of this conspiracy that MAY, together with others known and unknown, would and did give and authorize and cause to be given to persons at UBB advance notice of MSHA inspections, knowing and intending that the persons receiving this advance notice would conceal and cover up violations of mine health and safety laws that otherwise would result in citations and orders issued by MSHA. MAY, together with others known and unknown, would and did use code phrases to give this advance notice of MSHA inspections, in order to conceal from MSHA the fact that such advance notice was being given.

10. It was further a part of this conspiracy that MAY, together with others known and unknown, upon receiving advance notice of MSHA inspections at UBB, would and did conceal and cover up, and authorize and cause the concealing and covering up of, violations of mine health and safety laws that otherwise would result in citations and orders issued by MSHA.

11. It was further a part of this conspiracy that MAY, together with others known and unknown, did falsify and authorize and cause the falsification of examination record books at UBB.

12. It was further a part of this conspiracy that MAY, together with others known and unknown, upon learning that an MSHA inspection was about to take place in a certain area of the Mine, would and did alter, and authorize and cause the alteration of, the ventilation system of the Mine to direct additional air to the area where the inspection was to take place, in order to conceal and cover up the quantity of air that normally reached that area of the Mine.

Overt Acts

13. In furtherance of the conspiracy, and to effect the illegal objects thereof, the following overt acts, among others, were committed in the Southern District of West Virginia:

a. On many occasions on various dates between February 2008 and April 5, 2010, MAY, together with others known and unknown, gave and authorized and caused to be given to persons at UBB advance notice of MSHA inspections, knowing and intending that the persons receiving this advance notice would conceal and cover up violations of mine health and safety laws that otherwise would result in citations and orders issued by MSHA.

b. On many occasions on various dates between February 2008 and April 5, 2010, MAY, together with others known and unknown, upon receiving advance notice of MSHA inspections at UBB, concealed and covered up, and authorized and caused the concealing and covering up of, violations of mine health and safety laws that otherwise would result in citations and orders issued by MSHA.

c. On numerous occasions between around February 2008 and April 5, 2010, MAY, together with others known and unknown, instructed persons working at UBB regarding code phrases that were to be used to give advance notice of MSHA



inspections at UBB, and regarding the meanings of those phrases.

d. On an occasion between February 2008 and April 5, 2010, MAY ordered a known person to falsify examination record books by omitting from the record books a hazardous condition, to wit, water of a depth that made it unsafe to travel a certain area of the Mine.

e. On an occasion between February 2008 and April 5, 2010, MAY, knowing that MSHA was about to sample the level of respirable dust in a certain area of the Mine, surreptitiously redirected additional air to that area of the Mine to conceal and cover up the quantity of air that would have reached that area of the Mine under normal conditions.

f. In or around February 2010, the legally mandated methane monitor on a continuous mining machine at the Mine stopped operating properly, which caused the continuous mining machine to be automatically deactivated as required by law. MAY caused and ordered the electrical wiring in the methane monitor to be altered to defeat the legally mandated automatic shut-off mechanism, allowing the continuous mining machine to be operated for several hours without a functioning methane monitor.

In violation of Title 18, United States Code, Section 371.

UNITED STATES OF AMERICA

R. BOOTH GOODWIN II  
United States Attorney

By:

\_\_\_\_\_  
STEVEN R. RUBY  
Assistant United States Attorney

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
CHARLESTON

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 12

GARY MAY

STIPULATION OF FACTS

The United States and Gary May stipulate and agree that the facts comprising the offense of conviction for the single count contained in the criminal Information attached to this plea agreement as Exhibit A include the following:

In or about February 2008, Mr. May became Mine Foreman at the Upper Big Branch mine ("UBB" or the "Mine"), which was located in or near Montcoal, Raleigh County, West Virginia, within the Southern District of West Virginia. In or about October 2009, Mr. May became one of two Mine Superintendents at UBB, in charge of a portion of the Mine known as UBB South, and he remained in that position through and including April 5, 2010. As both Mine Superintendent and Mine Foreman, Mr. May supervised dozens of persons.

UBB was owned and operated by Performance Coal Company, a wholly owned subsidiary of Massey Energy Company. UBB produced coal for commercial use, and its products and operations affected interstate commerce. UBB and persons employed there were subject to the Federal Mine Health and Safety Act of 1977, as amended (the "Mine Act") and to the regulations promulgated thereunder, which were administered and enforced by the Mine Safety and Health Administration (MSHA).

During the entire period when Mr. May worked at UBB, mine health and safety laws were routinely violated at the Mine, in part because of a belief that following those laws would decrease coal production. Mr. May and others employed at, or with supervisory authority over, UBB understood that if violations of mine health and safety laws were detected, MSHA would issue citations and orders that could result in coal production being stopped in one or more areas of the Mine and also would result in monetary penalties. Mr. May and others

PLEA AGREEMENT EXHIBIT B

employed at, or with supervisory authority over, UBB also understood that MSHA's issuance of citations and orders moved the Mine closer to being classified as a mine with a pattern or potential pattern of violations, which would result in increased scrutiny of the Mine by MSHA and in MSHA's issuance of additional serious citations and orders.

From February 2008 through at least April 5, 2010, Mr. May and others employed at, or with supervisory authority over, UBB combined and agreed to hinder and impede MSHA in administering and enforcing mine health and safety laws at UBB. On many occasions between February 2008 and April 5, 2010, Mr. May or others employed at, or with supervisory authority over, UBB gave advance notice to persons working underground at UBB that an MSHA inspection was about to occur at UBB. Mr. May frequently gave such advance notice himself and also frequently directed others to give such advance notice. Mr. May and others employed at, or with supervisory authority over, UBB used code phrases to give such advance notice, in order to conceal from MSHA the fact that such advance notice was being given. Mr. May and others employed at UBB instructed others regarding code phrases that were to be used to give advance notice of MSHA inspections at UBB and regarding the meanings of those phrases.

Also on many occasions between February 2008 and April 5, 2010, Mr. May and others employed at, or with supervisory authority over, UBB, upon receiving advance notice of MSHA inspections at UBB, concealed and covered up, and caused and authorized the concealing and covering up of, violations of mine health and safety laws that otherwise would result in citations and orders issued by MSHA. The violations concealed and covered up included inadequate air quantity in various areas of the mine; failure to extend line curtain or other face ventilation controls to within 10 feet of the deepest point of mining penetration in various areas of the mine; excessive piles of coal dust and coal fragments; and inadequate rock dust in various areas of the mine.

Among the purposes of giving advance notice of MSHA inspections at UBB and concealing and covering up violations of mine health and safety laws was to prevent MSHA from observing the Mine in the conditions under which it normally operated.

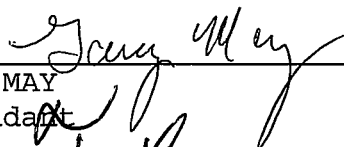
On another occasion between February 2008 and April 5, 2010, Mr. May ordered a known person to falsify an examination record book by omitting from the record book the fact that water

was more than 18 inches deep in an area of the mine approximately 20 feet long and 20 feet wide.


In or around February 2010, the methane monitor on a continuous mining machine at the Mine stopped operating properly, which caused the continuous mining machine to be automatically deactivated. Mr. May ordered the electrical wiring in the methane monitor to be altered to defeat the automatic shut-off mechanism, allowing the continuous mining machine to be operated for several hours without a functioning methane monitor while cutting rock outby the working face in a track entry to prepare for mining in a new section of the Mine.

All of the above-described events occurred in or around Raleigh County, West Virginia, and in the Southern District of West Virginia.

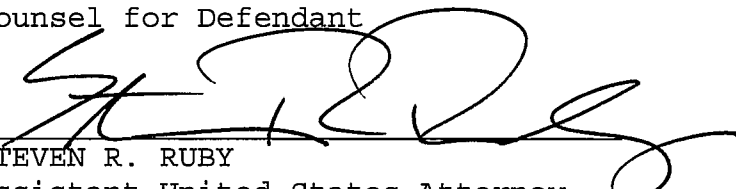
Stipulated and agreed to:

  
\_\_\_\_\_  
GARY MAY  
Defendant

2-27-2012  
Date

  
\_\_\_\_\_  
TIM C. CARRICO  
Counsel for Defendant

2/27/12  
Date

  
\_\_\_\_\_  
STEVEN R. RUBY  
Assistant United States Attorney

2/27/12  
Date