IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v- 10-CR-219-S

TONAWANDA COKE CORPORATION and
MARK L. KAMHOLZ

Defendants.

GOVERNMENT'S TRIAL MEMORANDUM

THE UNITED STATES OF AMERICA, by and through its attorney, William J. Hochul, Jr., United States Attorney for the Western District of New York, and Ignacia S. Moreno, Assistant Attorney General for the United States Department of Justice, Environment and Natural Resources Division, and the undersigned Assistant United States Attorney and Senior Trial Attorney, hereby submits this memorandum on behalf of the government to summarize its theory of the prosecution and related issues which may become relevant during trial. This memorandum is not intended to be all inclusive and is not intended to restrict the government's presentation of the proof at trial.

I. STATEMENT OF CASE

On July 29, 2010, a federal grand jury returned a 20 count Indictment against defendant TONAWANDA COKE CORPORATION ("TCC") and defendant MARK L. KAMHOLZ ("KAMHOLZ"). The first 15 counts of the Indictment charge the defendants with violating the Clean Air Act

("CAA"), Title 42, United States Code, Section 7413(c)(1), by operating a stationary source of air pollution in violation of a permit issued under the CAA. In particular, Counts 1 through 5 of the Indictment charge the defendants with violating the CAA by emitting coke oven gas from a pressure relief valve in the by-products department, an unpermitted emission source. Counts 6 through 10, and 11 through 15, charge the defendants with violating the CAA by operating the western quench tower, and the eastern quench tower, respectively, without baffles. Count 16 charges the defendants with obstruction of justice relating to the defendants' role in concealing the emission of COG from government regulators during an inspection at TCC, in violation of Title 18, United States Code, Section 1505. Counts 17 to 20 all charge violations of the Resource Conservation and Recovery Act ("RCRA"), Title 42, United States Code, Section 6928(d)(2)(A), including the unpermitted storage of a hazardous waste adjacent to two large deteriorating tanks (Count 17), the unpermitted disposal of a hazardous waste originating from in and around the two large deteriorating tanks (Count 18), the unpermitted treatment, storage and disposal of a hazardous waste originating from an abandoned railroad tanker car (Count 19), and the unpermitted disposal of a hazardous waste by spreading the hazardous waste onto the coal field (Count 20). On April 26, 2012, this Court scheduled the matter for trial to commence on February 26, 2012.

II. STATEMENT OF FACTS

A. COKE PRODUCTION AT TCC

Defendant TCC operates as a merchant by-product coke facility whose products include foundry and furnace coke and whose by-products include coal tar. TCC has been in operation since in or about February of 1978, and from at least on or about March 13, 1981, to the present, defendant KAMHOLZ has been Manager of Environmental Control for TCC.

Coke is used in the steel-mill and foundry industries as an additive in the steel making process. Coke is produced through the prolonged heating of bituminous coal in sealed ovens at high temperatures. The heating of the coal takes place in groups of ovens called batteries. TCC operates a single coke battery consisting of 60 adjacent ovens, with each oven measuring 13 feet high. The battery began operations in 1962 under different ownership, and all 60 ovens are operational today.

Coal arrives at TCC via truck and rail, at which point it is sorted and stored in the coal field. Prior to loading the coal into the coke ovens, the coal is pulverized and then blended based on a specific "recipe" that is used to control the properties of the resulting coke. The prepared coal mixture is transported to a

larry car, which is the charging vehicle located on top of the battery, which then deposits the coal into the ovens.

During the heating process, volatile materials are driven from the coal and removed from the ovens as coke oven gas ("COG"), which is sent through a by-product recovery system. During the recovery process, the COG is cooled, sprayed, stripped in a steam stripper (still), and separated using a complex process to recover valuable materials from the COG. The cleaned COG that remains is then combusted in boilers to produce steam for the facility and/or returned to the coke ovens as fuel to heat the coal. One of the by-products recovered by TCC is coal tar, during which recovery process a sludge is created, which is known as coal tar sludge.

At the end of the heating cycle, the solid carbon mass remaining in the oven is coke. The doors on both ends of the oven are removed and the incandescent coke is pushed from the oven by a ram that is extended from a pusher machine. The coke is pushed into a special railroad car called a quench car, where it is taken to a quench tower and soaked with water to prevent the coke from burning after exposure to air. During this quenching process, a by-product called coke breeze is produced. Coke breeze is a solid material containing small fines of coke.

B. REGULATORY OVERSIGHT AND PERMITS AT TCC

Because the production of coke involves potential impacts to the environment, TCC is regulated by federal and New York State statutes and regulations, including the Clean Air Act, the Resource Conservation and Recovery Act, and the New York Codes, Rules and Regulations. The U.S. Environmental Protection Agency ("EPA") and the New York State Department of Environmental Conservation ("NYS-DEC") are responsible for administering and enforcing the applicable environmental statutes and regulations.

Title V of the 1990 amendments to the Clean Air Act created an operating permit program that regulates the emission limits and compliance methods of stationary sources of air pollution. TCC emits nitrogen oxides and sulfur dioxide at levels above the major source thresholds of 100 tons per year, and therefore, requires a Title V permit to operate. TCC was issued its current Title V operating permit by NYS-DEC on April 30, 2002. The Title V permit expired on May 1, 2007; however, the permit has been administratively extended until a new Title V permit is issued by NYS-DEC because TCC submitted a timely Title V air permit renewal application. TCC's Title V operating permit contains 102 federally enforceable conditions, three of which are relevant to this criminal case. Condition #4 addresses unpermitted emission sources, and requires that all existing emission sources be

included within the Title V permit. Condition #96 and Condition #97 require that all wet coke quench towers be equipped with baffles. Baffles are pollution control devices that are used to disrupt airflow and entrap particulate matter before it is released to the atmosphere.

There are three residential neighborhoods in the vicinity of TCC, one directly to the south, one to the south-east, and one to the north-east. Following a long history of complaints from local residents about TCC, in July of 2007, NYS-DEC initiated the federally-funded Tonawanda Community Air Quality Study to evaluate air pollutant concentrations in the industrial area of Tonawanda. Sampling at four air quality monitoring stations situated in this industrial area concluded in July 2008. One of the monitoring stations was located directly north-east of TCC, in the direction of the prevailing winds (the Grand Island Boulevard station). In June of 2009, NYS-DEC released the results of the air study, which found that the concentration of benzene at the Grand Island Boulevard station was 75 times higher than the annual guideline concentration established by the New York State Department of Health.[1]

[1] On July 11, 2003, TCC submitted a hazardous air pollutant emission inventory to NYS-DEC, which calculated TCC's benzene emissions at 6.038 tons of benzene per year. However, in May of 2010, a fugitive benzene emission test was conducted at TCC which revealed that TCC emits 90.8 tons of benzene per year.

C. COAL TAR SLUDGE AT TCC

As described above, one of the by-products derived during the production of coke is coal tar, which is sold by TCC to various customers. In the process of making coal tar, coal tar sludge is created, and is deposited into a hopper, or "tar box," at TCC. This sludge, technically known as decanter tank tar sludge from coking operations (K087), is a listed hazardous waste under RCRA. See 40 C.F.R. § 261.32.

To clean the tar box, one of the by-products operators would call for an end-loader operator to come to the tar box and scoop the coal tar sludge out with a front-end loader. During periods of high coke production, the tar box would need to be cleaned approximately once per day. During medium production, the tar box would be cleaned every other day, and during low production, approximately once per week. The tar box is able to hold approximately 165 gallons of coal tar sludge, almost all of which can be removed by a front-end loader. Since at least May 20, 1994, the emptying of the tar box was routinely recorded in a log book maintained by the by-products operator, which was obtained from TCC by way of a grand jury subpoena.

The coal tar sludge generated during the by-product recovery process is reused by TCC as a coal additive, and is blended with

the coal prior to being loaded into the coke oven. Numerous witnesses will testify at trial that it was common practice for the end-loader operators at TCC, after picking up a load of coal tar sludge, to dump the sludge directly on the coal, in the coal field. The end-loader operator would then work the coal tar sludge into the coal, which would then sit on the ground until it was loaded onto belts to be brought to the coke ovens. It is this practice of mixing the coal tar sludge directly with the coal on the ground that is the subject of Count 20 of the Indictment. Trial witnesses will also identify a large cement pad with short walls in the coal handling department, which was supposed to be used for the mixing of the coal tar sludge with the coal. However, this cement pad appears to have only been used for the coal tar sludge that was shipped from the closed Bethlehem Steel Site to TCC.

D. COAL TAR SLUDGE AROUND THE BURNED TANKS

Numerous witnesses will testify at trial regarding two large deteriorating tanks that were present on the TCC site, south of the coke oven battery. These tanks, measuring approximately 30 feet in diameter, were in place, but out of service, at the time TCC purchased the facility in 1978. In approximately 1998, numerous witnesses will testify that they observed a large amount of coal tar and coal tar sludge spread around the base of these tanks, in almost a pool-like fashion. In fact, the tar was so thick and

viscous at one point, that a deer became trapped in the coal tar, was unable to get out, and died. The deer was observed by several witnesses laying horizontally, half-submerged, in the coal tar. Upon learning about the dead deer, one witness will testify that he approached KAMHOLZ and told him that he had to do something about the coal tar around these tanks because it was killing the wildlife. In response, and after waiting a couple of weeks, KAMHOLZ spread small pieces of coke and coke breeze over the surface of the coal tar sludge to manage the sludge stored on the ground so that no other animals would get stuck and die. KAMHOLZ did not clean up or remove any of the coal tar sludge at that time. It is the storage of the coal tar sludge in and around these two large tanks that forms the basis for Count 17 of the Indictment.

During the summer of 2008, a large fire occurred at the TCC site in which the contents in and around these two large tanks burned. A large black cloud was seen coming from the TCC site, and 5 fire companies responded to fight the blaze. The fire companies were not told that the contents of these tanks were or could be hazardous. During the fire, witnesses will testify that they observed coal tar and coal tar sludge oozing from the tanks onto the ground. After the fire was put out, TCC had the tanks scrapped by an outside contractor. Two TCC employees then used heavy machinery to pull out sections of the tanks that were not removed

by the contractor, which further disturbed the coal tar sludge in and around these tanks. Once this was complete, one of the witnesses will testify that in he asked KAMHOLZ if he could excavate some of the coal tar sludge in and around the base of the removed tanks, so that it could be mixed with the coal in the coal field and ultimately disposed of in the coke ovens. KAMHOLZ approved this request, and the witness then removed 5 to 6 bucket loads of sludge (estimated 5 tons of material per bucket) on 5 to 7 separate occasions. The witness will explain that he stopped excavating the tar and sludge when the weather turned cold because the sludge had solidified.

On June 17, 2009, RCRA investigators with EPA and NYS-DEC conducted an inspection at TCC and observed the remnants of the two burned tanks, and the coal tar sludge in the area. During this inspection, KAMOHLZ stated that the material around the tanks was coal tar, and described how the tanks had burned during the fire and then were scrapped. EPA and NYS-DEC returned to inspect these tanks on September 10, 2009. As part of the inspection, eight samples of the coal tar sludge were taken from the left tank and analyzed using the toxic characteristic leaching procedure (TCLP), which is the standard testing procedure for determination of hazardous wastes under RCRA. The TCLP results indicated that all of the samples exceeded the TCLP regulatory level for benzene which

is 0.5 mg/L. Specifically, the TCLP results for the eight samples were as follows: 3.9, 1.7, 1.4, 1.1, 0.64, 2.1, 14.0, and 3.0 mg/L. In addition, EPA and NYS-DEC observed less coal tar sludge in and around the tanks during this inspection, as well as evidence that some of the tar sludge was removed with an excavator. When KAMHOLZ was asked about this, he stated that some of the tar sludge was removed and spread on the coal. The disposal of the coal tar sludge in and around these tanks by placing the material on the coal is the subject of Count 18 of the Indictment.

On December 17, 2009, during the execution of the criminal search warrant, the coal tar sludge and residual material in and around the two deteriorating tanks was sampled by EPA. A total of 18 samples were taken at that time, 12 of which had a benzene TCLP result greater than 0.5 mg/L. Specifically, the TCLP results for the 12 samples were as follows: 8.5, 6.5, 0.81, 2.9, 9.8, 3.7, 5.8, 3.6, 3.4, 1.9, 0.86, and 2.6 mg/L.

E. THE RAILROAD TANKER CARS

Along the southern border of the TCC site, there are three abandoned railroad tanker cars that have been present in that location since at least 1978. Several witnesses will testify that beginning in the summer of 2007, and continuing until the summer of 2008, KAMHOLZ and others removed an oily liquid from one of these

tanker cars, and deposited the liquid into the waste oil spray tanker. The waste oil spray was used to blend with the coal prior to being loaded into the coke ovens, which helped increase the bulk density of the coal.

One witness will testify that he assisted KAMHOLZ in sampling this material in June or July of 2007, and that the samples were sent to a local laboratory in Buffalo, New York for analysis. Those lab results have been obtained through a Grand Jury subpoena, and indicate that KAMHOLZ only requested that the oily liquid be tested for PCBs.

Two other witnesses, one of which was the plant superintendent at the time, will testify that they assisted KAMHOLZ in removing the liquid from the eastern-most railroad tanker car using a sump pump and a 300 gallon storage cube. Another witness will testify that around the time the liquid was being removed from this railroad tanker car, KAMHOLZ came up to him and asked him to smell the oily liquid, and that it appeared the KAMHOLZ did not know what the substance was. In total, from January of 2008 to October of 2008, approximately 4,500 gallons of this oily substance was removed from the railroad tanker car, placed into the waste oil spray, which was ultimately disposed of by way of the coke ovens.

On May 7, 2010, EPA entered the TCC site with the consent of TCC, and sampled the eastern-most railroad tanker car. Approximately 16 inches of liquid remained in the tanker car. Twelve samples were taken by EPA, three of which were provided directly to a laboratory chosen by TCC. All of the EPA samples were analyzed using TCLP, and were found to contain a concentration of benzene several orders of magnitude above the regulatory limit. Therefore, the substance is a characteristic RCRA hazardous waste for toxicity. TCC did not have a permit under RCRA to dispose of this hazardous waste, which is addressed in Count 19 of the Indictment.[2]

F. OPERATION OF QUENCH TOWERS WITHOUT BAFFLES

In April of 2009, the civil components of EPA and NYS-DEC conducted a joint inspection of TCC to document TCC's compliance with their Title V operating permit, and with other federal and state environmental regulations. Beginning on April 14, 2009, and continuing until April 21, 2009, EPA and NYS-DEC regulators conducted a thorough inspection of all aspects of the operations at

[2] Count 19 also alleges that the material disposed of from the railroad tanker cars was hazardous due to the toxicity characteristic for mercury and because the material was ignitable. The government has now filed a motion to strike this language from Count 19, see Dkt. #71, as the government has since learned that the lab conducting TCC's test may have not conducted the proper testing, as required for a hazardous waste determination under RCRA.

TCC. During the inspection, numerous photographs were taken of the operating conditions, and interviews were conducted with TCC personnel.

As mentioned above, Condition ## 96 and 97 of TCC's Title V CAA operating permit require that they must have baffles installed in their quench towers. TCC currently has two quench towers located on either side of the battery. The two quench towers are identified as quench tower #1, located to the west of the battery and closest to the Niagara River, and quench tower #2, located to the east of the battery.

During the EPA inspection in April of 2009, it was learned that neither of the quench towers located at TCC had baffles installed in them. Specifically, when one of the NYS-DEC regulators asked KAMHOLZ about the lack of baffles in the quench towers, KAMHOLZ acknowledged that he was aware that the quench towers should have had baffles in them, and was unable to explain why they did not have baffles. NYS-DEC issued a notice of violation to TCC for their lack of baffles, and in November of 2009, KAMHOLZ wrote to NYS-DEC notifying them that baffles had been re-installed in quench tower #2 as of November 14, 2009. During the criminal search warrant executed at TCC on December 17, 2009,

EPA investigators observed baffles in quench tower #2, but noted that quench tower #1 still did not have baffles.

A review of the NYS-DEC regulatory file regarding baffles revealed that on September 19, 1983 (prior to implementation of TCC's Title V operating permit), KAMHOLZ wrote to the NYS-DEC and requested an exemption from having baffles installed in quench tower #1. In this letter, KAMHOLZ stated that quench tower #1 is only used approximately 10% of the time, and is far from neighboring properties. By way of a letter dated March 14, 1984, NYS-DEC approved KAMHOLZ's request, but noted that quench tower #1 could not be used more than 10% of the time. Regarding quench tower #2, on December 29, 1996, KAMHOLZ wrote to the NYS-DEC requesting to modify quench tower #2 by lowering the height of the tower. On January 6, 1997, NYS-DEC responded to KAMHOLZ's request in writing, and granted the request but specifically noted that a baffle system must be installed in all wet quench towers. As noted above, on April 30, 2002, TCC's Title V operating permit mandated that both quench towers contain baffles.

At trial, several witnesses will testify that for as long as they can remember, quench tower #1 did not had baffles (until recently, when baffles were installed after the criminal search warrant). These witnesses will acknowledge that quench tower #1

was used less frequently than quench tower #2, but that quench tower #1 was used at least once or twice per shift (and used more during the winter), which would result in at least 3 to 6 quenches at this tower in a 24 hour period. Witnesses will also testify at trial that from at least 1997 to November of 2009, there were no baffles in quench tower #2, and that quench tower #2 was used for the majority of the quenches at TCC. One witness will discuss an incident that occurred in 1997, at which time he referred to quench #2 as a "tower," and that KAMHOLZ sought him out and told him that quench #2 was not a tower, but a "station." When this individual asked KAMHOLZ what the difference was, KAMHOLZ told him that quench "stations" do not need baffles. Another witness will testify that when quench tower #2 was lowered, he asked KAMHOLZ whether the tower needed baffles, and KAMHOLZ stated that with a lower quench station, baffles were not required. Counts 6 through 10 of the Indictment charge the defendants with operating the western quench tower (quench tower #1) without baffles in violation of their Title V permit. Counts 11 through 15 charge the defendants with operating the eastern quench tower (quench tower #2) without baffles.

G. THE PRESSURE RELIEF VALVE

On April 21, 2009, during the last day of the EPA inspection, EPA and NYS-DEC regulators noticed a vertical pipe in the

by-products area that appeared to be emitting some type of gas into the atmosphere. At the time of this observation, the regulators were walking with KAMHOLZ in the vicinity of the pipe, and asked him what this discharge was. KAMHOLZ stated that he believed it was just steam. KAMHOLZ was unable to answer any questions the regulators had about this pipe or emission, and he had Pat Cahill ("CAHILL"), the supervisor of the by-products division, accompany the group at this point.

CAHILL then explained for the group that this pipe was used to release COG when the pressure in the COG line became too high, and referred to the emission source as a bleeder valve. CAHILL told the regulators that when the pressure in the COG line gets too high and hits the set point, a valve is triggered which releases the COG directly to the atmosphere until the pressure in the line comes down below the set point. CAHILL mentioned that the set point on the valve was adjustable, and that a 24 hour circular chart located in a shack below the pipe continuously records the pressure in this line and documents when COG is released to the atmosphere. The group then reviewed the circular chart for that day, and the previous days, and learned that the valve was set to release when the pressure released 130 cm of oil. In EPA's final report for the April of 2009 inspection, EPA refers to this emission source as a pressure relief valve (“PRV”), which is noted as an area of concern

with the following language: "COG releases typically do not last for more than 15 seconds; however, a large quantity of air toxics could be emitted as a result of this practice." The report also notes that "TCC could not explain why the PRV is set at a pressure within normal operations."

CAHILL has been given immunity, and will testify at trial that in the days leading up to the EPA April of 2009 inspection, KAMHOLZ specifically instructed him that the PRV should emit gas during the EPA inspection. CAHILL will explain that prior to the inspection, he was walking throughout the by-products area with KAMHOLZ, at which time KAMHOLZ saw the PRV vent COG to the atmosphere. KAMHOLZ directed CAHILL's attention to the PRV, and told him that "we can't have that going off when they're here." As a result of that conversation, every morning prior to the EPA team arriving at the plant, CAHILL raised the PRV setting to 130cm (so it would go off less), and then at the end of each day when EPA had left TCC for the day, CAHILL lowered the PRV back down to 100cm. CAHILL, and others, will testify that the PRV was set at 80 to 100cm during normal operations, and that during times of high production, COG would be releasing almost continuously from the PRV. CAHILL will testify that he was surprised when KAMHOLZ pretended to have no knowledge of the PRV in front of the regulators, and that he believes that KAMHOLZ "threw him under the bus."

Additional witnesses will testify that KAMHOLZ knew about the PRV. One witness will describe a conversation he had with KAMHOLZ about the PRV approximately 10 years ago. Specifically, the witness will discuss how naphthalene was present in the COG that vented from the PRV, and that during the winter, it would cause a frost to appear on the roadway below the PRV. This witness asked KAMHOLZ if this was a problem, and he responded that it was not. Another witness will testify that approximately 15 to 20 years ago, he told KAMHOLZ that the PRV was venting COG constantly, and inquired as to whether this was legal. KAMHOLZ stated that it was. This witness also asked KAMHOLZ if the PRV needed to have a flare, and KAMHOLZ said it did not. Other witnesses will discuss an incident when the PRV was struck by lightening, which ignited the COG that was being released from the PRV, and was only extinguished upon raising the set point of the PRV.

Following the April of 2009 inspection by EPA, EPA sent TCC a Request for Information on September 1, 2009, requesting details regarding numerous issues at TCC, including the PRV. In October of 2009, KAMHOLZ responded to EPA's Request For Information, and provided additional details regarding the PRV.[3] In his response, KAMHOLZ stated that the PRV was installed in approximately 1999,

[3] KAMHOLZ also provided details regarding the quench towers, and acknowledged that the quench towers do not contain baffles.

and that the "PRV opens very rarely....[s]hould the valve open it would only be for 5-10 second." In or about January of 2010, after the execution of the criminal search warrant on December 17, 2009, TCC removed the PRV from service so that it no longer could release COG to the atmosphere.

III. RELEVANT LAW

A. THE CLEAN AIR ACT

The Clean Air Act, 42 U.S.C. §§ 7401 et seq., and the regulations promulgated thereunder, is a comprehensive air pollution control statute that reflects the congressional purpose "to protect and enhance the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1).

The defendants are charged in counts 1 through 15 of the Indictment with violations of the Clean Air Act, which makes it a felony for any person to knowingly violate "any requirement ... under ... section 7661a(a) or 7661b(c) of this title (relating to permits), ... including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or subchapters." 42 U.S.C. § 7413(c)(1). Title 42, United States Code, Section 7661a(a) makes it unlawful for any person to operate a major source in violation of its Title V permit issued under the Clean Air Act. The penalty associated with a conviction under the

Clean Air Act is a "fine pursuant to Title 18, or by imprisonment for not to exceed 5 years, or both." 42 U.S.C. § 7413(c)(1).

As discussed above, Title V of the 1990 amendments to the Clean Air Act, 42 U.S.C. §§ 7661 et seq., created an operating permit program that regulates the emissions limits and compliance methods of stationary sources of air pollution. Title V also requires sources to monitor and report whether they are operating in compliance with their permits. Title V was designed to put into a single operating permit all requirements that apply to a particular facility. Each Title V permit includes, among other things, enforceable emissions limits and standards; a schedule of compliance; the permittee's consent to inspection and monitoring; and periodic submission of necessary monitoring data (at least once every six months). 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a)&(c).

In New York, the "permitting authority" under Title V is the delegated air pollution control agency, NYS-DEC, which is authorized by EPA to carry out the permit program under Title V as codified in Title 40 of the Code of Federal Regulations. 40 C.F.R. § 70, Appendix A. The State of New York received interim approval of its program effective December 9, 1996. Id. New York was granted final full approval of its program effective January 31, 2002. Id. The New York regulations pertaining to Title V

operating permits are set forth in Title 6 of the New York Codes, Rules and Regulations (NYCRR) Sub-parts 201-6. The United States retained its federal criminal enforcement authority under the CAA even after the EPA approved New York's State operating permit program under Title V. 42 U.S.C. § 7413.

There are three conditions in TCC's Title V permit relevant to Counts 1 through 15 of the Indictment. Condition 4 of the permit relates to unpermitted emission sources, and mandates that for any existing emission source that is unpermitted, the owner and/or operator must apply for a permit for such emission source. Condition 96 of the permit, which relates to the western quench tower (quench tower #1), prohibits any person from operating "a wet quench tower of a coke oven battery unless it is equipped with a baffle system designed to effectively reduce particulate emissions during quenching." Condition 97 is identical to Condition 96, except that it relates to the eastern quench tower (quench tower #2).

In order to convict the defendants of operating in violation of their Title V permit issued under the Clean Air Act, the government is required to prove beyond a reasonable doubt the following four elements:

(1) the defendant was an owner or operator of a source of air pollutants,

(2) the source was subject to the operating permits program,

(3) the defendant operated the source in violation of a permit requirement, and

(4) the defendant acted knowingly.

To establish that the defendants acted "knowingly," the government must only prove that the defendants had "knowledge of the facts that constitute the offense." United States v. Bryan, 524 U.S. 184, 193 (1998). The government is not required to prove that the defendants knew that their acts were unlawful, id., which in this case would be the defendants' knowledge of the prohibitions in the Title V permit and that their actions were in violation of those prohibitions. In the context of a case involving a knowing violation of the Clean Air Act's asbestos work practice standards, the Second Circuit reaffirmed the prevailing meaning of the term "knowing" in the context of Clean Air Act cases. In United States v. Weintraub, 273 F.3d 139, 147 (2d Cir. 2001), the court, in affirming the defendant's conviction, stated that in the order to be guilty, the defendant had to have "knowledge of the facts and attendant circumstances that comprise a violation of the statute, not specific knowledge that one's conduct is illegal." See also United States v. Buckley, 934 F.2d 84, 87 (6th Cir. 1991) (court

upheld a general intent instruction on knowledge that stated, in part, that "the government must prove that the defendant knew the general nature of the asbestos material [removed in violation of applicable standards] .... The government does not have to show that the defendant knew the legal status of the asbestos materials or that he was violating the law").

In Weintraub, the court specifically limited its analysis to the asbestos work practice standards, noting that the "application of the scienter requirement to criminal violations involving other hazardous air pollutants or violations of other provisions of the CAA must await future cases." Weintraub, 273 F.3d at 151. The government is unaware of any circuit decision addressing the knowledge element in a Clean Air Act involving a violation of a Title V permit. However, one district court has reached the issue, and concluded that the government must prove that the defendant knew the conduct was in violation of the permit condition. See United States v. Atlantic States Cast Iron Pipe Co., 2007 WL 2282514, *14-17 and *21-40 (D.N.J., Aug. 2, 2007) (which involved numerous environmental and Title 18 offenses, including violations of a Title V permit by burning more than 55 gallons per day of waste paint in the cupola). The government disagrees with the analysis in Atlantic States Cast Iron Pipe Co., and does not believe that the decision is consistent with Second Circuit case

law. See United States v. Hopkins, 53 F.3d 533, 537-41 (2nd Cir. 1995) (holding that in a Clean Water Act prosecution, the trial court properly instructed the jury that the government "was required to prove that [Defendant] knew the nature of his acts and performed them intentionally, but was not required to prove that he knew that those acts violated the CWA, or any particular provision of that law, or the regulatory permit issued to [Company]."); United States v. Laughlin, 10 F.3d 961, 966 (2d Cir. 1993) (in prosecution under RCRA, "the Government need prove only that a defendant was aware of his act of disposing of a substance he knew was hazardous. Proof that a defendant was aware of the lack of a permit is not required.").

B. OBSTRUCTION OF JUSTICE

The defendants are charged in Count 16 of the Indictment with Obstruction of Justice, in violation of Title 18, United States Code, Section 1505. This charge relates to the defendants attempts to conceal from EPA and the NYS-DEC that the pressure relief valve located in the by-products department emitted coke oven gas to the atmosphere during normal operations at TCC. Section 1505, in relevant part, reads as follows:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, ...

> [s]hall be fined under this title, imprisoned not more than 5 years,... or both.

To convict the defendants of Obstruction of Justice under 18 U.S.C. § 1505, the government is required to prove the following three elements of the offense:

> (1) there was a proceeding pending before a department or agency of the United States;
>
> (2) the defendant knew of or believed that the proceeding was pending; and
>
> (3) the defendant corruptly endeavored to influence, obstruct, or impede the due and proper administration of the law under which the proceeding was pending.

See United States v. Quattrone, 441 F.3d 153, 174 (2d Cir. 2006).

Regarding the first element, a "proceeding" has been interpreted to include an administrative or criminal investigation conducted by a department or agency which has rule-making or adjudicative authority. United States v. Schwartz, 924 F.2d 410, 423 (2d Cir. 1991); United States v. Browning, 572 F.2d 720, 724 (10th Cir. 1978); United States v. Fruchtman, 421 F.2d 1019, 1021 (6th Cir. 1970). Thus, section 1505 has been held to apply to investigations or inquiries by the Environmental Protection Agency. See United States v. Technic Services, 314 F.3d 1031, 1044 (9th Cir. 2002) (EPA investigation which could lead to civil or criminal

proceedings is a "proceeding" under section 1505). See also Browning, 572 F.2d at 724 (investigation by the Customs Service into importation practices of defendant held to be a proceeding); Schwartz, 924 F.2d at 423 (interview of defendants by Customs Service deemed to be a proceeding); United States v. Vixie, 532 F.2d 1277, 1278 (9th Cir. 1976) (administrative investigation by the Internal Revenue Service is a proceeding).

The Second Circuit has defined the term "corruptly" as having an improper purpose, and that an "intent to subvert or undermine the fact finding ability of an official proceeding is an improper purpose." United States v. Kaplan, 490 F.3d 110, 125-26 (2d Cir. 2007). In the Kaplan case, the Second Circuit specifically approved of the jury instruction used by the district court, which has been included in the government's proposed jury instructions. Id. A defendant may be found guilty under 18 U.S.C. § 1505 even if he was not successful in obstructing the agency proceeding, as "the jury may convict one who 'endeavors' to obstruct such a proceeding. By analogy, it is no defense that the government might have obtained the desired information elsewhere." United States v. Vixie, 532 F.2d 1277, 1278 (9th Cir. 1976) (internal citations omitted).

The Second Circuit has also made it clear that after the decisions in United States v. Aguilar, 515 U.S. 593, 599 (1995) and Arthur Andersen LLP v. United States, 544 U.S. 696 (2005), the jury must be instructed on the "nexus" requirement between the defendant's conduct and the administrative proceeding. See Quattrone, 441 F.3d at 177-80; Kaplan, 490 F.3d at 125-26. In other words, the government must prove that the defendants undertook their alleged obstructive activities in contemplation of a particular administrative proceeding. In Quattrone, the court approved of a the following portion of the district court's jury instruction relating to the nexus requirement:

> I have already charged you on what corrupting means. It means improper motive or purpose of obstructing justice. In connection with this element, the government here too must prove ... some relationship in time, causation or language [sic] between the defendant's actions and the SEC proceeding so that his action or actions may be said to have the natural and probable effect of interfering with that proceeding.

Quattrone, 441 F.3d at 177.

C. THE RESOURCE CONSERVATION AND RECOVERY ACT

The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq., and the regulations promulgated thereunder, was enacted in 1976 as a response to the growing number of hazardous waste sites resulting from unregulated waste disposal practices. The objectives of RCRA include the protection of human health and the environment through strict regulation of the generation, treatment,

storage, transportation and disposal of hazardous wastes. The statute creates a "cradle to grave" regulatory scheme that tracks hazardous wastes from their points of generation to the locations of their final dispositions. 42 U.S.C. §§ 6901 and 6902.

Counts 17 through 20 of the Indictment charge the defendants with violations of the Resource Conservation and Recovery Act, Title 42, United States Code, Section 6928(d)(2)(A), which relates to the storage and disposal of hazardous waste at TCC. Count 17 alleges that the defendants stored hazardous waste on the ground adjacent to two large deteriorating tanks at TCC. Count 18 charges the disposal of hazardous waste from in and around the two tanks. Count 19 alleges that the defendants disposed of hazardous waste originating from an abandoned railroad tanker car at TCC, and Count 20 relates to the defendants disposal of hazardous waste by spreading it on the coal field.

Section 6928(d)(2)(A), in relevant part, reads as follows:

> Any person who knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter without a permit under this subchapter ... shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed ... five years ..., or both.

To support a guilty verdict on the charge of illegal storage and disposal of hazardous waste in violation of RCRA, as alleged in the Indictment, the government must prove the following four elements:

(1) the defendants knowingly treated, stored, or disposed of or caused others to treat, store, or dispose of a waste on or about the date set forth in the indictment;

(2) that pursuant to RCRA, the waste was hazardous;

(3) the defendants knew that the hazardous waste had a potential to be harmful to others or the environment or, in other words, it was not a harmless substance like uncontaminated water; and

(4) the defendants did not have a permit to treat, store, or dispose of the hazardous waste under RCRA.

See United States v. Laughlin, 10 F.3d 961, 965 (2d Cir. 1993) (approving of a district court's jury instruction that included the same elements).

1. Person

The term "person" is defined under RCRA to include individuals, companies, and corporations. 42 U.S.C. § 6903(15). The definition of "person" encompasses TCC. The Second Circuit has long held that a "corporation may be held criminally liable for the acts of an agent within the scope of his employment." United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir. 1946), citing New York Cent. & H.R.R. Co. v. United States, 212 U.S. 481 (1909). See also United States v. Ionia Management S.A., 555 F.3d 303, 309-10 (2d Cir. 2009). Conduct falls within the scope of one's employment if it is done on behalf of and at least partially for the benefit of the corporation, even though it may be contrary to general corporate policy or express instructions to the

employee. See United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989) (holding that a compliance program, "however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law").

2. Definition of Treat, Store, and Dispose

The term "treatment" is defined under RCRA as

> any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

42 U.S.C. § 6903(34).

The term "storage" is defined under RCRA as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste." 42 U.S.C. § 6903(33).

The term "disposal" is defined under RCRA as

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the

> environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3).

As relevant to Count 17 of the Indictment, it is anticipated that the defendants will argue that their conduct falls outside the scope of the definition of "storage" because they did not "actively manage" the hazardous waste. The difference between "storage" and "disposal," and the notion of "active management," is captured in a Memorandum from John Skinner, EPA Director of Office of Solid Waste, dated August 17, 1983, which specifically states:

> Storage is an ongoing process as opposed to disposal, which is intended to be the final step in handling hazardous waste. This interpretation is based on EPA's existing regulatory definitions of "storage" and "disposal." "Storage" occurs when waste is held for a temporary period at the end of which the waste is treated, stored or disposed elsewhere. This "storage" always implies that there will be future management of the waste after the storage period is over. Any facility which is storing hazardous waste that was placed onsite on or before November 19, 1980, is an active storage facility and is subject to the provisions of RCRA, even if no hazardous waste was placed onsite after November 19, 1980. This applies to storage in surface impoundments and waste piles as well as to storage in tanks and containers. If a waste pile or surface impoundment is a storage facility, it should be managed in accordance with the interim statue requirements. If, however, the placement of waste in the surface impoundment or waste pile occurred before November 19, 1980, and such placement constituted final disposal, the interim status requirements would not apply to the facility unless the owner or operator engaged in significant management activities after November 19, 1980.

See Dkt. #21-4 (Exhibit C to Motion to Dismiss). In its pretrial motion to dismiss regarding active management, defendant TCC further cited to an EPA Training Module, dated September of 2005, which states: "The term active management means physically disturbing wastes within a waste management unit or disposing of additional hazardous waste in existing units containing previously disposed wastes." See Dkt. #21-3 (Exhibit B to Motion to Dismiss). It is the government's position, which will be presented through the testimony of witnesses at trial, that the defendants "stored" the hazardous waste at issue in Count 17 of the Indictment, and as such, the issue of active management is not applicable.

3. Hazardous Waste

A hazardous waste under RCRA must be both a solid waste and a hazardous waste as those terms are defined in 42 U.S.C. § 6903 and 40 C.F.R. Part 261.

a. Solid Waste

A solid waste is any "discarded material" that has not been excluded under the regulations. 40 C.F.R. § 261.2(a)(1). Under 40 C.F.R. § 261.2(a)(2), a "discarded material" includes any material that is abandoned or recycled. 40 C.F.R. § 261.2(a)(2)(i). "Abandoned" materials, are solid wastes if they are abandoned by being disposed of, burned or incinerated, or accumulated, stored,

or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated. 40 C.F.R. § 261.2(b). A material is considered a "solid waste" if it is recycled – or accumulated, stored, or treated before recycling. 40 C.F.R. § 261.2(c). The regulations describe, in table form, which recycled materials are solid wastes based the type of material it is and the recycling activity involved. Id. Among the recycled materials listed as solid wastes are "sludges" that are somehow placed on the land. Id.

There are certain exclusions from the definition of a "solid waste." As related to the coal tar sludge (K087) at issue in Count 20 of the Indictment, there is an exclusion under RCRA as follows:

> (a) Materials which are not solid wastes. The following materials are not solid wastes for the purpose of this part: ...
>
> (10) EPA Hazardous Waste Nos. K060, K087, K141, K142, K143, K144, K145, K147, and K148, and any wastes from the coke by-products processes that are hazardous only because they exhibit the Toxicity Characteristic (TC) specified in section 261.24 of this part when, subsequent to generation, these materials are recycled to coke ovens .... This exclusion is conditioned on there being no land disposal of the wastes from the point they are generated to the point they are recycled to coke ovens ....

40 CFR § 261.4(a)(10) (emphasis added). In interpreting this exclusion, EPA has made a clear distinction between materials that are recycled as part of a continuous, ongoing process, which are not subject to RCRA, and those which are placed on land between

production and recycling. See 57 Fed. Reg. 27,880 (June 22, 1992). In describing the parameters of this exclusion, EPA stated that

> [i]mportantly, the exclusion is conditioned on there being no land disposal of the residues at any point from residue generation to reinsertion to the coke oven or tar recovery or refining process. Materials that are stored in piles on the land are thus considered to be solid wastes and are not excluded from regulation.
> ...
> The exclusion for coke by-product residues rests on the following factors.... Third, by conditioning the exclusion of no land disposal occurring, the traditional RCRA objectives of absence of land placement of material and general safe handling will be assured. Thus, any of these materials that are placed in land disposal units such as piles are solid and hazardous wastes, and the units are regulated units. (In addition, of course, an abandoned spill of these materials (viz. a spill not picked up expeditiously and used beneficially) constitutes disposal of a hazardous waste.

Id. at 27,884. Because the coal tar sludge was placed on the coal piles on the ground prior to being re-introduced into the coke oven, it is the government's position that the coal tar sludge at TCC is not excluded from the definition of "solid waste."

b. Hazardous Waste

Hazardous wastes are identified in two ways: a waste may be specifically listed as hazardous or it may exhibit a characteristic that makes it hazardous. A listed hazardous waste appears by name on one of four lists of hazardous wastes in the regulations. See 40 C.F.R. § 261.30. Coal tar sludge (K087) is listed at 40 C.F.R. § 261.32 as a hazardous waste specifically associated with coking.

Characteristic hazardous wastes are identified as hazardous wastes by virtue of the characteristics they exhibit. Specifically, wastes are hazardous wastes if they exhibit the characteristics of ignitability, corrosivity, reactivity or toxicity. 40 C.F.R. §§ 261.20 - 261.24. Wastes exhibit the characteristic of toxicity if, using the Toxicity Characteristic Leaching Procedure ("TCLP") tests, the extract from a representative sample of the waste contains more than a specified level of any of the contaminants listed in the relevant regulations. Pursuant to the regulations, the TCLP threshold limit for benzene toxicity is 0.5 mg/L. 40 C.F.R. § 261.24(b).

4. Knowledge

The felony provision of 42 U.S.C. § 6928(d)(2)(A) is not a specific intent crime. The government must prove that the defendant acted "knowingly." That term, in the context of "public welfare" statutes such as RCRA, however, does not require that the defendant act with the specific intent to violate the law or with specific knowledge of the particular regulatory program promulgated under RCRA. See United States v. Laughlin, 10 F.3d 961, 965-67 (2d Cir. 1993), cert. denied 114 S. Ct. 1649 (1994); United States v. Kelley Technical Coatings, Inc., 157 F.3d 432, 436-38 (6th Cir. 1998); United States v. Dee, 912 F.2d 741, 745-46 (4th Cir. 1990), cert. denied, 499 U.S. 919 (1991). The government must show that

the defendant had a general awareness that he was performing acts proscribed by statute or that he knew factually what she was doing. See United States v. International Minerals & Chemical Corp., 402 U.S. 558, 565 (1971) ("where ... dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation"); Laughlin, 10 F.2d at 966-67; United States v. Baytank, 934 F. 2d 599 (5th Cir. 1991). Thus, knowledge of the facility's permit status is not an element of the offense in cases involving the knowing treatment, storage or disposal of hazardous waste under 42 U.S.C. § 6928(d)(2).[4] United States v. Hoflin, 880 F. 2d 1033, 1038 (9th Cir. 1989), cert. denied, 493 U.S. 1083 (1990); Laughlin, 10 F.3d at 966; United States v. Dean, 969 F. 2d 197, 191 (6th Cir. 1992), cert. denied, 113 S. Ct. 1852 (1993); United States v. Wagner, 29 F.3d 264, 265-66 (7th Cir. 1994); United States v Sellers, 926 F.2d 410, 415-17 (5th Cir. 1991); Dee, 912 F.2d at 745-46 (4th Cir. 1990); Kelley

[4] There is a split in the Circuits as to whether knowledge of the facility's permit status is required in cases involving the transportation of hazardous waste without a permit under 42 U.S.C. 6928(d)(1). See United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986); United States v. Speach, 968 F.2d 795 (9th Cir. 1992). That disagreement between the Circuits is not implicated in this case.

Technical Coatings, 157 F.3d at 438.[5] In United States v. Laughlin, the Second Circuit stated that "[w]ith respect to the mens rea required by section 6928(d)(2)(A), the Government need prove only that a defendant was aware of his act of disposing of a substance he knew was hazardous. Proof that a defendant was aware of the lack of a permit is not required." 10 F.3d at 966.

With respect to whether the government must prove that the defendant knew that the waste material was a regulated hazardous waste under RCRA, courts uniformly have held that it does not. The government must prove only that the defendant was aware of the general hazardous character of the waste, or that the waste had the potential to be harmful to others or the environment or, in other words, was not a harmless substance like uncontaminated water. United States v. Greer, 850 F.2d 1447, 1450-52 (11th Cir. 1988); Hoflin, 880 F.2d at 1039; Dee, 912 F.2d at 745; Sellers, 926 F.2d at 415-17 ; United States v. Goldsmith, 978 F.2d 643, 645-46 (11th Cir. 1992); Laughlin, 10 F.3d at 965-67.

[5] The Hoflin and Laughlin courts found that Section 6928(d)(2)(A) did not require proof that the defendant knew that the facility lacked a permit. The Wagner and Dean courts held that knowledge of RCRA's permit requirement was not an element of an offense under Section 6928(d)(2)(A).

IV. EVIDENTIARY/LEGAL ISSUES

A. DEFENDANT KAMHOLZ'S STATEMENTS ARE NOT HEARSAY

At trial, the government will seek to introduce numerous statements made by defendant KAMHOLZ to EPA and NYS-DEC officials, as well as statements made to other TCC employees and agents for TCC. Federal Rule of Evidence 801(d)(2)(A) provides that a party's own statement, offered against him, is not hearsay.[6] See United States v. Nixon, 418 U.S. 683, 702 (1974), citing United States v. Matlock, 415 U.S. 164, 172 (1974); On Lee v. United States, 343 U.S. 747, 757 (1952) ("Such statements are declarations by a party defendant that 'would surmount all objections based on the hearsay rule...' and, at least as to the declarant himself, 'would be admissible for whatever inferences' might be reasonably drawn."); United States v. Clemons, 676 F.2d 122 (5th Cir. 1982) ("A statement is not inadmissible hearsay if it is the statement of a party against whom it is offered."). "[A]ny and every statement of an accused person ... is usable against him as an admission." United States v. Rouse, 452 F.2d 311, 313-314 (5th Cir. 1971), citing 6

[6] The hearsay exception embodied in Fed. R. Evid. 801(d)(2) does not allow a defendant to offer his own out-of-court statements into evidence. The rule only allows admission by a party opponent to be "offered against" the speaker. United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982) (defendant cannot introduce his own statement because it is inadmissible hearsay); see also Gorman Pub. Co. v. Stillman, 516 F.Supp. 98, 111 (D.C.Ill., 1980). Thus, defendant KAMHOLZ may not offer his own-out-of court statements, which are non-admissible hearsay.

Wigmore, Evidence, § 1732, p. 99 (3d Ed. 1940); see also Asher v. United States, 394 F.2d 424, 429 (9th Cir. 1968). Because the statements are not hearsay, they are "properly admitted for substantive purposes." United States v. Lynn, 608 F.2d 132, 135 (5th Cir. 1979); United States v. Cline, 570 F.2d 731, 735-36 (8th Cir. 1978) (testimony was admissible as substantive evidence because it qualified as an admission by the defendant).

Rule 801(d)(2) expressly provides for the admission of statements made by a defendant "in either his individual or a representative capacity" and "by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Fed.R.Evid. 801(d)(2)(A) and (D), see also United States v. Pena, 527 F.2d 1356, 1360 (5th Cir.1976) (statement of an agent of a party admissible as a vicarious or representative admission of his principal). In order to admit out-of-court statements made by a defendant's agent, the government must show the existence of the agency relationship, that the statement was made within the course of the relationship, and that the statement relates to matters within the scope of the relationship. Fed. R. Evid. 801(d)(2)(D); see also United States v. Brothers Construction, 219 F.3d 300, 310-11 (4th Cir. 2000) ("Because a corporation can act only through its employees, a statement by a corporate official ... can certainly be considered

an admission by a corporate defendant"); United States v. Shunk, 881 F.2d 917, 921 (10th Cir. 1989) (statements made by a party's agent are non-hearsay admissions).

Similarly, letters, memoranda, notes, journals and other documents written by defendant KAMHOLZ are admissible under Rule 801(d)(2)(A) as direct substantive evidence against the defendants. United States v. Cline, 570 F.2d 731, 735-36 (8th Cir. 1978) (defendant's own statement admissible as substantive evidence because it qualified as an admission under Fed.R.Evid. 801(d)(2) and was relevant). In Cline, the court reasoned that the defendant's statement was "relevant as direct evidence on the issue of concealment. The jury could have found that it showed that appellant not only had the presence of mind to destroy the weapon but also the presence of mind to concoct a story which would explain the weapon's disappearance to the owner." Id. Likewise, in this case, many of defendant KAMHOLZ's own statements will be offered as direct evidence relevant to his knowledge of the violations and his state of mind to falsify documents and conceal material information from EPA and NYS-DEC.

B. BUSINESS RECORDS ARE ADMISSIBLE

The government anticipates offering records of TCC obtained during the execution of the criminal search warrant and/or by way

of grand jury subpoena, as well as records of businesses performing services for TCC, all of which are admissible as records of regularly conducted activity or absence of the same pursuant to Rules 803(6) and (7) of the Federal Rules of Evidence.

The Second Circuit has stated that "Rule 803(6) 'favors the admission of evidence rather than its exclusion if it has any probative value at all.'" United States v. Williams, 205 F.3d 23, 34 (2d Cir. 2000) quoting In re Ollag Constr. Equip. Corp., 665 F.2d 43, 46 (2d Cir. 1981)). A prerequisite to admissibility is "that the record have 'sufficient indicia of trustworthiness to be considered reliable.'" United States v. Williams, 205 F.3d 23, 34 (2d Cir. 2000), quoting Saks Int'l v. M/V "EXPORT CHAMPION", 817 F.2d 1011, 1013 (2d Cir. 1987). "To lay a proper foundation for such a record, a 'custodian or other qualified witness' must testify that the document was 'kept in the course of a regularly conducted business activity and also that it was the regular practice of that business activity to make the [record].'" Williams, 205 F.3d at 34, quoting United States v. Freidin, 849 F.2d 716, 719 (2d Cir. 1988) (internal quotation marks and citation omitted).

While the business record must be regularly maintained, it does not need to be routinely made. See, e.g., Willco Kuwait

(Trading) S.A.K. v. deSavary, 843 F.2d 618, 628 (1st Cir.1988) ("'non-routine' records made in the course of a regularly conducted business should be admissible under Rule 803(6) so long as (i) they meet the other requirements of the rule, and (ii) the attendant circumstances do not indicate a lack of trustworthiness"); Kassel v. Gannett Co., Inc., 875 F.2d 935, 945 (1st Cir. 1989); United States v. Jacoby, 955 F.2d 1527, 1536-37 (11th Cir. 1992) (allowing documents that noted concerns about transactions the defendant was involved with to be admitted as business records even though they were not routinely made, but instead were made from once a week to once a month or even less). Accord 4 J. Weinstein & M. Berger, Weinstein's Evidence § 803(6)[03] at 803-182 (1988).

It is irrelevant whether the witness introducing the document created the document or simply received and maintained it in the normal course of business. See Phoenix Assocs. III v. Stone, 60 F.3d 95, 101 (2d Cir. 1995); Dyno Construction Co. v. McWane, Inc., 198 F.3d 567, 575-76 (7th Cir. 1999). Surveys, laboratory analyses, correspondence, reports, agreements and other records prepared by one entity and retained in the files of a separate entity, in the normal course of the retaining entity's business, are admissible under Rule 803(6). United States v. Ullrich, 580 F.2d 765, 771 (5th Cir. 1978). The sound policy supporting such an admission is that the regular receipt of the records, reliance upon

them and their integration into the receiving entity's day-to-day operations lend a "trustworthiness and probative value" to the records. See Black Sea & Baltic General v. S.S. Hellenic Destiny, 575 F.Supp. 685, 691 (S.D.N.Y. 1983). Where such circumstances are present, the records are admissible under Rule 803(6) even without testimony by a representative of the entity which prepared the records. Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1099 (3d Cir. 1995) ("Rule 803(6) of the Federal Rules of Evidence ... permits the admission of documents prepared in the ordinary course of business, even if the individual who prepared them does not testify about their contents."); United States v. Parker, 749 F.2d 628, 633 (11th Cir. 1984); United States v. Hawkins, 905 F.2d 1489 (11th Cir. 1990); see also, United States v. Reden, 556 F.2d 278, 280 (5th Cir. 1977) (credit card receipts, completed by business establishments, are admissible as business records of the issuing companies).

Where the foundation required under Rule 803(6) is laid, business records are admissible even when the records are incomplete and inaccurate. Claims of inaccuracy and incompleteness are matters going to the weight of the evidence and not its admissibility. United States v. Panza, 750 F.2d 1141, 1151 (2d Cir. 1984); Matador Drilling Company v. Post, 662 F.2d 1190, 1199

(5th Cir. 1981); United States v. Gremillion, 464 F.2d 901 (5th Cir. 1972), cert. denied, 409 U.S. 1085 (1972).

C. PUBLIC RECORDS ARE ADMISSIBLE

Documents will be offered into evidence by the government which had been created by governmental agencies as part of their everyday function. These documents include EPA and NYS-DEC reports, correspondence to the defendants, and permits. The government will also offer documents that governmental agencies received from the defendants and were maintained by the agency as part of its duty imposed by law. Some of these documents were prepared by defendant KAMHOLZ. These include permit applications, correspondence, certifications, emission tests, and inspection and monitoring reports. All of these records are admissible as defendant statements or public records of the agency.

The public records exception permits the admittance of any report created by a public agency that is related to the duties imposed on the agency by law. Fed. R. Evid. 803(8). While the public records exception generally does not apply to criminal matters observed by police officers and other law enforcement personnel, courts have recognized the difference between objective observations made by law enforcement personnel as part of the everyday function of the agency and observations made by law

enforcement personnel while investigating a crime. See United States v. Feliz, 467 F.3d 227, 237 (2d Cir. 2006) (holding that an autopsy report qualified as a public record under Fed. R. Evid. 803(8)); United States v. Thompson, 420 F.2d 536, 545 (3d Cir. 1970) ("it has long been held that official registers or records kept by persons in public office in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties, are admissible, without calling the persons who made them, as a reasonable exception to the hearsay rule"); United States v. Quezada, 754 F.2d 1190, 1193-94 (5th Cir. 1985) (recognizing that 803(8) should not be interpreted narrowly and distinguishing between law enforcement reports that were prepared in a routine, non-adversarial setting and law enforcement reports made while investigating a crime or evaluating the results of an investigation). Thus, while the business records exception cannot be a "backdoor" to admit evidence otherwise precluded by 803(8), observations maintained as a part of an official duty by law enforcement personnel not in anticipation of litigation, are admissible under both the Business Rule exception and the Public Records exception. United States v. Grady, 544 F.2d 598, 604 (2d Cir. 1976); United States v. Brown, 9 F.3d 907, 911 (11th Cir. 1993), citing Quezada, 754 F.2d at 1194.

D. LEADING QUESTIONS OF WITNESSES ALIGNED WITH TCC

The government will likely call as witnesses present and former TCC employees with a potential bias against the government. The manner of questioning witnesses remains within the discretion of the trial judge, which is reviewed under an abuse of discretion standard. See United States v. Carboni, 204 F.3d 39, 45 (2d Cir. 2000); Fed R. Evid. 611 advisory committee's note; United States v. Phelps, 733 F.2d 1464, 1471-72 (11th Cir. 1984). Federal Rule of Evidence 611 provides, "leading questions should not be used on the direct examination of a witness." However, Rule 611(c) permits leading questions if the witness is hostile, an adverse party, or a witness identified with an adverse party. Suarez Matos v. Ashford Presbyterian Community Hosp., Inc., 4 F.3d 47, 50 (1st Cir. 1993) (employee of party is sufficiently connected to employer to allow opponent to ask leading questions), citing Perkins v. Volkswagen of America, Inc., 596 F.2d 681, 682 (5th Cir.1979)). In addition, Federal Rule of Evidence 607 provides that the credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 611(c) broadened the ability of a party to call a witness on direct examination and treat them as a hostile witness. Haney v. Mizell Memorial Hospital, 744 F.2d 1467, 1477-78 (11th Cir. 1984); Stahl v. Sun Microsystems, Inc., 775 F. Supp. 1397, 1398 (D.

Colo. 1991). In Stahl, the court permitted the use of leading questions when the plaintiff called a witness on direct examination because the witness was a former employee of the defendant and had an ongoing relationship with a key witness for the defendant. Stahl, 775 F. Supp. at 1398. Similarly, in Haney, the court allowed the plaintiff to use leading questions of a witness on direct examination because the witness was a former employee of the defendant, and was an employee at the time in question. Haney, 744 F.2d at 1477-78.

The rule removes the prior requirements that the proponent show that the witness was "actually hostile or was an adverse party, officer, director, or managing agent of such adverse party." Id. Certain categories of witness are deemed automatically adverse. See id. (finding a former employee of the defendant hospital, who was an employee at the time in question, identifiable with the adverse party because of the employment status); see also Ellis v. City of Chicago, 667 F.2d 606, 612-613 (7th Cir. 1981) (holding that police officers employed by the defendant were adverse to the plaintiff for purposes of Rule 611(c)); National Railroad Passenger Corporation v. Certain Temporary Easements Above the Railroad Right of Way in Providence, Rhode Island, 357 F.3d 36, 42 (1st Cir. 2004) (holding that the defendants could call an

expert appraiser in its case-in-chief, retained by the plaintiffs, as a hostile witness).

Further, a corporation can only act through its employees. United States v. Brothers Construction, 219 F.3d 300, 310-311 (4th Cir. 2000). Therefore, if the government calls current employees to the stand, it is simply calling the human embodiment of the defendant, TCC.

Here, the government intends to call witnesses that are aligned with TCC, due to their past or current employment relationship with TCC, or their past, present, or future business relationship as contractors for TCC. In the event that such witnesses are called, the government is entitled to use leading questions on direct examination.

E. CHARTS AND SUMMARIES

The government may make use of charts and summary evidence during the trial in this case. Summary charts are admissible under Fed. R. Evid. 1006. Courts have found the admittance of summary evidence is necessary because it would not be reasonable to expect an average jury to compile summaries and re-create sophisticated flow charts of the voluminous evidence that underlies some cases.

United States v. Duncan, 919 F.2d 981, 988 (5th Cir. 1990), cert. denied, 500 U.S. 926 (1991).

Fed. R. Evid. 1006 provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

A proper foundation must be established "connecting the numbers on the chart with the underlying evidence." United States v. Citron, 783 F.2d 307, 316 (2d Cir. 1986). Prior to use at trial, the Court must determine that the summary charts "fairly represent and summarize the evidence upon which they are based." United States v. O'Connor, 237 F.2d 466, 475 (2d Cir.1956). If the summary charts fairly represent the evidence, they may be admitted with a limiting instruction. Id. Once admitted, summary evidence, like other evidence, may be taken by the jury to the jury room for examination during deliberations. United States v. Pinto, 850 F.2d 927, 935 (2d Cir. 1988).

F. SUMMARY WITNESS

To assist the jury in the examination of the records and documents admitted into evidence, including the correspondence between the defendants and EPA and NYS-DEC, bleeder charts, TCC log

books, and sampling activities conducted at TCC, the Government may rely on one or more summary witnesses who will testify in connection with charts and summaries which will be prepared from the government's evidence. The use of such witnesses under these circumstances has been consistently approved by the courts. United States v. Johnson, 319 U.S. 503, 519 (1943); United States v. Koskerides, 877 F.2d 1129, 1134 (2d Cir. 1989); United States v. Behrens, 689 F.2d 154, 161 (10th Cir. 1982); United States v. Scales, 594 F.2d 558, 563 (6th Cir. 1979).

The government plans to present EPA-CID Special Agent Robert Conway as a witness, and during a portion of his testimony, he will summarize certain evidence presented to the jury to aid the jury in understanding and comprehending the information. The summaries and computations will be based on the evidence admitted during the trial.

G. OTHER ACT EVIDENCE

The government offers this notice pursuant to Fed. R. Crim P. 404(b) of its intent to introduce evidence of other crimes, wrongs or acts to prove the defendants' "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Among the evidence of this type that the government may

seek to introduce in its case-in-chief are the following categories of information:

(i) False statements made by defendant KAMHOLZ in letters and correspondence to EPA and NYS-DEC regarding the operation of the PRV and TCC's compliance with its Title V permit;

(ii) KAMHOLZ's instructions to Pat Cahill to conceal the fact from EPA and NYS-DEC during the April of 2009 inspection that during normal business operations, the drip leg valves were open and released COG to the atmosphere;

(iii) KAMHOLZ's removal of the automatic-igniter for the battery flare stack and instructions to TCC employees to light the flare by setting a broom on fire and throwing it onto of the battery;

(iv) NYS-DEC's issuance of a notice of violation relating to the discovery that the flare described above in (iii) did not have an automatic igniter;

(v) KAMHOLZ's practice of forging the plant superintendent's name on certain records submitted to EPA and NYS-DEC;

(vi) KAMHOLZ's instructions to dump barrels containing an unknown thick dirty brown oil into the coal field;

(vii) TCC's lowering of the back pressure on the collector main prior to Method 303 inspections so as to reduce leaks on doors, manholes, and standpipes;

(viii) TCC's attempt to hide adjustments to the back pressure setting on the collector main by re-adjusting the pin used to record the setting; and

(ix) KAMHOLZ's insistence to a witness that beehiving (which occurs when the exhauster breaks down and the battery flare stack is opened) never occurred for more than 10 minutes, when in truth, beehiving often occurred for longer than 10 minutes.

(x) A 2007 incident in which TCC placed full transformers containing PCB oil into a scrap metal dumpsters, and KAMHOLZ's comment to a TCC employee that when he was

interviewed by NYS-DEC, he had to do some "fast talking."

(xi) TCC's practice of not installing the jumper during oven charges which would result in increased emissions to the atmosphere.

(xii) TCC's failure to notify the fire departments of the hazardous nature of the contents of the two tanks that had caught fire.

Rule 404(b) does not bar the admission of such bad-act evidence; it merely limits the purposes for which such evidence may be introduced. Huddleston v. United States, 485 U.S. 681 (1988). If offered for a proper purpose, and not a prohibited one (such as that the defendant acted in conformity with bad character), evidence of uncharged wrongs is "subject only to general strictures limiting admissibility such as Rules 402 and 403." Id. at 688. Thus, such evidence need not be subjected to additional scrutiny beyond that provided in the rules of evidence, and "should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act." Id. at 685. No separate finding by the trial court is required.

Applying the principles outlined in Huddleston, courts in the Second Circuit take the "inclusionary" approach, "which admits all 'other act' evidence that does not serve the sole purpose of showing the defendant's bad character and that is neither overly prejudicial under Rule 403 nor irrelevant under Rule 402." United

States v. Curley, 639 F.3d 50, 56 (2d Cir. 2011). See also United States v. Ortiz, 857 F. 2d 900, 903 (2d Cir. 1988), cert. denied, 109 S. Ct. 1352 (1989); United States v. Colon, 880 F.2d 650, 656 (2d Cir. 1989). The Second Circuit has articulated a four-part test in analyzing the admissibility of evidence pursuant to Rule 404(b): "(1) the prior crimes evidence was 'offered for a proper purpose'; (2) the evidence was relevant to a disputed issue; (3) the probative value of the evidence was substantially outweighed by its potential for unfair prejudice pursuant to Rule 403; and (4) the court administered an appropriate limiting instruction." United States v. McCallum, 584 F.3d 471, 475 (2d Cir.2009), citing Huddleston, 485 U.S. at 691.

In the present case, item (i) is admissible to show KAMHOLZ's knowledge of the PRV and the requirements of the Title V permit, which bears directly on the defendant's motive in obstructing the EPA and NYS-DEC proceeding, (ii) is admissible because it touches directly on KAMHOLZ's intent to conceal the releases of COG to the atmosphere from EPA and NYS-DEC, and shows that there was no mistake or misunderstanding in KAMHOLZ's instructions to Cahill. All of the other items are admissible because they bear directly on environmental compliance issues at TCC.

H. EXPERT TESTIMONY

The government intends on calling certain experts at trial, and has made an expert disclosure to the defendants. See Dkt. #55. Rule 702, Federal Rules of Evidence, states that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

A trial judge has broad discretion in determining whether to admit such testimony, United States v. Tutino, 883 F.2d 1125, 1134 (2d Cir. 1989); United States v. Diaz, 878 F.2d 608 (2d Cir. 1989), and a trial judge's determination will be sustained on appeal unless "manifestly erroneous." Tutino, 883 F.2d at 1134. Based on representations by defense counsel made on the record during recent court appearances, it is understood that the defendants intend to file a Daubert motion regarding the government's experts. As such, any a further discussion of expert testimony will be presented in the government's response to any such motion.

I. STIPULATIONS

At the time of this memorandum, the parties have not agreed upon any stipulations.

DATED: Buffalo, New York, December 5, 2012.

Respectfully submitted,

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S/ AARON J. MANGO

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v- 10-CR-219-S

TONAWANDA COKE CORPORATION and
MARK L. KAMHOLZ

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2012, I electronically filed the foregoing **GOVERNMENT'S TRIAL MEMORANDUM** with the Clerk of the District Court using its CM-ECF system, which would then electronically notify the following CM/ECF participants on this case:

Rodney O. Personius, Esq.

Gregory F. Linsin, Esq.

John J. Molloy, Esq.

S/ AARON J. MANGO

AARON J. MANGO