



U.S. 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
Fax: (304) 347-5104

Mailing Address
Post Office Box 1713
Charleston, WV 25326-1713
(304) 345-2200
1-800-659-8726

May 14, 2010

Douglas N. White
Associate Regional Solicitor
Arlington Regional Office
1100 Wilson Blvd., 22nd floor
Arlington VA, 22209

Dear Associate Regional Solicitor White:

This Office has become aware of the pending civil litigation between the Secretary of Labor, Mine Safety and Health Administration ("MSHA"), and entities involved in the Upper Big Branch mine ("UBB"). The purpose of this letter is to confirm that this Office is currently conducting a criminal investigation of violations that have occurred at UBB, including those violations that are at issue in the cases identified in Attachment A to this letter. Given the ongoing criminal investigation, we request that MSHA petition the designated Administrative Law Judge for a stay of the pending civil actions pertaining to UBB until the criminal matters are resolved, as well as any other cases that are subsequently docketed.

A portion of the criminal investigation involves whether Performance Coal and its directors, officers and agents engaged in willful criminal activity at UBB. As you know, the Mine, Safety and Health Act ("the Act") provides criminal penalties for, among other things, "any mine operator who willfully violates a mandatory health or safety standard" and for directors, officers and agents of mine operators who knowingly authorized, ordered or carried out such a violation. 30 U.S.C. § 820(c), (d). A number of the violations at issue in the cases identified in Attachment A to this letter potentially constitute separate violations of these provisions. Each violation may also provide evidence that other violations were committed willfully and knowingly. See, e.g., Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts . . . may . . . be admissible for other purposes, such as proof of motive, . . . intent, preparation, plan, knowledge . . . or absence of mistake or accident"); *United States v. Mohr*, 318 F.3d 613, 619 (4th Cir. 2003) (evidence of subsequent bad acts admissible under 404(b) to prove defendant's "willful intent"); *United States v.*

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Blood, 806 F.2d 1218, 1222 (4th Cir. 1986) (evidence of defendant's prior tax dealings admissible under 404(b) to prove "willfulness" and a "continued pattern" of tax avoidance). The violations may also provide a context that would be lacking if each were considered separately. See, e.g., *United States v. Cooper*, 482 F.3d 658, 663 (4th Cir. 2007) ("Even where evidence predates the time period of the indictment, the government is allowed to provide context relevant to the criminal charges."). Moreover, the violations may involve identical factual issues, such as whether Performance Coal is an "operator" under the Act. Thus, there is a commonality of evidence and issues between the pending civil litigation and the ongoing criminal investigation. See *Buck Creek Coal, Inc.*, 17 FMSHRC 500, 503 (Apr. 1995).

In light of the above, this Office has an interest in ensuring that the pending civil proceedings do not interfere with the criminal investigation. As courts and the Commission have repeatedly recognized, civil proceedings may prejudice criminal prosecutions. See, e.g., *Buck Creek*, 17 FMSHRC at 504. For example, liberal civil discovery procedures may provide criminal defendants with access to materials that would not be available to them under the criminal discovery rules. See *id.*; *Securities & Exch. Comm'n v. Chestman*, 861 F.2d 49, 50 (2d Cir. 1988); *Founding Church of Scientology v. Kelley*, 77 F.R.D. 378, 380 (D.D.C. 1977). This, in turn, may interfere with the integrity of a criminal investigation, e.g., by resulting in witness intimidation, perjury or manufactured evidence. See *Campbell v. Eastland*, 307 F.2d 478, 487 n. 12 (5th Cir. 1962). Moreover, civil proceedings may interfere with the proper functioning of the grand jury, if and when one is convened to investigate these matters. See *In re Grand Jury Proceedings (Williams) v. United States*, 995 F.2d 1013, 1018 n. 11 (11th Cir. 1993). In light of the public's strong interest in law enforcement, see, e.g., *Campbell*, 307 F.2d at 487; *In re Ivan Boesky Sec. Litig.*, 128 F.R.D. 47, 49 (S.D.N.Y.), we believe that a stay of the civil proceedings is appropriate. Such a stay may also result in the conservation of agency resources, which is in the public interest. See *Maloney v. Gordon*, 328 F. Supp. 2d 508, 513 (D. Del. 2004); *Southmountain Coal, Inc., et al.*, 17 FMSHRC 1081 (June 1995). We can assure you that we will seek to expedite our investigation, in a manner consistent with our responsibility to investigate federal criminal violations, so as to minimize any potential prejudice to the litigants and the public in staying the civil proceedings.

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Thank you for your attention to this matter.

Sincerely,

CHARLES T. MILLER
United States Attorney

A handwritten signature in black ink, appearing to read "R. Booth Goodwin II", written over a horizontal line.

By: R. BOOTH GOODWIN II
Assistant United States Attorney

cc: Heidi W. Strassler,
Deputy Associate Solicitor

Attachment A
Docket Numbers of Civil Cases Pending Before the
Federal Mine Safety and Health Review Commission

WEVA-2007-0460
WEVA-2007-0470
WEVA-2007-0576
WEVA-2007-0608
WEVA-2007-0672
WEVA-2007-0767
WEVA-2008-0249
WEVA-2008-0888
WEVA-2008-0889
WEVA-2008-0890
WEVA-2008-0891
WEVA-2008-0892
WEVA-2009-0129
WEVA-2009-0281
WEVA-2009-0282
WEVA-2009-0283
WEVA-2009-0831
WEVA-2009-0970
WEVA-2009-1129
WEVA-2009-1130
WEVA-2009-1375
WEVA-2009-1839
WEVA-2009-1840
WEVA-2009-1928
WEVA-2009-1928
WEVA-2009-1929
WEVA-2010-0064
WEVA-2010-0065
WEVA-2010-0206
WEVA-2010-0207
WEVA-2010-0318
WEVA-2010-0319
WEVA-2010-0535
WEVA-2010-0626
WEVA 2010-0711
WEVA-2010-0728
WEVA-2010-0729
WEVA 2010-0801
WEVA-2010-0869
WEVA-2010-0902
WEVA-2010-0903
WEVA-2010-0941
WEVA-2010-0978
WEVA-2010-0979