

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

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UNITED STATES OF AMERICA

-v-

10-CR-219-S

TONAWANDA COKE CORPORATION and  
MARK L. KAMHOLZ

Defendants.

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**GOVERNMENT'S SENTENCING 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 Robert G. Dreher, Acting 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, respectfully files this sentencing memorandum with respect to Defendant Tonawanda Coke Corporation (“Tonawanda Coke”) and Defendant Mark L. Kamholz (“Defendant Kamholz”). Based on the egregiousness of the defendants’ conduct and the history and characteristics of the defendants, the government is seeking the imposition of a substantial criminal sentence for each defendant. This case involved, in essence, the defendants releasing known killers into the air and ground of an unsuspecting community, and doing so over and over again on a nearly daily basis for decades. As such, the defendants must be appropriately punished.

**I. SUMMARY OF RECOMMENDED SENTENCE**

**A. Tonawanda Coke**

As discussed in more detail below, the government recommends that Defendant Tonawanda Coke be sentenced as follows:

- (1) Payment of \$12,794,182 in community service projects;
- (2) Payment of a \$44,347,517 criminal fine;
- (3) Payment of a \$5,600 special assessment;
- (4) Imposition of a 5 year term of probation;
- (5) Conduct a remedial investigation of the coal field, and remediate if necessary; and
- (6) Implementation of an Environmental Compliance Plan.

**B. Defendant Kamholz**

As discussed in more detail below, the government recommends that Defendant Kamholz be sentenced to a term of imprisonment of 78 to 97 months, which is the advisory guideline range as computed in the Presentence Report (“PSR”), and sentenced to a \$250,000 criminal fine.

**II. PRELIMINARY STATEMENT**

Tonawanda Coke and Defendant Kamholz each proceeded to trial on a 19-count Indictment (Dkt. #191). Jury selection in this case commenced on February 26, 2013 (Dkt. #150). During its case-in-chief, the government called 25 witnesses and rested on March 18, 2013. On March 18, 2013, the defendants moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure, which was opposed by the

government. *See* Dkt. ##171, 172. On March 20, 2013, the Court denied the defendants' Rule 29 motion, after which the defendants called four defense witnesses and rested on March 25, 2013. The government then called 1 rebuttal witness and rested on March 25, 2013.

On March 28, 2013, the jury found Defendant Tonawanda Coke guilty of 14 felony counts and Defendant Kamholz guilty of 15 felony counts. Specifically, both defendants were found guilty of Counts 1 through 5 (violations of the Clean Air Act ("CAA") by emitting coke oven gas from an unpermitted emission source), Count 9 (violation of the CAA by operating the western quench tower without baffles), Counts 11 through 15 (violations of the CAA by operating the eastern quench tower without baffles), and Counts 17 through 19 (violations of the Resource Conservation and Recovery Act ("RCRA")). Defendant Kamholz was additionally found guilty of Count 16 (obstruction of justice). A status conference to discuss sentencing has been scheduled by the Court for October 22, 2013.

### **III. APPLICABLE SENTENCING LAW FOR CORPORATIONS**

The Background Commentary to United States Sentencing Guidelines (USSG) §8C2.1 specifically indicates that the fine provisions of Chapter 8 do not apply to the Part Q environmental offenses, such as the CAA and RCRA charges for which the jury convicted Tonawanda Coke. *See* USSG §8C2.1 cmt. background. Courts must apply instead the provisions of 18 U.S.C. §§ 3553 and 3572 to determine the proper fine amount. *United States*

*v. Comprehensive Environmental Solutions Inc. (“CESI”),* 2009 WL 1856228 (E.D. Mich. June 29, 2009), \*2 (citing USSG §8C2.10).

In determining the appropriate sentence to be imposed upon a defendant convicted of a criminal offense, a court may conduct a broad inquiry “largely unlimited either as to the kind of information he may consider, or the source from which it may come.” *United States v. Tucker*, 404 U.S. 443, 446-47 (1972). Such inquiry naturally includes the conduct for which the defendant was convicted, but it also includes other conduct relevant to the crime. *United States v. Silkowski*, 32 F.3d 682, 688 (2d Cir. 1994). In addition to the counts of conviction, the Court may consider conduct related to dismissed counts of an indictment, *see United States v. Quintero*, 937 F.2d 95, 97 (2d Cir. 1991); conduct not charged in an indictment, *see United States v. Perdomo*, 927 F.2d 111, 114 (2d Cir. 1991); conduct underlying offenses of which the defendant has been acquitted, *see United States v. Watts*, 519 U.S. 148, 156-57 (1997); and conduct not subject to prosecution due to the statute of limitations, *see Silkowski*, 32 F.3d at 688.

#### **A. Imposition of a Fine**

Imposition of a fine for the CAA charges is guided by 18 U.S.C. § 3571(c)(3), which limits fines against organizations to \$500,000 per felony count of conviction.<sup>1</sup> See 42 U.S.C. § 7413(c)(1). Thus, Tonawanda Coke’s potential fine for the 11 CAA counts of conviction (counts 1-5, 9, 11-15) is \$5,500,000 (\$500,000 x 11 counts).

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<sup>1</sup> Pursuant to the 18 U.S.C. § 3571(d), an alternative fine may be imposed based on the pecuniary gain or loss from the offense, however, no evidence of pecuniary gain was admitted at trial and the government is not seeking imposition of a fine under an alternative fine theory.

For the RCRA counts of conviction, 42 U.S.C. § 6928(d) imposes a maximum fine of \$50,000 per day of violation; though, any fine over \$50,000 must be based on a jury finding beyond a reasonable doubt. *See Southern Union Co. v. United States*, 132 S.Ct. 2344, 2357 (2012) (in a case involving a violation of RCRA, the Court held that the jury must find the number of days of violation because “the rule of *Apprendi* applies to the imposition of criminal fines.”). Based on the Jury Verdict Form (Dkt. #192), the jury found the defendants in violation of RCRA from May 31, 1998, to December 17, 2009, for Count 17, June 30, 2009, to September 17, 2009, for Count 18, and August 2, 2005, to December 17, 2009, for Count 19; resulting in maximum penalties of \$210,950,000 for Count 17, \$4,000,000 for Count 18, and \$79,950,000 for Count 19; respectively.

In total, for all counts of conviction, Tonawanda Coke faces a maximum fine of \$300,400,000.

**B. Imposition of a Special Assessment**

Pursuant to 18 U.S.C. § 3013(a)(2)(B), a mandatory \$400 special assessment must be imposed for each count of conviction. Therefore, Tonawanda Coke faces a mandatory \$5,400 special assessment.

**C. Imposition of a Term of Probation**

Because the counts of conviction are all felony offenses, Tonawanda Coke faces a term of probation of “not less than one nor more than five years.” 18 U.S.C. § 3561(c)(1). At sentencing, the Court has discretion to order as a condition of probation that the

defendant “work in community service as directed by the court” and to “satisfy such other conditions as the court may impose.” 18 U.S.C. §§ 3563(b)(12) and (22).

**D. Remedial Order**

Pursuant to USSG §8B1.2, the Court has authority to enter a remedial order as a condition of probation “to remedy the harm caused by the offense and to eliminate or reduce the risk that the instant offense will cause future harm.” USSG §8B1.2. The commentary to USSG §8B1.1 provides examples of situations in which a remedial order may be appropriate, including “a clean-up order for an environmental violation.” USSG §8B1.2, cmt. background.

**E. Community Service**

Pursuant to USSG §8B1.3, the Court has authority to order as a condition of probation that the defendant engage in community service “where such community service is reasonably designed to repair the harm caused by the offense.” USSG §8B1.3. In recommending a sentence that includes a community service component, the government is guided by certain policies regarding community service, including the requirement that any community service projects have a nexus to both the geographic area of the crime and the environmental medium affected by the crime. Moreover, any community service component of a sentence must be considered separate and apart from the issue of a criminal fine, and should not be offered in exchange for a reduction in the appropriate fine. Otherwise, there could be a violation of the Miscellaneous Receipts Act, 31 U.S.C. §

3302(b), which requires that any money received for the government be deposited into the U.S. Treasury.

**F. Implementation of an Environmental Compliance Plan**

At sentencing, the Court may order as a condition of probation that an organizational defendant implement an environmental compliance plan that seeks to prevent and detect criminal conduct. *See* USSG §§8B2.1 and 8D1.4.

**IV. APPLICATION OF THE § 3553(a) FACTORS MANDATES A SUBSTANTIAL PUNISHMENT**

Distilled to its essence, this case illustrates the complete and utter disregard by the defendants of the environmental safeguards established by law to protect the air, soil and community surrounding Tonawanda Coke. The government believes that based on the seriousness of the defendants' CAA and RCRA offenses, the defendants' complete lack of acceptance of responsibility, and the need, in light of Tonawanda Coke's considerable wealth, to deter the defendants and other corporations similarly situated from future offenses, combine to justify the imposition of the substantial punishment recommended by the government. In particular, the government respectfully requests that the Court take into account the significant harm to the environment by the defendants' conduct; the impact the defendants' crimes have had on the Tonawanda and Grand Island communities; the defendants' attitudes regarding environmental compliance, and Tonawanda Coke's wealth in imposing sentence. All of these factors make it imperative that the Court impose a substantial criminal penalty in order to provide just punishment and an effective deterrent.

**A. The Nature and Circumstances of the Offense**

**1. The Clean Air Act Charges**

*a. Tonawanda Community Air Quality Study and the initiation of the criminal case*

In 2005, individuals in Tonawanda began a concerted effort to learn what compounds were in the air they were breathing. Home-made testing kits led to the discovery that benzene, a known human carcinogen, was present in large quantities in the air. As the Court is aware, community members then put pressure on the New York State Department of Environmental Conservation (NYS-DEC) and the United States Environmental Protection Agency (EPA) to investigate the source of the benzene. As a result, 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 Tonawanda Coke, 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. The final report, released in October of 2009, can be found at <http://www.dec.ny.gov/chemical/59447.html>.

On Sunday October 11, 2009, the Buffalo News published a front-page article highlighting the results of the Tonawanda Community Air Quality Study, and noted that Tonawanda Coke's owner, J.D. Crane, "has refused to speak with media or community

groups for years....” The article also reported that Tonawanda Coke was emitting benzene “up to 2½ times more than what the company reported to regulators.” A copy of the October 11, 2009, Buffalo News article is attached hereto as **Exhibit 1**. Based on this article, the U.S. Attorney’s Office, along with criminal investigators at EPA and NYS-DEC, initiated a criminal investigation to explore Tonawanda Coke’s compliance with its Title V CAA permit.

*b. The defendants’ operation of the bleeder valve*

Of the various CAA charges the defendants were convicted of, it is the defendants’ operation of the bleeder valve that the government views as the most egregious because the defendants took active steps to conceal the existence of the bleeder valve, and its operation allowed for the release of tremendous quantities of hazardous air pollutants into the Tonawanda air. A photograph of the bleeder valve, taken on April 21, 2009, is attached hereto as **Exhibit 2**. As established at trial, the defendants used the bleeder valve, also referred to as the pressure relief valve, to vent excess coke oven gas directly to the atmosphere since at least the mid-1980s. Witness after witness testified that the typical pressure setting for the bleeder valve was between 80 and 100 cm/oil, and that if the pressure in the coke oven gas line exceeded the pressure setting for the valve, the valve would open and coke oven gas would be emitted until the pressure in the line fell below the setting on the valve. Typically, the bleeder valve would open during battery reversals, which occurred every 20 or 30 minutes, and would stay open for 10 to 15 seconds at a time. On occasion, generally during periods of high production, the bleeder valve would stay open for longer periods of time, and had in the past, caught fire during lightning strikes.

Without a doubt, the bleeder valve was in operation at the time the defendants applied to the NYS-DEC for a Title V CAA permit on November 28, 1997. Yet, the defendants failed to identify the bleeder valve as a source of air emissions, and failed to notify the NYS-DEC in any way that they were operating a bleeder valve in the by-products department. Likewise, when commenting on the draft Title V permit in 2001 and 2002, the defendants failed to raise the existence of the bleeder valve to regulators. In 2006, when the defendants applied to renew their Title V permit, they failed to identify the by-products bleeder valve as a source of air emissions.

At trial, the defendants attempted to argue that notice of the operation of the bleeder valve was provided to the NYS-DEC through the submission of a Hazardous Air Pollutant (“HAP”) Emission Inventory in July of 2003.<sup>2</sup> A copy of the HAP Inventory submitted by Tonawanda Coke is attached hereto as **Exhibit 3**. The defendants argued that the table on page 4-2 identified one pressure relief valve in the coke oven gas line, and that should have provided notice to the government. In making this argument, the defendants ignored the fact that in addition to the bleeder valve, there was a second pressure relief valve on the coke oven gas line near the boiler house, which was referred to as the water seal bleeder. During the investigation and pretrial preparations, several employees discussed the operation of the water seal bleeder valve, which operated in a similar manner to the by-products bleeder valve. In an interview with Dennis Mock, the Supervisor of the Boiler House at Tonawanda Coke, he discussed the operation of the water seal bleeder valve, and the fact

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<sup>2</sup> The HAP Inventory is designed to determine if a stationary source is a major or minor source of HAPs. It is not a substitute for providing notice as part of the permit application or ongoing permit obligations to notify the permitting authority of emissions sources or points

that this bleeder was generally set 10-15 cm higher than the by-products bleeder valve, and therefore, the by-products bleeder would have been first to release during a pressure build up. Attached hereto as **Exhibit 4** is a copy of the interview report with Dennis Mock, which provides details regarding the operation of the water seal bleeder valve. Several other employees also discussed the water seal bleeder valve during their interviews with the government. Although the defendants would like the Court to believe that the HAP Inventory provided notice regarding the operation of the by-products bleeder valve, the presence of the water seal bleeder valve, along with the pressure relief valve that was found on top of the light oil scrubber column, highlight the inherent unreliability of the HAP Inventory, and the defendants' failure to accept responsibility for their crimes.<sup>3</sup>

Not only did the defendants fail to disclose the existence of the bleeder valve, they took active steps to conceal it from government regulators. As the Court is well aware, Pat Cahill testified that on April 10, 2009, he was conducting a walkthrough of the plant with Defendant Kamholz in preparation for an EPA inspection, at which point Defendant Kamholz noticed the bleeder valve releasing, and instructed Cahill that "we can't have that going off when they're here." Moreover, when EPA and NYS-DEC regulators arrived at the plant on April 14, 2009, to begin the week-long inspection, they were specifically told by Defendant Kamholz that there were no pressure relief valves, and were provided with a coke oven gas flow diagram that did not list the by-product bleeder valve. A copy of the coke oven gas flow diagram Defendant Kamholz provided to regulators on April 14, 2009, is attached hereto as **Exhibit 5**. During the April of 2009 inspection, when Defendant

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<sup>3</sup> Moreover, the HAP Inventory also stated that the "Tonawanda Coke quench tower has baffles..." See Exhibit 3, page 2-10. This statement is further evidence of the complete unreliability of the HAP Inventory.

Kamholz was asked about the bleeder valve, he was evasive, feigned ignorance, and refused to answer any questions.

During trial, Harish Patel, a regulator with the New York City office of the EPA, testified that based on the defendants' responses to information request letters, his knowledge of the operation of the bleeder valve, and his review of the bleeder valve circular charts, that in a given year, the bleeder valve would emit approximately 172 tons of coke oven gas into the atmosphere. Following the execution of the criminal search warrant, the defendants blanked off the bleeder valve in the spring of 2010. Although the government cannot specify the exact amounts of benzene and other identified air toxics known to be present in coke oven gas, coke oven emissions themselves are classified as hazardous air pollutants. *See* 42 U.S.C. § 7412(b)(1). As such, the defendants' operation of the bleeder valve for multiple decades allowed for the release of tremendous quantities of hazardous air pollutants into the Tonawanda ambient air. In the environmental context, it is hard to fathom a more serious crime, which was essentially the indiscriminate and prolonged poisoning of an entire community.

*c. The April of 2009 inspection revealed enormous quantities of benzene being released into the air and a facility in complete disrepair*

During the April of 2009 inspection, the EPA team from the National Enforcement Investigations Center ("NEIC") methodically examined the operations of the Tonawanda Coke Corporation, with particular emphasis on the by-products department. The inspection included a visual inspection of the facility, documented through photographs, conducting field measurements of coke by-product recovery equipment components using a toxic vapor

analyzer, and the collection of wastewater and air canister samples. The results, documented in a NEIC Final Report, were shocking. A copy of the NEIC Final Report is attached hereto as **Exhibit 6**. At least three tar intercepting sumps, that by regulation were supposed to be enclosed, were observed to be uncontrolled, with benzene emissions from these sumps escaping directly to the atmosphere. Attached hereto as **Exhibit 7** are photographs of the three uncontrolled tar intercepting sumps taken during the inspection. Air samples taken from around these three sumps indicated significantly elevated levels of benzene (1,240 and 3,670 parts per billion by volume). A copy of the NEIC Laboratory Report for the analytical results for the air and water samples taken during the inspection is attached hereto as **Exhibit 8**.

Facility equipment was observed in a state of disrepair, and several instances of leaking or malfunctioning equipment were documented. Attached hereto as **Exhibit 9** is a photograph of the ammonia stripper feed tank; **Exhibit 10** is a photograph of the by-products moat area; **Exhibit 11** is a photograph of the tar decanter pump with an oily rag used to cover a leak; **Exhibit 12** is a photograph of the line from the primary cooler with oil/tar dripping on it from above; and **Exhibit 13** is a photograph of the coke oven gas collector main with what appears to be plastic wrap used to seal a leak. Additional leaks were measured on facility equipment, and several additional benzene waste streams were identified. See **Exhibit 6**. The observations of the NEIC inspection team are even more shocking in light of the financial wherewithal of the company (see below) to address these deficiencies and the relative ease it would have been to fix them.

*d. The defendants repeatedly disregarded and ignored clear directives by regulators*

The defendants were convicted in Counts 11-15 of the Indictment with violating condition 97 of their Title V permit, which related to the requirement that the eastern quench tower (Tower #2) be equipped with baffles. As part of these charges, correspondence between the defendants and the NYS-DEC was introduced at trial, including a December 29, 1996, letter from Defendant Kamholz to the NYS-DEC regarding modification of Tower #2, which is attached hereto as **Exhibit 14**. In response to Defendant Kamholz's notification that he intended to modify Tower #2, the NYS-DEC sent a letter to the defendants dated January 6, 1997, informing them of the requirement that baffles had to be installed in the tower, which is attached hereto as **Exhibit 15**. Following receipt of this letter, the defendants modified the tower and never re-installed baffles in the tower. The defendants then operated the quench tower, in direct violation of their permit and in disregard of the NYS-DEC directive for the next 12 years.

Another example of the defendants' failure to follow a regulatory directive, as evidenced at trial, was the failure to have the battery flare stack equipped with a pilot light and automatic igniter. Most troubling is the fact that the defendants specifically applied to the EPA on October 29, 1993, to use an alternative flare system, attached hereto as **Exhibit 16**, which was ultimately denied by the EPA on December 30, 1993, attached hereto as **Exhibit 17**. Subsequent to that, Defendant Kamholz implemented a manual lighting system for the battery flare stack, exactly what the EPA told him not to do, and removed the pilot light from the battery flare stack for the stated reason that natural gas was too expensive. Most troubling are the instructions Defendant Kamholz provided to employees on how to

ignite the battery flare stack, namely, to light a broom and throw it up to the batter flare stack.

*e. The defendants were aware of the benzene issue at least as early as 2005, yet refused to take proactive measures*

During the execution of the criminal search warrant at Tonawanda Coke on December 17, 2009, a folder was seized from the office of Defendant Kamholz that contained historical news articles relating to air contamination in Tonawanda. A copy of the folder is attached as **Exhibit 18**, and the contents of that folder are attached as **Exhibit 19**. These articles, which date to at least early-2005, establish that Tonawanda Coke was aware of the benzene issue, and concerned enough to clip these articles and keep them in a folder. Although Tonawanda Coke was aware of the benzene problem, they took no proactive steps of their own to reduce the benzene emissions emanating from the plant. Instead, the defendants operated as business as usual, putting profits ahead of environmental compliance.

A different folder, labeled "TCC-BENZENE ISSUE", was also located during the execution of the criminal search warrant on December 17, 2009, and was found in the office of Paul Saffrin. This folder contained the October 11, 2009, Buffalo News article referenced above, *see* **Exhibit 1**, along with various internet searches regarding benzene and internal work product as to how company management should respond to the increased media attention following the Tonawanda Community Air Quality Study. In addition to developing an internal strategy to handle the benzene crisis, the defendants also attempted to mislead elected representatives regarding the status of their environmental compliance.

On August 21, 2009, J.D. Crane, Tonawanda Coke's CEO, wrote to United States Senator Charles E. Schumer that "our company has been and continues to be in full compliance with its lawfully issued DEC air permit. The extensive monitoring, maintenance, testing, and reporting that is required under our DEC permit confirms this and not once has our facility been cited for an air permit violation...." A copy of this letter is attached hereto as **Exhibit 20**. This statement by J.D. Crane was blatantly false, and in fact, upon seeing this letter, Larry Sitzman, NYS-DEC Regional Air Pollution Control Engineer for Region 9 at the time, felt compelled to respond and sent a letter to Defendant Kamholz outlining several instances of permit violations. A copy of this letter is attached hereto as **Exhibit 21**.

**2. The Resource Conservation and Recovery Act Charges**

**a. *A substantial quantity of hazardous material was stored and disposed of in the environment***

The present case involves substantial quantities of hazardous material that were intentionally placed into the environment and left to persist over an extended period of time. The magnitude of the amount of hazardous waste improperly handled by the defendants is shocking. With respect to Count 19, over the course of at least two decades, the defendants repeatedly dumped decanter tank tar sludge from coking operations (referred to as "K087" or "coal tar sludge"), a listed hazardous waste, onto the coal field at Tonawanda Coke. The K087 was removed from a tar box located in the by-products department through the use of an end-loader, and then driven to the coal field. The end-loader operator could scoop out the entire tar box with the end-loader, approximately 3 to 5 tons worth of material. During periods of high production, the tar box was cleaned daily, and during medium production, every other day. Using conservative estimates, this would amount to more than 300 tons of

K087 waste dumped on the coal field during a given year. With respect to Count 18, the disposal of the hazardous contents of the Barrett Tanks onto the coal field, testimony at trial established that approximately 250 tons of material was removed, and dumped on the coal field. These are enormous quantities of hazardous material.

The extent of contamination of the coal field has yet to be investigated, but based on the defendants' sustained practice of using the coal field as their hazardous waste dumping ground, and using the remediation of the two Barrett Tanks as a guide, the government believes that widespread contamination of the soil and groundwater in the coal field will be found. As such, included in more detail below is a request that Tonawanda Coke be ordered to fund an investigation of the coal field to determine the extent of contamination of the soil and ground water, and fund the remediation of any contamination found.

The defendants' conduct of leaving the two Barrett Tanks to rot, with the hazardous contents exposed to the environment, is equally as shocking. On June 17, 2009, and September 10, 2009, the NYS-DEC and EPA conducted RCRA inspections at Tonawanda Coke and observed the remains of the two Barrett Tanks at the site, and documented the condition of the site using photographs. Attached hereto as **Exhibit 22** is a photograph of the remnants of the eastern most Barrett Tank taken on June 17, 2009; **Exhibit 23** is a photograph of the ground north of the western most Barrett Tank taken on June 17, 2009; **Exhibit 24** is a photograph of coal tar leaking out of the tanks onto the ground taken on June 17, 2009; **Exhibit 25** is a photograph of the remnants of the western most Barrett Tank taken on September 10, 2009; **Exhibit 26** is a photograph of the view inside the western

most Barrett Tank taken on September 10, 2009; **Exhibit 27** is a photograph of the view inside the eastern most Barrett Tank taken on September 10, 2009; **Exhibit 28** is a photograph of sample #2 taken from the western most Barrett Tank on September 10, 2009, which revealed a concentration of benzene of 1.7 mg/L;<sup>4</sup> and **Exhibit 29** is a photograph of sample #6 taken from the western most Barrett Tank on September 10, 2009, which revealed a concentration of benzene of 2.1 mg/L.

In evaluating the offense conduct relating to the two Barrett Tanks, it is important to note that as of April 21, 2007, both of the Barrett Tanks were still standing. An aerial photograph taken on April 21, 2007, taken from the top of the plant facing south, is attached hereto as **Exhibit 30**. This photograph depicts both of the Barrett Tanks still standing, and in what appears to be decent condition. Sometime thereafter, the defendants elected to put profit ahead of environmental compliance, and began a scrapping operation designed to cash in the metal from these two Barrett Tanks, and leave the hazardous waste contained therein, fully exposed to the environment.

*b. The defendants were aware that K087 waste could not be placed on the ground*

At trial, the defendants attempted to defend the RCRA counts by arguing that the placement of the hazardous material onto the coal field was permitted under the regulations. The underpinnings of this defense was essentially the defendants were unaware that K087 waste could not be mixed on the coal field. This defense was refuted by witness testimony at trial that established that when the concrete pad was first installed, it was used for the

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<sup>4</sup> The regulatory threshold for benzene is 0.5 mg/L.

mixing of K087 and thus the material did not touch the ground. However, once the pug mill that was attached to the concrete pad broke down, the defendants reverted to the pre-regulation method of mixing the K087 material directly into the coal piles. Thus, testimony at trial would suggest that the defendants used the pad to mask from inspectors where exactly the mixing of the K087 with the coal took place.

In fact, one exhibit that the defendants marked for trial, but did not introduce, reinforces the fact that the defendants knew exactly that they could not mix the K087 on the ground. Defense Exhibit BBB marked for trial, which is attached hereto as **Exhibit 31**, are internal Tonawanda Coke documents regarding construction of the concrete pad and the handling of the K087 waste. Specifically, page 11 of that exhibit is an internal memorandum regarding the handling of K087, and it states that the “recycling operations at Tonawanda Coke Corporation is done by placing the listed K material on a specially constructed concrete pad where it is mixed with coal (See Attachment 2),” and includes a note at the top in Defendant Kamholz’s writing that he gave a copy of the memorandum to Bob Bloom on August 18, 1999. Conveniently at trial, the defendants elected not to introduce this exhibit, and rather, claim that they believed that K087 waste could be mixed on the coal.

### **3. The Lengthy Course of the Offenses**

The sheer duration of the offenses demonstrates an insensibility on the part of the defendants that should be taken into account in any sentence. It is one thing if the defendants had operated the bleeder valve or disposed of K087 waste on the coal field for

several days or even several weeks, but for the defendants' knowing conduct to go on day after day, week after week, year after year is outrageous. In establishing a per diem sentencing structure for the RCRA offenses, Congress obviously felt that one day was too long a period for a hazardous waste to be illegally stored; as each day goes by, risks to people and the environment only multiply.

#### **4. The Defendants' Failure to Provide Environmental Training**

Every day Tonawanda Coke generates significant quantities of hazardous waste through the operation of coke oven by-product recovery system. Likewise, in the course of operating the coke oven battery, a number of hazardous air pollutants are created that need to be managed and handled in an environmentally appropriate manner. However, despite the pervasive need to have an awareness of environmental compliance matters, the defendants do not provide any type of environmental training for their employees. Many of the employees that testified at trial noted that they have never received any type of environmental training, were not told of the types of hazardous wastes at the facility, or had any idea as to the requirements of the CAA. In fact, the former plant managers testified that they did not even know what a Title V permit was. The failure by the defendants to provide even the most basic environmental training to its employees is astounding, and certainly contributed to the prolonged criminal conduct in the present case. In essence, except for Defendant Kamholz, the defendants imposed a culture of environmental ignorance. Not only does this support the imposition of a substantial criminal penalty, it supports an order that as part of their sentence, the defendants must implement an environmental compliance plan and begin training their employees on environmental matters immediately.

**B. The History and Characteristics of the Defendants**

**1. Prior Environmental Violations at Tonawanda Coke**

*a. Notices of Violation*

The Presentence Report lists three historical notices of violation (“NOV”) prior to the return of the current indictment, February 25, 1998; June 30, 2006; and October 19, 2009. The February 25, 1998, NOV related to observations made by the NYS-DEC that opacity exceeded 20% during coke pushing and transport to the quench tower. The defendants paid a \$5,000 civil penalty for this NOV. The June 30, 2006, NOV related to observations made by the NYS-DEC that opacity from emissions from the waste heat stack exceeded 40%. The defendants paid a \$6,000 civil penalty for this NOV. The October 19, 2009, NOV was the result of NYS-DEC learning that the defendants did not have baffles in the eastern quench tower. That NOV is still open and is now part of the larger civil case relating to the defendants. In addition to the three NOVs mentioned in the PSR, the defendants were issued a notice of violation on October 27, 2008, as well, which related to the defendants’ failure to have a continuously operable pilot light installed on the battery flare stack and the defendants’ failure to account for the amount of furnace/foundry coke produced. NYS-DEC did not pursue a civil penalty for this NOV.

*b. PCB Disposal*

On August 16, 2007, an anonymous individual called the NYS-DEC to report that oil from eight large electrical transformers was emptied onto the coal field. A copy of the spill report, correspondence, and photographs for this incident is attached hereto as **Exhibit**

32. NYS-DEC investigated, and on August 21, 2007, observed several leaking transformers on site. At the time, Defendant Kamholz informed the NYS-DEC that the oil from these transformers was going to be spread onto the coal and then burned in the coke ovens, as had been done in the past. The defendants were notified that prior to using this material, the material needed to be tested to determine the PCB content and that a beneficial use determination (BUD) permit had to be granted by the NYS-DEC. No BUD was obtained prior to the defendants' disposal of the PCB containing oil. Cleanup of the site was ordered, and in addition, the defendants agreed to pay a \$9,000 civil penalty for this conduct. During the investigation of the criminal case, one employee recalled that Defendant Kamholz commented to him that when NYS-DEC first arrived on scene regarding this incident, Defendant Kamholz stated he had to do some "fast talking" to stay out of trouble.

**c. Railroad Tanker Cars**

Along the southern border of the Tonawanda Coke site, there are three abandoned railroad tanker cars that have been present in that location since at least 1978. A photograph of the railroad tanker cars is attached hereto as **Exhibit 33**. During the criminal investigation, several witnesses noted that beginning in the summer of 2007, and continuing until the summer of 2008 (well after the PCB incident discussed above), Defendant Kamholz and others removed an unknown oily liquid from one of the tanker cars, and deposited the liquid directly onto the coal prior to being burned in the coke ovens. One witness, Daniel Heukrath, explained that beginning in or around January of 2008, and continuing until in or about October of 2008, he assisted Defendant Kamholz in removing the contents from the eastern most tank car. Mr. Heukrath described the material coming

out of this railroad tanker car as having an unpleasant odor, similar to a solvent, and when he asked Defendant Kamholz what the material was, Defendant Kamholz did not seem to know what it was or where it came from. Mr. Heukrath was aware that Defendant Kamholz had taken a vial of the material around to other employees, including Anthony Brossack, and asked them to smell the material. According to Mr. Heukrath, they used a generator and electric pump to remove the contents from the rail car, and emptied the material into a rectangular 300 gallon storage tote, which was then sprayed onto the coal prior to being loaded into the coke ovens. Mr. Heukrath stated that he filled a total of 15 storage totes (4,500 gallons), and that the rail car was half full when he began and one-quarter full when he finished. Of the 15 totes he filled, Mr. Heukrath filled 13 of them with Defendant Kamholz, and for the other 2, was assisted by Steven McCormick, another employee.

Mr. McCormick described how he assisted Mr. Heukrath empty the contents of the rail car for two days, but stopped after discovering that he was bitten by a tick at the end of the second day. Mr. McCormick noted that the material he removed from the rail car was brownish/rust colored and had an odor. After the first day of removing the material, Mr. McCormick asked Defendant Kamholz what the material was, to which Defendant Kamholz responded that the material was sampled, sent to a lab, and came back "OK." Mr. McCormick did not further question Defendant Kamholz regarding the material. David Dahl, the coal handling supervisor at the time, told investigators that initially, the unknown liquid was sprayed onto the coal in the coal handling building, and had a horrible smell. In fact, Mr. Dahl stated that he and others called the substance "Agent Orange."

Another employee, Bruce Schlager, who worked with Defendant Kamholz in the lab, explained that in September of 2007, he assisted Defendant Kamholz in sampling the contents from the rail car, and that the sample was sent out for analysis. Prior to sending the material out for analysis, Mr. Schlager stated that he and Defendant Kamholz learned that the material would burn after they dipped a glass rod into the material and then held the rod over a Bunsen burner. Mr. Schlager did not see a copy of the analytical results, however, the government has obtained a copy of the results which are attached hereto as **Exhibit 34**. The sample results reveal that Defendant Kamholz only requested that the material be analyzed for semivolatile organic compounds. The material was not tested for PCBs or for total halogen content, and as such, the defendants would not have been entitled to consider this material "used oil" under RCRA, which could then be burned in the coke ovens. The defendants were aware of the requirement to conduct total halogen testing on oil they sought to burn, and had actually requested such testing in November of 2006. Attached hereto as **Exhibit 35** is a copy of a Tonawanda Coke request to Waste Stream Technology to conduct a total halogen test, along with the sample results.

On May 7, 2010, EPA 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 Tonawanda Coke. All of the EPA samples were analyzed using the Toxic Characteristic Leaching Procedure (TCLP) test, and were found to contain a concentration of benzene several orders of magnitude above the

regulatory limit.<sup>5</sup> A copy of the EPA's laboratory report for the railroad tanker car samples is attached hereto as **Exhibit 36**. The samples delivered to Tonawanda Coke's laboratory were not analyzed using the TCLP test, however, these results also shed some light on the makeup of the unknown liquid removed from the railroad tanker car and sprayed onto the coal. A copy of the analytical data report for the Tonawanda Coke samples from the railroad tanker car is attached hereto as **Exhibit 37**.

The defendants' handling of the unknown material from the railroad tanker car illustrates the defendants' belief that they could dispose of any type of unwanted material at Tonawanda Coke by simply burning it in the coke ovens. The defendants were aware of the permitting regulations under RCRA and the requirement to seek a Beneficial Use Determination from the NYS-DEC, and their failure to follow even simplest of environmental regulations demonstrate an utter disrespect for the environment and the contaminants they were releasing into the air.

## **2. Prior Environmental Violations at Erie Coke Corporation**

As referenced in the PSR, the Erie Coke Corporation ("Erie Coke"), located in Erie, Pennsylvania, has a related second-level parent company to that of Defendant Tonawanda Coke Corporation. Attached as **Exhibit 38** is a copy of a corporate organization chart seized during the execution of the search warrant on December 17, 2009, which displays the

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<sup>5</sup> However, during pretrial proceedings, the government learned that the analyst performing the TCLP test neglected to weigh the filter paper used for the extract and any solid material left on the filter paper, and consequently, could not compute a percent solids for the sample, a required step in the TCLP test. Although the government viewed this as a technical error since the analyst noted negligible solid material in the sample, the government ultimately moved to dismiss this count from the original Indictment in the interests of justice. Regardless, the analytical results still shed some light on the composition of the unknown material from the railroad tanker car, and the hazardous properties it exhibited.

corporate relationships between Tonawanda Coke and Erie Coke. During the investigation, many of the employees from Tonawanda Coke discussed conducting work at Erie Coke, and in fact, at least from 2005 to 2009, Defendant Kamholz also served as the Manager of Environmental Control at Erie Coke.

On September 22, 2009, the U.S. Department of Justice and the Commonwealth of Pennsylvania filed a civil complaint against Erie Coke seeking civil penalties for violations of the Clean Air Act. A copy of the complaint filed against Erie Coke is attached hereto as **Exhibit 39**, and includes violations relating to opacity from the combustion stack, opacity from pushing operations, and failure to adequately maintain the coke ovens. Ultimately, in September of 2011, Erie Coke settled the civil suit by agreeing to the payment of a \$6,000,000 civil fine and to implementing upgrades to the plant equipment valued at \$15,000,000.

During an interview with Gerald Priamo, a former plant manager at Tonawanda Coke, he discussed troubling interactions he observed between Defendant Kamholz and Pennsylvania environmental regulators. In particular, Mr. Priamo described how on one occasion, after Erie Coke was issued a violation notice, Defendant Kamholz crumpled up the violation, threw it at the regulator and stated that it was “bull shit” and went home. On another occasion, Mr. Priamo observed Defendant Kamholz get into an argument with the Pennsylvania regulator about whether a coke push was a dirty push, and that Defendant Kamholz shoved the regulator and the regulator fell to the ground. Mr. Priamo noted that

Defendant Kamholz then claimed that the regulator tripped on a piece of coke. A copy of Mr. Priamo's interview report is attached hereto as **Exhibit 40**.

Therefore, the history of the defendants, and in particular their deceitful conduct to conceal the environmental violations in the present case, coupled with Defendant Kamholz's intimidation tactics used with the Pennsylvania regulators, paint a troubling portrait of the defendants which warrants substantial punishment.

### **3. Defendant Kamholz's Control over Environmental Matters**

Testimony during the trial by several witnesses indicated that Defendant Kamholz had complete control over environmental matters at Tonawanda Coke and could direct any employees with regard to environmental matters. For example, Jon Rogers testified he was directed by Defendant Kamholz to conduct several labor intensified projects including the mixing waste on the coal piles and relocating the unpermitted bleeder valve. Similarly, three former plant managers, Mr. Priamo, Mr. Cahill,<sup>6</sup> and Mr. Heukrath, all testified that they relied on Defendant Kamholz on matters regarding environmental compliance. Mr. Priamo testified that as a plant manager, he was required to sign certain environmental forms, which were brought to him by Defendant Kamholz for signature. In fact, Mr. Priamo told Defendant Kamholz that he was not comfortable signing these forms, and would ask Defendant Kamholz if everything on the forms was accurate, to which Defendant Kamholz would instruct him to sign. Aside from not being comfortable signing these documents, Mr. Priamo identified at least two instances where it appeared that

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<sup>6</sup> Days after Mr. Cahill's trial testimony concluded on March 6, 2013 in the criminal case, he was demoted from plant manager to supervisor of the by-products department.

Defendant Kamholz forged his name on environmental compliance documents. The first type of document related to Tonawanda Coke's annual Title V certification form. Attached hereto as **Exhibit 41** is a copy of the 2005 annual compliance certification that Mr. Priamo stated he did sign. Attached hereto as **Exhibit 42** is a copy of the 2006 annual compliance certification that Priamo stated he did not sign, and appears to contain the initials "MLK," those of Defendant Kamholz. The second type of document related to Tonawanda Coke's monthly discharge monitoring reports (DMR) pursuant to the Clean Water Act. Attached hereto as **Exhibit 43** is a copy of a DMR that Priamo noted he did not sign, and also contain the initials "MLK."

#### **4. Post-Indictment Environmental Compliance**

A couple of months prior to trial, the government learned that a complaint had been made regarding spilled petroleum products at Tonawanda Coke. The NYS-DEC initiated an investigation into the areas at the plant where spills were reported, and documented their findings in a Field Inspection Report dated November 14, 2012. A copy of the Field Inspection Report is attached hereto as **Exhibit 44**. That report documents numerous locations at Tonawanda Coke that appeared to have been contaminated by recent spills. In addition, the photographs taken during this inspection indicate the same poor housekeeping and equipment deficiencies that were noted during the April of 2009 inspection. It is shocking to think that the defendants, charged with serious environmental crimes and only months away from trial, would allow such widespread petroleum contamination to occur. Such flagrant conduct reinforces the government's strong belief that the defendants have yet

to take seriously their duty to attain and maintain environmental compliance, and as such, a substantial criminal sentence is warranted.

**C. The Seriousness of the Offense, and the Need to Promote Respect for the Law and to Provide Just Punishment All Warrant a Substantial Fine**

**1. CAA and RCRA Violations are Serious Environmental Offenses**

Hazardous air pollutants and hazardous waste are dangerous to human health and the environment. The jury in this case convicted the defendants for violating the CAA and RCRA, the primary federal statutes that regulate hazardous air pollutants and hazardous waste in this country. A violation of the CAA is an undeniably serious offense. Enacted in 1970, the CAA 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). Hazardous air pollutants, including benzene and coke oven emissions, are a particular concern under the CAA, which has been focused on the elimination of the health-related effects of exposure to hazardous air pollutants. In 1990, Title V of the amendments to the CAA created an operating permits program, known as the Title V program, that regulates the emission limits and compliance methods of stationary sources of air pollution. The purpose of Title V was to put into a single operating permit all requirements that apply to a particular facility. Through their conduct, the defendants knowingly caused the release of substantial quantities of hazardous air pollutants into the Tonawanda ambient air, in direct contravention of the CAA and its implementing regulations for coke manufacturing. .

Likewise, a violation of RCRA is an extremely serious offense. Enacted in 1976 as an overhaul of the Solid Waste Disposal Act (SWDA), RCRA was designed to address the nation's growing hazardous waste disposal problem resulting primarily from industrial operations. It was designed to fill the gap left by the CAA and the Clean Water Act concerning the dumping of pollutants on the land. The intent of RCRA is the proper and safe management of hazardous waste from the time it is generated until its ultimate disposal, that is, from cradle to grave. The overriding goals of the SWDA, as amended by RCRA, are:

- (1) to protect human health and the environment from the dangers associated with waste management and disposal; and
- (2) to encourage the conservation and recovery of natural resources through reuse, recycling, and waste minimization.

*See* 42 U.S.C. §6902. The RCRA offenses committed by the defendants in this case directly undermined those goals. Illegal, unpermitted storage and disposal of hazardous waste is a particularly serious crime because of the public health threat that directly flows from such conduct.

Rather than respect for the law, the defendants' actions here demonstrated an indifference to it and the surrounding Tonawanda community.

**2. A Substantial Penalty is Necessary to Promote Respect for the Law and Provide a Just Punishment**

Too often, environmental laws and environmental compliance are not taken seriously by corporate officials. Promoting respect for the law is particularly important in the environmental context because so many environmental laws, including the CAA and

RCRA, the laws violated in this case, rely on self-reporting by regulated entities. Environmental crimes, especially violations of a CAA permit and illegal hazardous waste storage and disposal, are inherently difficult to detect. As was the case here, environmental crimes often occur on private property and regulators do not have unlimited budgets to perform around-the-clock inspections. As a result, regulators and the public rely on companies and corporate officials to apply for permits when required. When a corporation or corporate official deliberately fails to accept this responsibility, the entire system suffers as a result.

Corporate lip service often is paid to environmental compliance through the distribution of lengthy, self-serving internal manuals and by the hiring of numerous environmental consultants. But a company's actions speak louder than grand pronouncements to its employees to always comply with environmental laws. Here, the defendants' actions, or inactions, spoke loudly and clearly to the jury. This Court's sentence should speak just as loudly and clearly to the defendants. Tonawanda Coke is a large, extremely profitable company that made deliberate decisions about how it wanted to allocate resources and handle environmental compliance. The defendants could have chosen to do things the right way, and they certainly had the financial wherewithal to do so. Instead, the defendants noted in their internal business plans that environmental compliance was a weakness, and that a corporate risk was the cost associated with environmental mandates. Attached hereto as **Exhibit 45** is a copy of a portion of the defendants' business plan for the fiscal year ending June 30, 2009. Given all the aggravating factors already discussed, a substantial fine for Tonawanda Coke and a lengthy period of incarceration for

Defendant Kamholz would be just punishment for such risky and reckless intentional conduct.

In the present case, the defendants' actions have impacted an entire community. Although the government cannot point to any particular individual victim, there can be no dispute that through the defendants' widespread contamination of the air and ground, that all of Tonawanda has suffered. In preparation for sentencing, the government notified the community that anyone who felt they had been affected by the defendants' crimes could submit an impact statement to the government to be forwarded to the Court for consideration. At present, the government has received 128 impact letters. A summary list of all of the impact statements is attached hereto as **Exhibit 46**, and copies of all of the impact statements are attached hereto as **Exhibit 47** in alphabetical order.<sup>7</sup> These letters, sent in by a variety of individuals, including homeowners, tenants, Town Supervisors, a former police chief, a veterinarian, a registered nurse, and widowers, tell a horrific tale of misery, and discuss diagnoses for a myriad of lethal diseases, such a breast cancer, thyroid cancer, esophageal cancer, stomach cancer, lung cancer, leukemia, brain tumors, and Non-Hodgkin's lymphoma. These individuals sincerely believe that Tonawanda Coke is to blame for the physical, emotional, and psychological trauma they have endured, and whether or not a causal connection may someday be established, these statements are a powerful reminder of the broad impact of the defendants' conduct and should be considered by the Court in imposing a sentence that provides just punishment for the crimes. In the event the defendants request a sentencing hearing, and the Court determines that such a

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<sup>7</sup> Any of the impact statements that contain personally identifiable information have been redacted, however, a complete set of unredacted statements has been forwarded to the Probation Department.

hearing is necessary, the government will ask that several community members be permitted to testify regarding the impact of Tonawanda Coke's operations.

**3. A Substantial Penalty is Needed to Provide Adequate Deterrence to Further Criminal Conduct**

Sentencing achieves two types of deterrence:

The first deals with deterring crimes by individuals or entities similarly situated to the defendant [general deterrence]; it favors exemplary sentences, so that one's punishment may serve as a warning to others. The second aspect focuses on recidivism by the same person or business; it supports sentences tailored to individual circumstances and just severe enough to ensure a company will not commit other crimes in the future [specific deterrence].

*CESI*, 2009 WL 1856228, \*6. In the corporate context, both types of deterrence are implicated by the size of the fine relative to the size and profitability of the corporate defendant.

Specific deterrence can only be accomplished by the imposition of a substantial fine. Tonawanda Coke is a very profitable company that still handles hazardous wastes as part of its business. And it is a company that, despite the jury's verdict, still maintains that the offenses were committed based on failures of the NYS-DEC regulators to bring the violations to the attention of the defendants. *See* Addendum to the Tonawanda Coke PSR.<sup>8</sup> Likewise, Defendant Kamholz seeks to explain the offenses of conviction as largely resulting from poor communication with NYS-DEC. A non-substantial fine will reinforce

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<sup>8</sup> The government disputes many of the statements contained in Tonawanda Coke's Offense Statement as being factually inaccurate and not consistent with the testimony at trial. For example, NYS-DEC RCRA Inspector Thomas Corbett testified that he was not told in June of 2009 where Tonawanda Coke intended to mix the material removed from the Barrett Tanks, yet, the defendants continue to maintain that Inspector Corbett was told the mixing would happen on the coal field. This is simply not true.

Tonawanda Coke's belief that its conduct was acceptable and should have been discovered by NYS-DEC, and that it can continue such behavior and simply write it off as the cost of doing business. The Tonawanda and Grand Island communities should not be required to suffer the harm and needless threat to public health based on the defendants' actions. A substantial fine for Tonawanda Coke and a significant term of incarceration for Defendant Kamholz is needed to ensure the defendants get that message.

Discouraging other companies similarly situated to Tonawanda Coke, and in the same industrial corridor from engaging in similar conduct that jeopardizes the safety of the community should be of paramount importance to this Court. Significant general deterrence in the area of environmental compliance can be achieved by a substantial fine in this case. Companies, and shareholders, care about their bottom line, and a substantial fine in this case will send a strong message to other large companies that handle hazardous wastes and hazardous air pollutants: comply with environmental laws or your bottom line will suffer. Achieving general deterrence is "a particular concern for environmental and white-collar crimes, because they are often perceived as carrying substantially lesser punishment than other comparable offenses." *CESI*, 2009 WL 1856228, \*6.

**V. APPLICATION OF THE § 3572 FACTORS MANDATES A SUBSTANTIAL PUNISHMENT**

In determining the proper criminal fine to be imposed, Title 18, United States Code, Section 3572(a) sets forth additional factors to be considered by the Court in determining whether to impose a fine, the amount of the fine, and how the fine should be paid. Several of the § 3572 factors are directly applicable in this case, including:

- (1) the defendant's income, earning capacity, and financial resources;
- (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;
- (3) any pecuniary loss inflicted upon others as a result of the offense;
- ...
- (7) whether the defendant can pass on to consumers or other persons the expense of the fine; and
- (8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

18 U.S.C. § 3572(a). All of these factors support the imposition of a substantial fine in this case.

**A. Tonawanda Coke is Financially Able to Pay a Fine**

The first two § 3572 factors listed above relate directly to a corporate defendant's ability to pay a substantial fine. In this case, Tonawanda Coke's financial health is beyond reasonable dispute, and its ability to pay a significant fine is documented in the evidence obtained by the government during the execution of the criminal search warrant and in the PSR. The amount of profit earned by Tonawanda Coke from 2005 to 2009, the principal time period for the criminal offenses, substantial. During that time period, the average yearly profit earned by Tonawanda Coke was \$9.83 Million, with highs of \$11.60 Million and \$15.18 Million in 2008 and 2009, respectively.

Throughout the trial the defendants attempted to use the wealth of the company as a defense to their motivation to avoid compliance with environmental regulations, such as the fact that the cost to re-install baffles in the quench towers was \$125,000. However, the evidence at trial established that the defendants violated environmental requirements in spite of the relatively low cost of compliance for some of these violations. It is respectfully submitted that the cost of compliance when compared to the profitability of Tonawanda Coke only makes the defendants' actions more egregious, and illustrate the corporate philosophy of maximizing profits by engaging in the least amount of environmental compliance as possible. Based upon the defendants' continued references to the wealth of Tonawanda Coke throughout the trial the defendants have the financial wherewithal to not only make the needed changes in their operations, but also fund the recommended fine and community service projects the government recommends herein

To assist the government in determining what an appropriate financial sanction would be for Tonawanda Coke, the government enlisted the efforts of Leo Mullin, an EPA cost recovery expert from Philadelphia, Pennsylvania, with extensive experience conducting ability to pay assessments. Using documents seized during the search warrant, Mr. Mullin conducted an ability to pay assessment for Tonawanda Coke using established guidance and policies implemented by the EPA. Mr. Mullin presented his findings in an eight-page report, a copy of which is attached hereto as **Exhibit 48**. In that report, Mr. Mullin concludes that Tonawanda Coke has the ability to pay at least \$57,141,699, and that is the amount the government is asking this Court to impose as a total financial sanction. It is to be noted that Tonawanda Coke has opposed all requests by the government to view the

financial records from the last three years of its operations. Accordingly, Tonawanda Coke should be precluded from contending at sentencing that its financial conditions have radically changed as they have blocked any attempts to reasonably assess that contention.

**B. Tonawanda Coke Can Pass on the Cost of Any Fine to Consumers**

As of January 1, 2012, Tonawanda Coke was one of 19 operating coke plants in the United States. See [http://accfi.org/documents/CokePlantListing\\_010112.pdf](http://accfi.org/documents/CokePlantListing_010112.pdf), last visited September 14, 2013. Certainly, Tonawanda Coke will be able to charge incrementally more for the coke they produce, thereby passing on the cost of any criminal fine to consumers. Such possibility further justifies a substantial criminal penalty in the present case. 18 U.S.C. 3572(a)(7).

**C. Tonawanda Coke Has Not Taken Any Steps to Discipline Those Responsible**

The one Tonawanda Coke employee most responsible for the present crimes was Defendant Kamholz. Defendant Kamholz held a management position with Tonawanda Coke, and appears to have reported directly to owner, J.D. Crane. There is no evidence in the record that Tonawanda Coke took any measures to discipline Defendant Kamholz in order “to prevent a recurrence of such an offense,” 18 U.S.C. 3572(a)(8). In fact, Defendant Kamholz remains employed as the Manager of Environmental Control at Tonawanda Coke, and continues to be the principal point of contact with the NYS-DEC and EPA. Such failure to discipline Defendant Kamholz speaks to Tonawanda Coke’s indifferent attitude toward environmental compliance that continues to this day.

**VI. THE GOVERNMENT'S SENTENCING RECOMMENDATION**

**A. Defendant Tonawanda Coke**

**1. Community Service**

The government respectfully moves this Court to order Defendant Tonawanda Coke, as a condition of probation, to fund the following community service projects:

- a. The Tonawanda Health Study: An Epidemiologic Study of Health Effects and Coke Oven Emissions from Tonawanda Coke (\$11,448,021);
- b. Air/Soil Testing Study: Determining the Environmental Impact of Coke Oven Emissions Originating from Tonawanda Coke Corp. on Surrounding Residential Community (\$711,161);
- c. Industrial Pollution Prevention Project (\$250,000);
- d. Citizen Science Lending Library (\$250,000);
- e. Worker and Community Toxics Education Project (\$100,000);  
and
- f. Riverside Tree Planting (\$35,000).

As discussed above, the government believes that the primary victim in the present case is the entirety of the community surrounding Tonawanda Coke. This Court has the authority to order community service as a condition of probation “where such community service is reasonably designed to repair the harm caused by the offense[s].” USSG § 8B1.3. All of the community service projects listed above have been designed not only to repair the harm caused by the defendants’ conduct, but to provide the Tonawanda community with the necessary resources to fully understand and/or heal from the impact of the crimes committed by the defendants. Importantly, a community service component of the sentence

will allow some funds to remain in the Western New York area to benefit those individuals most severely affected by the crimes of the defendants.

*a. Tonawanda Health Study (\$11,448,021)*

As the Court is aware, just prior to trial, the New York State Department of Health (NYS-DOH) released the results of their Tonawanda Study Area Health Outcomes Review, which found that the incidence of certain cancers was elevated within the study area. A copy of the NYS-DOH Health Outcomes Review can be found at: [www.health.ny.gov/environmental/investigations/tonawanda/index.htm](http://www.health.ny.gov/environmental/investigations/tonawanda/index.htm), last accessed September 14, 2013. Importantly, the NYS-DOH study had several limitations, and could not make any conclusions as to whether any particular health outcome was or was not caused by air emissions within the study area.

Shortly after the jury verdict in this case, the government contacted Dr. Matthew Bonner, a professor and epidemiologist in the Division of Environmental Health Sciences within the Department of Social and Preventive Medicine at the University at Buffalo (UB) to discuss the possibility of developing an epidemiological study which would allow for a better understanding of the health risks posed by exposure to emissions from Tonawanda Coke. The result has been the creation of the Tonawanda Health Study: An Epidemiologic Study of Health Effects and Coke Oven Emissions from Tonawanda Coke, with a proposed budget of \$11,448,021. The research study is a significant multi-phase epidemiological study designed to investigate the current health status of the Tonawanda and Grand Island communities, and to monitor residents for a period of time. In a nutshell, this study will

assist the community in understanding and addressing the health risks posed by the defendants' criminal conduct. Attached hereto as **Exhibit 49** is a copy of the study proposal, budget, budget justification, curriculum vitae for Dr. Bonner, and biographical sketches for the principal investigators. This research study has support at the highest levels at the UB, and in an unprecedented move, the University has agreed to waive all facilities and administrative costs that UB will incur. In a letter from Charles Zukoski, Provost and Executive Vice President for Academic Affairs at UB, he describes tremendous level of support for this research study, and how this study will advance UB's mission to fuel knowledge and serve the community. A copy of Provost Zukoski's letter is attached hereto as **Exhibit 50**.

The government strongly recommends the full funding of this project as a condition of probation as it will help the Tonawanda community and Tonawanda Coke workers gain a better understanding of the potential and/or actual adverse health effects sustained due to the operations at Tonawanda Coke. The study will also provide for a health education center to assist study participants with reducing the disease burden from coke oven emissions. If the Court so desires, then Dr. Bonner can be available at sentencing to answer any potential questions and/or concerns the Court may have regarding this study.

***b. Air/Soil Testing Study (\$711,161)***

Following the jury verdict, a proposal was submitted to the U.S. Attorney's Office by Jackie James-Creedon with the Tonawanda Community Fund to fund a comprehensive environmental air and soil investigation to examine the impact of Tonawanda Coke's

foundry coke emissions, specifically particulate organic material, in the immediate surrounding environment, with a proposed budget of \$711,161. A detailed description of this study, along with a budget, is attached hereto as **Exhibit 51**. The government believes that this study will provide important information to the residents living near Tonawanda Coke, including level of soil contamination from particulate organic material.

*c. Industrial Pollution Prevention Project (\$250,000)*

Following the jury verdict, the Clean Air Coalition for Western New York (“CACWNY”) engaged in a Participatory Budgeting Process to identify and recommend to the government community service projects that could be funded as part of Tonawanda Coke’s criminal sentence. As a result of that process, the CACWNY submitted to the government a Results Memo, identifying all of the proposed projects and the votes that each project received from community members. Attached hereto as **Exhibit 52** is a copy of the CACWNY’s Results Memo. The project that received the most votes is an Industrial Pollution Prevention Project, which is a collaborative project between the University at Buffalo’s School of Engineering and the CACWNY to work with manufacturers in the Tonawanda, Riverside, and Grand Island area to reduce emissions of hazardous pollutants. *See Exhibit 52* for more details. The government recommends the funding of this project as it will assist the Tonawanda, Riverside, and Grand Island communities, all of which were exposed to hazardous pollutants as a result of the defendants’ conduct, in lessening the future burden of toxic and hazardous chemicals through outreach and education.

*d. Citizen Science Lending Library (\$250,000)*

Included in the CACWNY's Results Memo is a project to fund a citizen science lending library. *See Exhibit 52* for more details. As the Court is aware, in 2004/2005, a handful of local residents engaged in do-it-yourself air testing which ultimately lead to the heightened attention to Tonawanda Coke by the NYS-DEC and EPA. The government recommends the funding of this project to further empower local citizens in the Tonawanda area to investigate and study environmental pollution in their community.

*e. Worker and Community Toxics Education Project (\$100,000)*

Included in the CACWNY's Results Memo is a worker and community toxics education project that is designed to educate workers and residents regarding the chemical risks for working at and living near industrial facilities such as Tonawanda Coke. *See Exhibit 52* for more details. The government recommends funding this project as it will provide the public with valuable information regarding exposure to hazardous pollutants.

*f. Riverside Tree Planting (\$35,000)*

Included in the CACWNY's Results Memo is a tree planting project in the Riverside community. *See Exhibit 52* for more details. The government recommends funding this project as it will provide a direct environmental benefit to residents and visitors to the Riverside community, which is in close proximity to Tonawanda Coke.

*g. Other Projects Not Part of the Government's Request*

The CACWNY's Results Memo included several additional projects that are not included in the government's formal community service requests to the Court, in large part due to the limited nexus between the defendants' criminal conduct and the specific project. However, the complete CACWNY's Results Memo has been included as an exhibit so that the Court can independently evaluate the listed projects. Similarly, the Town of Tonawanda has submitted several community service project proposals that are not part of the government's formal request to the Court due to the limited nexus between the project and the criminal conduct. However, attached hereto as **Exhibit 53** is the project proposals received from the Town of Tonawanda for the Court's independent consideration. Finally, in addition to the Air/Soil Testing Study that is being recommended by the government (see above), the Tonawanda Community Fund also recommended a project entitled "Niagara Riverfront Community Wellness and Resource Center" which is detailed in **Exhibit 54** for the Court's own review.

**2. The Fine**

As already discussed above, it is the government's position that Tonawanda Coke has the ability to pay a total financial sanction of \$57,141,699. The community service projects recommended by the government and set forth above amount to a total of \$12,794,182. Therefore, the government is seeking that the remaining amount within the government's calculation of the ability to pay, namely \$44,347,517, be imposed as a criminal fine. Given the aggravating factors outlined above, Tonawanda Coke's failure to accept full responsibility, and the need to deter future misconduct by Tonawanda Coke and

other corporations, the government believes that a \$44,347,517 fine, a substantial amount, is amply justified.

### **3. Probation**

In accordance with 18 U.S.C. §§ 3561 and 3563, and §§ 8D1.1 through 8D1.3 of the Sentencing Guidelines, the government recommends that the defendant be placed on probation for a period of five years, and be ordered to comply with the terms and conditions specified below.

### **4. Remedial Investigation and Cleanup**

Proof at trial established that for an extended period of time, the defendants routinely dumped hazardous coal tar sludge onto the coal field at Tonawanda Coke. Based on this longstanding practice, and the level of contamination ultimately discovered in and around the Barrett Tanks, the government believes that widespread contamination of the coal field will be found. Therefore, the government is seeking this Court to impose, as a condition of probation, an order that Tonawanda Coke must conduct, through a third-party contractor acceptable to the NYS-DEC, a remedial investigation to determine the nature and extent of possible contamination of the coal field, and if contamination is discovered, to clean up the contamination. It is further requested that the remedial investigation follow the standards and procedures set forth in DER-10, a guidance document issued by NYS-DEC and available at [www.dec.ny.gov/regulations/67386.html](http://www.dec.ny.gov/regulations/67386.html), last accessed September 14, 2013.

## **5. Environmental Compliance Program**

Pursuant to 18 U.S.C. § 3563(b)(22) and §§ 8B2.1 and 8D1.1.4(c) of the Sentencing Guidelines, the government recommends that Tonawanda Coke submit evidence of an existing corporate-wide environmental regulatory compliance program that includes all elements set forth in section 8B2.1 of the Sentencing Guidelines to the Probation Department and the government within 30 days after sentencing. If Tonawanda Coke does not have a corporate-wide environmental regulatory compliance program, or if, in the judgment of the Probation Department and the government, its existing program is inadequate, Tonawanda Coke will develop and implement such a program sufficient to satisfy the requirements of § 8B2.1 of the Sentencing Guidelines concerning effective programs to prevent and detect violations. An example of an appropriate Environmental Compliance Program is attached hereto as **Exhibit 55**.

### **B. Defendant Kamholz**

As discussed above, Defendant Kamholz was the lone person responsible for environmental compliance at Tonawanda Coke, and has such, must be adequately punished for the environmental travesty that unfolded at Tonawanda Coke. The government requests, that based on the egregious environmental crimes committed by Defendant Kamholz, along with the obstructive conduct he was convicted of, that the Court sentence Defendant Kamholz to a guideline sentence of imprisonment of 78 to 97 months. In addition, based on Defendant Kamholz's net worth of over \$780,000, the government requests that the Court also impose a criminal fine in the amount of \$250,000, which amounts to the maximum fine for just one of the CAA offenses he was convicted of.

**CONCLUSION**

For the foregoing reasons, the government respectfully recommends that Defendant Tonawanda Coke sentenced as follows: (1) payment of \$12,794,182 in community service projects, (2) payment of a \$44,347,517 criminal fine, (3) payment of a \$5,600 special assessment, (4) imposition of a 5 year term of probation, (5) conduct a remedial investigation of the coal field, and remediate if necessary, and (6) implementation of an Environmental Compliance Plan; and that Defendant Kamholz be sentenced to a term of imprisonment of 78 to 97 months and a criminal fine of \$250,000.

DATED: Buffalo, New York, September 16, 2013.

Respectfully submitted,

WILLIAM J. HOCHUL, JR.  
United States Attorney

*S/ AARON J. MANGO*

BY:

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

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UNITED STATES OF AMERICA

-v-

10-CR-219-S

TONAWANDA COKE CORPORATION and  
MARK L. KAMHOLZ

Defendants.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 16, 2013, I electronically filed the foregoing GOVERNMENT'S SENTENCING 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.

Jeanne M. Grasso, Esq.

Ariel S. Glasner, Esq.

John J. Molloy, Esq.

I further certify that I provided a copy of the foregoing via inter office mail to the following participant on this case:

United States Probation Department  
Attn: Susan C. Murray, USPO

***S/ AARON J. MANGO***

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AARON J. MANGO