

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

**DEFENDANT MARK KAMHOLZ'S  
SENTENCING MEMORANDUM**

v.

Cri. No. 10-CR-219

TONAWANDA COKE CORPORATION  
and MARK L. KAMHOLZ,

Defendants.

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**INTRODUCTION**

Following a month long jury trial, Mark Kamholz was found guilty by jury verdict on March 28, 2013 of the following offenses:

1. Eleven violations of the Clean Air Act, 42 U.S.C. §7413(c)(1), having to do with the absence of devices known as baffles in quenching towers at the Tonawanda Coke Corporation plant and the operation of a pressure relief valve ["PRV"] at the facility without a permit.
2. Three violations of the Resource Conservation and Recovery Act, 42 U.S.C. §6928(d)(2)(A), having to do with the storage and disposal of hazardous waste without a permit, that waste having consisted of coal tar which surrounded abandoned storage tanks, tar sludge contained within the same abandoned tanks, and coal tar sludge generated by coking operations at Tonawanda Coke.
3. One violation of the Obstruction of Justice statute found at 18 U.S.C. §1505, arising from a direction given to a fellow employee in April 2009 to manipulate the frequency of releases by the plant's PRV.

Mr. Kamholz has been held personally liable for the misconduct underlying the environmental law-based convictions by virtue of his position as the Manager of Environmental Control at Tonawanda Coke throughout the indictment period, and for several decades prior to that period of time.

A Presentence Investigation Report [“PSR”] has been prepared by the United States Probation Office. The original draft was completed on May 28, 2013. The final revised version of this report is dated September 5, 2013, and was forwarded to counsel on September 11, 2013. In a separate filing, Mr. Kamholz has filed formal objections to a number of the calculations and findings under the *United States Sentencing Guidelines* [“*Guidelines*”] reflected in the final version of the PSR. In this same filing, Mr. Kamholz also requests that downward departures be made with respect to three of the enhancements to Mr. Kamholz’s offense level reflected in the PSR.<sup>1</sup> Naturally, this sentencing submission is written without the benefit of the Court’s rulings on these applications.

As currently written, the PSR finds that the defendant’s adjusted offense level under the *Guidelines* is 28, based upon the following calculations:

<b>PSR Reference</b>	<b>Basis for Calculation</b>	<b>Offense Level Increase</b>	<b><i>Guidelines</i> Reference</b>
¶¶ 61, 69	base offense level	8	2Q1.2(a)
¶¶ 62, 70	ongoing, continuous, or repetitive discharge	6	2Q1.2(b)(1)(A)
¶¶ 63, 72	disposal in violation of a permit	4	2Q1.2(b)(4)
¶71	substantial cleanup expenditure	4	2Q1.2(d)(3)

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<sup>1</sup>In his separate filing, Mr. Kamholz objects to the proposed enhancements for role in the offense (manager/supervisor), abuse of a position of trust, and substantial cleanup expenditure. He also objects to the denial of any downward adjustment for acceptance of responsibility. Mr. Kamholz’s separate filing additionally seeks a downward departure or adjustment with respect to the enhancements for an ongoing, continuous, or repetitive discharge, disposal in violation of a permit, and substantial cleanup expenditure. The PSR, at ¶¶ 132-134, recognizes the Court’s departure authority with respect to these three enhancements.

<b>PSR Reference</b>	<b>Basis for Calculation</b>	<b>Offense Level Increase</b>	<b>Guidelines Reference</b>
¶¶ 65, 74	role in offense - manager/supervisor	2	3B1.1(c)
¶¶ 66, 75	abuse of position of trust	2	3B1.3
¶67	obstruction of justice	2	3C1.1
¶¶ 78-82	adjustment for grouping of related counts	2	3D1.4
Adjusted offense level		28	

After denying any downward adjustment for acceptance of responsibility (PSR ¶84), and in consideration of Mr. Kamholz's zero criminal history points which gives rise to a Criminal History Category of I (PSR ¶90), it is found at ¶92 that Mr. Kamholz's *Guidelines* sentencing range is 78 to 97 months incarceration.

As noted, the defense objections to the Probation Office's *Guidelines* calculations, and downward adjustment and departure requests, are addressed in a separate filing. Even if every single request by the defense in the accompanying submission were to be granted by the Court, Mr. Kamholz would still be facing a term of imprisonment under the advisory *Guidelines*. Based upon Mark Kamholz's extraordinary character, as detailed below, the circumstances of the offense as demonstrated by the trial record, and the application of the sentencing factors set forth at 18 U.S.C. §3553(a), it is the position of the defense that the Court should impose a non-*Guidelines* sentence which spares Mark Kamholz any period of imprisonment. Viewed as a whole, the background of the defendant and circumstances of the offenses of which he stands convicted fully

support the conclusion that a non-jail sentence will be sufficient, but not greater than necessary, to serve the purposes of a federal criminal sentence as set forth in §3553.<sup>2</sup>

## I. OVERVIEW OF THE TRIAL EVIDENCE

Mr. Kamholz's 15 counts of conviction generally fall into 5 categories; that is, the absence of baffles in the quenching towers, the releases of the PRV, the disturbance of the coal tar surrounding the abandoned Barrett tanks at Tonawanda Coke, the spreading of coal and tar sludge from the abandoned tanks, and coal tar sludge from Tonawanda Coke's operations, on the coal piles, and Mr. Kamholz's pre-inspection remark to By-Products Supervisor Patrick Cahill regarding the operation of the PRV in April 2009.

With respect to the baffles issue, the trial evidence revealed that the company had a specific exemption for one of the quenching towers, and that there were ongoing discussions between Mr. Kamholz and New York State Department of Environmental Conservation ["NYSDEC"] Inspector Gary Foersch regarding the need for and value of baffles in the second tower. Mr. Foersch acknowledged that he had voiced general agreement with Mr. Kamholz as to the limited utility of

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<sup>2</sup>Mr. Kamholz has elected to not take specific issue with the factual statements set forth in the PSR given that this matter went to trial, and the Court has had the benefit of approximately four weeks of trial testimony regarding this matter. This is not to say that there are not inaccuracies in the factual findings of the PSR. Solely by way of illustration, ¶22 of the PSR asserts that Mr. Kamholz was the decisionmaker regarding the removal of the pilot light from the battery flare. The testimony developed at trial demonstrated that there was no evidence to suggest that the defendant was any more than a messenger. At ¶39, the PSR states that, in the late 1990s, in the vicinity of the abandoned tanks at Tonawanda Coke, a deer became "trapped in the coal tar, was unable to get out, and died." This topic was the subject of motion practice prior to trial [Doc. Nos. 88, 96, 102], which resulted in a decision by the Court that this evidence would not be admitted pursuant to Federal Rule of Evidence 403. A significant circumstance, developed through these pleadings, was the *absence* of any evidence as to the actual cause of death of this deer. Nonetheless, this exact same allegation has found its way into the PSR.

baffles in the quenching towers, and that his supervisor, Henry Sandonato, was in agreement with that assessment. Mr. Foersch explained that the purpose of the baffles was simply to control the release of particulate matter (small pieces of coke released during the quenching process) which, in any event, would fall to the ground on Tonawanda Coke's property in the vicinity of the towers. The evidence also showed that, immediately upon being informed that baffles should be installed in the second tower, this step was taken by the company.

With respect to the PRV, trial evidence showed that this device had originally been intended to act as a backup release valve when pressure became too great in the coke oven gas line. During the 1990s and into the period covered by the Indictment, the use of this release valve by the company became much more frequent. The evidence nonetheless showed that this valve was positioned in an open and notorious location within the By-Products area of the plant, and was expressly referenced in a HAP Emissions Study provided to both the NYSDEC and the Environmental Protection Agency ["EPA"] in July 2003. As well, the evidence revealed that, once NYSDEC became aware of this valve, its reaction was to simply direct that the set point at which the valve would release be raised by the company.

The coal tar surrounding the abandoned Barrett tanks was stipulated by the parties to principally be a pre-existing condition, not created by anyone at Tonawanda Coke. It is not disputed that, once it was discovered that a dead deer was present in this coal tar, steps were taken at Mr. Kamholz's initiation to spread coke breeze over this coal tar. Based upon the definition of "active management" provided by the Court, the trial jury found that this action constituted active management of the otherwise abandoned coal tar, giving rise to liability for this condition. The trial evidence additionally showed that more coke breeze was spread on this coal tar during excavation

operations in 2008 and, perhaps, 2009. The verdict of the jury did not disclose whether or not this was also found to constitute active management; however, this was the position taken by the Government at trial. Evidence was also presented regarding steps to decommission one of these tanks in 2008, which resulted in a fire in the vicinity of the tanks. Evidence conflicted as to whether or not sludge or coal tar from one of the tanks was released during this fire. Without in any sense denying responsibility for this conduct, giving rise to Mr. Kamholz's conviction on Count 17, the basis for liability turned on the legal definition of "active management."

The spreading of coal tar, tar sludge, and coal tar sludge on the coal fields, as charged in Counts 18 and 19 of the Indictment, depended upon the definition of "land disposal" provided by the Court to the trial jury. The evidence revealed that Mr. Kamholz had made his intentions known to both the NYSDEC and EPA in June 2009 before coal tar surrounding the abandoned tanks and tar sludge removed from those tanks was mixed in the coal piles at Tonawanda Coke. As well, the evidence showed that the regular mixing of coal tar sludge from Tonawanda Coke's own coking operation on the coal piles had been revealed to NYSDEC hazardous waste inspectors as early as the late 1980s. The practice continued over the next two decades without any objection ever having been voiced by any regulatory authority.

All of these matters formed the basis of the principal defense advanced at trial; that is, entrapment by estoppel. There is no question but that the factual record developed at trial amply supported consideration of this defense by the trial jury. As their verdict reflects, however, this defense of entrapment was not accepted, and Mr. Kamholz was found guilty on the majority of the charges contained in the Indictment. We accept the jury's contrary finding, and Mr. Kamholz accepts responsibility for the offenses of conviction. At the same time, the trial evidence reflects

significant mitigating circumstances which justify the exercise of leniency at the time Mark Kamholz is sentenced by the Court.

The final count of conviction, objection of justice, was shown by the trial evidence to arise from a single remark made by the defendant during a walk through of the By-Products area with fellow employee Patrick Cahill prior to an announced EPA/NYSDEC inspection in April 2009. Ill-advised as it was, Mr. Kamholz's single comment to Mr. Cahill expressing a desire that the PRV not release during the upcoming inspection formed the singular basis for his finding of guilt on the charge of obstruction of justice. The evidence at trial showed that this comment triggered a series of actions taken by Mr. Cahill; however, there was no evidence that Mr. Kamholz knew of those actions nor that he ever in any way followed up with Mr. Cahill regarding what, if anything, he had done with respect to the operation of the PRV during the course of the EPA/NYSDEC inspection the following week. Again, the point of setting out these considerations is not to step away from Mr. Kamholz's responsibility for having obstructed justice, but rather to highlight the mitigating circumstances surrounding this offense.

## **II. THE COURT'S DISCRETION TO IMPOSE A NON-*GUIDELINES* SENTENCE**

While this Court must still correctly calculate the *Guidelines* range, it may not treat that range as mandatory or presumptive; rather it must be treated as "one factor among several" to be considered in imposing an appropriate sentence under §3553(a). *Kimbrough v. United States*, 552 U.S. 85, 90 (2007); *Gall v. United States*, 552 U.S. 38, 49, 51 (2007). The Court must "consider all of the §3553(a) factors," "make an individualized assessment based on the facts presented[,] and explain how the facts relate to the purposes of sentencing. *Gall*, 552 U.S. at 50. The Court's

“overarching” duty is to “‘impose a sentence sufficient, but not greater than necessary’ to accomplish the goals of sentencing[.]” *Kimbrough*, 552 U.S. at 101, citing 18 U.S.C. §3553(a).

Section 3553, of course, directs that the Court consider: the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense; the kind of sentences available; the need to avoid sentencing disparity between defendants with comparable records who have been convicted of similar crimes; and, the *Sentencing Guidelines*. “In conducting this review, a district court needs to be mindful of the fact that it is ‘emphatically clear’ that the ‘Guidelines are guidelines – that is, they are truly advisory.’” *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010), citing *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) [en banc]. The requirement under §3553 that a sentence be sufficient, but not greater than necessary, requires that the Court impose the lesser of two sentences where either sentence would properly serve the purposes of the statute. *United States v. Ministro-Tapia*, 470 F.3d 137, 142 (2d Cir. 2006).

A key component of Supreme Court precedent, designed to ensure that the *Guidelines* are truly advisory and constitutional, is the authority of a sentencing court to disagree with a guideline as a matter of policy. Because “the Guidelines ‘are now advisory’ . . . , as a general matter, ‘courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.’” *Kimbrough*, 552 U.S. at 101-102, citing brief for United States (in *Kimbrough*), at 16, and *Rita v. United States*, 551 U.S. 338, 351 (2007) [“a district court may consider arguments that ‘the Guidelines sentence itself fails properly to reflect §3553(a) considerations’”].

Using the crack cocaine guideline as an example, the Supreme Court has observed that the teaching of *Kimbrough* is that “district courts are entitled to vary from the crack-cocaine guidelines in a mine-run case where there are no ‘particular circumstances’ that would otherwise justify a variance from the Guidelines’ sentencing range.” Naturally, in instances where the Court concludes that a particular matter rests outside the “heartland,” the sentencing court has at least this same level, if not a greater level, of discretion. The considerable discretion at sentencing vested in district courts arises from the following considerations:

[T]he sentencing judge has “greater familiarity with . . . the individual case and the individual defendant before him than the Commission or the appeals court.” He is therefore “in a superior position to find facts and judge their import under §3553(a)” in each particular case. In light of these discrete institutional strengths, the district court’s decision to vary from the advisory Guidelines may attract greater respect when the sentencing judge finds a particular case “outside the ‘heartland’ for which the Commission intends the Guidelines to apply.”

*Kimbrough*, 552 U.S. at 109, citing *Rita*, 551 U.S. at 351, 357-358, and *Gall*, 552 U.S. at 51.

The added benefit that this court has in this instance is that, unlike the vast majority of cases where sentences are imposed, a lengthy trial has been conducted, which enables the Court to make firsthand judgments concerning both the nature and circumstances of the offense, and the history and characteristics of the defendant (Mr. Kamholz). Given the body of judicial precedent on the subject of a court’s authority to vary from the *Guidelines*, it is now well-established that, while consideration must be given to the proper calculation under the advisory *Guidelines*, that calculation is in no sense controlling nor does it restrict an appropriate exercise of discretion in an appropriate case.

### **III. PERSONAL HISTORY OF THE DEFENDANT**

Mark Kamholz is 66-years-of-age, having been born on September 6, 1947 in Buffalo, New York. He was raised in a home located at 49 Erb Street, which is in the Bailey-Kensington area of Buffalo; this residence was built by his maternal grandfather in 1917. He has always lived in Western New York; in fact he has only lived in four residences in his entire life. Although an only child, Mark benefitted from having had close contact with his maternal grandparents and his large extended family that also lived in Western New York. He recalls that his neighborhood was a friendly, middle class community of mixed ethnicity wherein the dominant social values included acquiring a strong work ethic, applying oneself conscientiously in school, and being respectful of one's elders. Mark and his parents lived with his maternal grandparents until he was approximately 10-years-old at which time his grandparents moved to a small cottage on Lake Erie in Southern Erie County. He was also close to his paternal grandmother who lived in the Grider-Delevan area of Buffalo, New York. He and his parents routinely spent Sunday afternoons with her until her death when Mark was a teenager. He remained in the family home on Erb Street until he married at the age of 25.

Mark's parents enjoyed traditional roles; his father, Louis Kamholz, had been self-employed in a home improvement business and his mother, Ruth (nee: Elseasser) Kamholz was a homemaker. Mr. Kamholz died in 1987 at the age of 67 from prostate cancer. Mrs. Kamholz died in 2002 at the age of 83 from illnesses related to aging that were subsequently complicated from a fall which heightened her physical fragility. Mark shares that he had a close relationship with both of his parents throughout their lifetimes. He recalls that they "did what good parents do." They provided a nurturing, loving environment, established expectations and guidance, and lived the core values

they expected Mark to acquire, which included responsibility to one's family and oneself, a strong work ethic, attention to the commitments, and being guided morally in decision-making. Mark notes that, because his father owned his own business, Mark began performing tasks in the summers with his dad when he was a teenager. He worked on roofs, helped put up siding, assisted in the installation of gutters, and did any other work related task his father assigned to him. He recalls his developmental years with fondness and appreciation, and has personally worked diligently at applying the same values emulated for him by his parents to every situation in life he encounters.

Mark was a student in the Buffalo Public School System through his high school graduation. For kindergarten through 6<sup>th</sup> grade he attended Public School 71 at Newburg and Lang Streets; he then attended School 82 located on Easton Street for 7<sup>th</sup> and 8<sup>th</sup> grade. Mark graduated from Kensington High School in 1965. He was an industrious student who was also on the Bowling Team and a member of the German Club in high school. As a college student, Mark pursued one of his interests and passions, chemistry. In 1969 he graduated from the State University of New York at Buffalo (U.B.) with a Bachelors of Science in Chemistry.

Mark was able to begin his career immediately after graduating from college by obtaining employment with Shanco Plastics in Tonawanda, New York as a researcher/lab technician. Six months later, in January 1970, Mark was hired by Semet Solvay, a Division of Allied Chemical, in Tonawanda, New York as a lab supervisor. In 1978, Allied was sold to Tonawanda Coke. Over time, as environmental regulations became more complex and dynamic, Mark became the Manager of Environmental Control; he has worked for Allied/Tonawanda Coke for 43 years. His current annual salary, notwithstanding decades with the company, is \$75,000.

In addition to his full time employment, Mark served his country by enrolling in the Army National Guard from 1971 through 1977. He received both his basic training and his advanced individual training at Fort Leonard Wood in Missouri. Throughout those seven years, Mark reported to his assigned duty station one week-end every month and for two weeks each summer. The highest rank he achieved while serving his duty was Specialist 4.

As noted above, Mark lived with his parents until he married his first wife, Patricia (nee: Bermel) Kamholz in 1972. He is candid in recalling that neither he nor his first wife was prepared to properly commit to their marriage. In 1980, by mutual agreement, they divorced. No children had been born to their union.

Mark married his current wife, Sandra (nee: LaBelle) Kamholz on August 13, 1983. Mrs. Kamholz has been employed as a teacher's aide for the past 14 years at Winchester Elementary School in West Seneca, New York. Her annual income is approximately \$22,000. Prior to gaining this employment, Sandra was a homemaker. She has a deep and abiding respect for her husband. Together, they have built a modest, happy and fulfilling life. In her letter to the Court, Sandy shares that:

“...His mere presence provides me with comfort and security....There is no room in Mark's heart for anger or hate. He believes in the basic goodness of people....”

Mark and Sandra have two sons. Jeremy is 26-years-old and Jordan is 25-years-old. During the boys' developmental years, Mark was actively involved in coaching their hockey and soccer teams. He has passed on to his sons an innovative spirit. As teenagers, with Mark's quiet supervision and support, Jeremy and Jordan began a lawn mowing, yard maintenance, snow removal

business that they have grown into a successful, thriving company. In his letter to the Court, Jordan reflects that :

“While my friend’s birthday gifts consisted of the hottest new toys, for my 13<sup>th</sup> birthday my dad bought me a lawn mower. It might sound dumb but that lawn mower gave me the entrepreneurial bug. Later, I would convince him that for my 16<sup>th</sup> birthday, a \$3,000 John Deere LX277 lawn tractor would not only make a great birthday present, it’ll be an investment in my future. ....That \$3,000 tractor was dad’s way of instilling a work ethic in us....”

Jeremy provides further insight into the positive influence Mark has had on his son’s character development when he reveals:

“In my teenage years I worked as a Buffalo News paperboy. This was my first job where I was able to learn about how to make a schedule, build relationships with customers, provide a service, collect payments, and work hard. For most people the weekend is a time of relaxation, sleep in, recuperate from the week, etc. This was untrue for my dad. He would be up nice and early to help me deliver the morning newspaper. It’s not that I had a big route, because it was not, but that it was one way my dad would spend time with me and helped me out by using the car rather than my bicycle or braving the snow and cold. I will never forget those small tokens of generosity and the times we had.”

Mark’s and Sandy’s sons resided with them until December 2012. They continue to live in close proximity to their parents and have frequent contact with them, minimally three to four times each week. They are an extremely close knit, loving and supportive family who enjoy being together.

Jeremy, Mark’s oldest son, recently became engaged. He and his fiancée are waiting for this matter to be settled before continuing with their marriage plans. It is important to them, as a family, that Mark be able to fully participate in the beginning of their new life together.

Mark has had two battles with cancer. In approximately 1995 he was diagnosed with prostate cancer and subsequently underwent a radical prostatectomy for removal of the prostate and nearby tissues. He has not had a recurrence of this cancer. In 2010 Mark had a bout of nonmelanoma skin cancer which was attended to by his dermatologist. Thus far, he has not had any recurrences of skin cancer.

Mark and Sandra have lived in their current residence for 25 years. They are members of Ebenezer United Church of Christ in West Seneca. The Kamholzes have an unassuming lifestyle. For a person who has carried the title of Environmental Manager with the same company for over 35 years, Mark's income is, as noted above, modest at \$75,000 per year. Nonetheless, his engrained work ethic and sense of loyalty does not allow him to believe he is entitled to or should be paid more. In 1978, he purchased a piece of land in Ashford Hollow in Cattaraugus County for \$14,000; this land was purchased from his relatives and Mark made the payments on the land over time. His cousin (he purchased the property from her parents) shares in a letter appended to this memo, that he never missed a payment, hand delivered the payments to her elderly parents (always staying for a visit), and always welcomed their family to the property. Mark and Sandy have an older model trailer on this land and use it recreationally in the spring, summer and early fall. In 2006, Mark and Sandy were able to purchase a home in Nevada as part of their retirement plans (he is 66-years-old and she is 60-years-old); that would not have been possible without an inheritance Mark received after his mother died. The Kamholzes have long held a financial model of fiscal conservancy. They are humble people who have planned appropriately and industriously for the future.

Mark's family is deeply saddened and shocked by his conviction on multiple environmental counts for a number of reasons, most importantly because they are keenly aware of his high ethical

and moral standards. They know Mark to be a man of integrity and good character. Jordan and Jeremy are passionate and intelligent young men, who are frankly wounded by the besmirching they feel their father endured as a result of the government's assertions at trial. They feel strongly that some of the "evidence" and/or statements at trial were appalling, disingenuous, deliberately misleading, unnecessarily snarly and insulting. While neither of them assert that their father is a perfect man, they both are personally aware of the many improvements and changes Mark was instrumental in making and/or contributing to in hardware and operational procedures at Tonawanda Coke that have made it a cleaner operation than it has ever been. They describe their father as a caring, methodical, dedicated and trustworthy man who is ethical, fair and honest. The Kamholzes have lived with this prosecution every day for close to five years. It has been an albatross around their necks and significantly altered the manner in which this decent, hard-working, law-abiding family has been living. Jeremy and Jordan Kamholz, along with their mother, are hopeful that the Court will recognize this while discerning their father's basic goodness and integrity, and use it as a compass in imposing sentence.

#### **IV. CHARACTER REFERENCE LETTERS<sup>3</sup>**

Mark's family, friends and co-workers have provided letters of support on his behalf for the Court's review and consideration. Each writer is well aware of Mark's conviction. A consistent

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<sup>3</sup>The discussion of character reference letters is broken down into three subject categories. The first category concerns letters from family members. In alphabetical order, by last name, those letters are annexed as **Exhibit A**. The next category of letters are from co-workers and members of the coking industry. Those letters are annexed, again in alphabetical order by last name, as **Exhibit B**. The third category of letters are from friends and acquaintances of Mr. Kamholz. Those letters in alphabetical order by last name are annexed as **Exhibit C**.

theme is the high regard and respect with which he is held. We respectfully request that the Court give substantial weight to the contents of these letters, particularly the strong message they convey regarding Mark's character.

**A. Family Members**

**Sandra Kamholz, wife**

"...It was painful for all of us (Mark, myself and our two sons who were in the court room every day) to listen to the comments and innuendo the Government made about Mark. Anyone who knows Mark knows those insinuations, misrepresentations and derogatory remarks could not have been further from the truth...Mark is very easy going and good natured...his mere presence provides me with comfort and security...There is no room in Mark's heart for anger or hate..."

**Jeremy Kamholz, son**

"...My father is the type of person who would give the world and ask nothing in return, but to see you smile and be happy...My father instilled values in me such as to be hardworking, to never give up, to take responsibility for my actions, to be a good citizen of the community, and a good sportsman...We have stayed strong together even though at times it has been very difficult and stressful...Putting a man's career under a microscope is sure to find some imperfections. No one is perfect but the 30+ years that were in question, my father's career displayed a lot of hard work that showed he always performed to the best of his ability with integrity, and was not out to mislead the government."

**Jordan Kamholz, son**

"Mark Kamholz is an outdoorsman, avid hunter, husband of 30 years and a remarkable father. He is a man of integrity, values and military service...I am proud to have him as an example of strength and determination...my dad took his responsibility as environmental control manager seriously and worked diligently to reduce plant emissions...While Mark is no more perfect than the next person, he is a religious man who lives his life with the highest standards of morals and values."

**Suzanne A. Noel, sister-in-law**

“...As a cancer survivor, I can look back with amazement at how my brother-in-law stood as a rock in my life as well. When speaking to cancer survivors at the Relay for Life, it brings tears to my eyes when to my surprise my brother-in-law showed up to support me and cheer me on....Mark has always given more than he has taken, in all he does....”

**Carol Sheriff, cousin**

“...My younger brother was hit and killed by a drunk driver at the age of 19. I had already moved away, and when I went home for his funeral my parents told me that Mark had been most helpful and supportive of them throughout the period of time they were waiting for my brother’s body to be returned home, and the planning of the funeral...My mother told me often how grateful she was to have Mark as her nephew, and how fortunate she was that he was so interested in her well-being....”

**Robert Banas, relative**

“...Through the years I have known Mark to be a quiet, well mannered, hard-working man whose life centers around his family....”

**Henry R. Banas, relative**

“...Mark was always there to care for his mother and mother-in-law in their later years. He provided them with any type of assistance that they needed at any time. Mark has always seemed to be a quiet and reserved person...I am proud to know him...”

**B. Co-workers/Members of Industry**

**Patrick Cahill, co-worker and a key Government witness at trial**

“...He would do anything for anybody. Over the years, he has earned the respect of his coworkers and friends...I wish that I could have half of the respect that Mark has....It never mattered what time of day or night, Mark would be there to help. He is a guy who’s on call 24-seven....I wish you could spend just a little time with Mark at work. You would see what he deals with every day.”

**Marc Schneckenberger, Executive Director of Environmental Compliance, Inc. with over 35 years industrial and environmental compliance experience**

“...I have been working directly with Mr. Kamholz in his position as Environmental Manager of Tonawanda Coke Corporation (TCC) since 2001. I have worked very closely and frequently (134 meetings) with Mr. Kamholz since 2001 in an effort to keep TCC operating in compliance with the myriad of extensive, complex, ever changing (dynamic) and sometimes conflicting environmental regulations...I find Mr. Kamholz to be a very honorable and reputable man. In all cases I have found him to work closely and diligently with DEC (lead agency) personnel to achieve environmental compliance...I find that Mr. Kamholz has worked diligently over the years to accomplish all that has been asked of him by the agencies (DEC and EPA)...I have found his patience admirable and his principle uncompromised...” Anyone that knows Mr. Kamholz fully understands he is a man of principle and integrity and holds his family in the highest regard....”

**Robert Kolvek, Vice President of Operations and 26-year employee of Tonawanda Coke**

“I meet Mark in the first couple days of starting with the company and I can still remember the first day he was very aggressive in explaining how important the environmental procedures and what was expected of me and every other supervisor to the letter of the law no matter what the situation. Mark was always very concerned in the fact that everything was always followed and always with in the environmental regulations that was expected of the company. Mark always had the same approach to every problem, it was by the book and always by the applicable rules....”

**Charles Lauricella, co-worker**

“...Based on his composure and behavior during the investigation and the trial, I think he demonstrated a dignity and honesty that is representative of his behavior for as long as I have known him...I would describe Mark as calm, rational, hardworking, friendly, intelligent and honest. He is a good man.”

**David Ailor, Executive Vice President, Regulatory Affairs for National Oilseed Processors Association, highly knowledgeable E.P.A. regulations and standards, including the Clean Air Act, Clean Water Act and Resource Conservation and Recovery Act**

“...I have known Mark for nearly 25 years and I highly regard his knowledge, expertise and experience insofar as environmental issues facing the metallurgical coke industry...His in-depth knowledge of operational and environmental issues facing the industry, together with professional integrity, leadership skills,

forthrightness, conscientiousness, personableness, honesty, and attention to detail, made him an invaluable resource to me...”

**Linda Baker, co-worker**

“...As a co-worker of Mark’s I have never known him to conduct himself in a negative manner. He always has a smile on his face and a friendly hello whenever you see him. He will always go the extra mile to answer any questions or help you with any problem that you may have. He is a professional, detailed oriented, dedicated employee...he is by no means a danger to society.

**Bruce A. Steiner, President, American Coke and Coal Chemicals Institute (ACCCI) with over 40 years’ experience with environmental regulations and compliance issues**

“...I have known Mark for over 20 years....I have observed him to have high degree of professional and personal integrity and character; to be cooperative, reliable, honest and forthright; to be devoted to his responsibilities; and to be conscientious about his intentions to comply with environmental regulatory requirements.”

**JoAnn Milsom, co-worker**

“...I have known Mark for approximately fifteen years. Mark is one of the most conscientious, pleasant, forthright people I know. I don’t believe I have ever seen him without a smile on his face....”

**Mark R. Kibler, President of Guardian Environmental Associates, Inc and a 20-year independent EPA Method 303 inspector at the Tonawanda Coke Plant**

“...On the occasions that a daily inspection found a high number of leaks, Mr. Kamholz addressed the deficient area by the next day....I believe that Tonawanda Coke and Mr. Kamholz made every effort to comply with 303 regulations. In the almost 20 years we have been doing the inspections, I cannot remember any violations of the EPA 303 limits....”

**John F. McNamara, retired engineer from Tonawanda Coke Company and a World War II vet**

“....I highly respect Mark’s capabilities and contributions and rate his as one of the top coke plant chemists in the United States. In working with Mark, I found him highly intelligent, with an unselfish attitude, willingness to help and commendable work ethic....”

**Daniel Heukrath, co-worker and another key Government witness at trial**

“...I felt he did as much as he could to solve emission problems and help remain in compliance with regulations....He would not hesitate to help you if you had a problem....Mark cares about the environment on many levels. He came to my office saying he had something to show me. He took me down to the river and showed me a peregrine falcon which had been making a nest an on old crane on the river bank. Being very rare in this area, he was concerned about the birds being disturbed. Work in the vicinity of the nest was limited to protect the birds...”

**James Matteson, co-worker**

“...In the time that I have been at Tonawanda Coke (7 years) and acquainted with Mark, I do not recall him having allowed any unethical laboratory practices...I believe he is of sound character and a trusted colleague at Tonawanda Coke...”

**Allen C. Dittenhoefer, Ph.D Meteorologist and Senior Vice President of Enviroplan Consulting and the principal air pollution consultant to the American Coke and Coal Chemicals Institute**

“...Mr. Kamholz has regularly attended these meetings and is highly regarded within the industry for his technical knowledge of industry operations and environmental compliance requirements. He is considered an industry leader on these issues....There were even instances where Mr. Kamholz encouraged and recommended the use of air pollutant emission estimates that were considered to be conservative (i.e., emission estimates, such as those for coke quenching operations, that tended to overstate the true emissions in order to be overly protective of potential local community health impacts). The emission reports that I prepared for the Tonawanda and Erie Coke plants were carefully reviewed, and approved, by the U.S. EPA and the respective state regulatory agencies....I can confidently state that Mr. Kamholz stands out as a man who has consistently displayed technical competence, integrity and concern for the environment.

**Michael K. Durkin, Chief Financial Officer for Tonawanda Coke**

“...I have found Mark to be diligent, accountable and forthright in the performance of his duties...”

**Bruce Schlager, Laboratory Director at Tonawanda Coke**

“...I have known and worked closely with Mark for over 29 years...When I began working at this facility, Mark was responsible for my training, and has always stressed the importance of truthfully representing ourselves; to have reliable data, integrity, and to accurately report any situation occurring at this facility. At times when a situation would occur that would have an impact environmentally, Mark has always instructed me to err on the side of safety and caution, to quickly prevent any further occurrence, and to verify and report any situation we are responsible for...I strongly believe Mark to be an ethical and honest person, and have never known him to lie or misrepresent the truth...”

**C. Friends**

**Charmaine L. Then, friend**

“...Mark has been a role model to his sons Jeremy and Jordan and a devoted husband to Sandra...He is kind, patient, honorable, compassionate and humble....My respect for him has never wavered.”

**Phillip Sparacino, friend**

“...Mark is a straight shooter and it does not take long to realize the dedication, love and loyalty Mark has for his wife and children...It is not difficult for one to detect the sincerity and genuineness with which he approaches all his projects, plans and goals. Mark epitomizes all that is good in helping those less fortunate or in need...one only need spend some time with Mark to understand his true core values.”

**Jeffrey L. Haxton, friend**

“...Mr. Kamholz has been a great influence on me and many others around me. He has always been very caring and compassionate especially with my mother. My mother was diagnosed with an aggressive form of Multiple Sclerosis 25 years ago and has been in assisted living and a nursing home for the past 10 years. Mr.

Kamholz always asks about her, lets me know he is thinking about her and wishes her the best. Mr. Kamholz was always helpful in any transportation I would need for hockey or any other event, since rides were difficult to obtain during my teenage years due to our situation...”

**Mary Grace Lichtenberger, friend**

“...Mark Kamholz has always and will always be a role model for myself. Mark is a mentor, an example of a man who was able to balance work and family, and maintain a valid moral compass...”

**Mary Ann Werner, friend**

“...The boy’s outstanding character was instilled by their dad. Mark was always involved in their activities in school as well as helping them get started in their business. You could always see Mark out with the boys helping whenever needed...”

**James and Maureen Duffey, friends**

“...We hired them (Mark’s sons) because of the quality of the work they do and because of the honesty and integrity that has been instilled in them through Mark and his wife, Sandy...”

**James F. Driscoll, friend**

“...Over the thirty plus years I have known Mark, I have come to realize he is someone we can all count on....Mark spent countless hours involved with the boys practices, games and tournaments, always thinking of his family first...”

**Sandra Szczepanski, waitress at a restaurant Mark frequents**

“...Even when I goof up his order (rarely) he’s as calm as could be and just waits patiently....I wish you could know him as I do. He’s a kind, loving and considerate man....”

**Thomas Cizdziel, friend**

“...Mark is a friendly and kind person, he is an ideal neighbor...He has taken care of our house when we have gone away on vacation. Mark and his sons have voluntarily helped me dig out after snow storms...Mark observed my father up on a ladder cleaning the gutters. Mark came over, concerned for my father’s safety, and completed the job for him....”

**Paul Montante, friend**

“...Our conversations about sports, politics and life have helped me to mold my opinions and perspectives...Mr. Kamholz will always hear what I have to say and take it into account...”

**Christopher D. Koehler, friend**

“...The motto of the Border Patrol is “Honor First.” After hearing this for the first time at the academy I knew the meaning of the phrase before my instructor even attempted to explain it because of the way Mr. Kamholz raised his sons and coached me....I am truly thankful for what he has shown me in my life and I look forward to continuing to learn from him...”

**V. ACCEPTANCE OF RESPONSIBILITY**

Mark has accepted full responsibility for the conditions that led to his conviction. He has provided a thorough and detailed offense statement to the probation officer, which has been appended to the revised PSR.<sup>4</sup> Despite making the offer on several occasions, the assigned Probation Officer has opted to not conduct a follow up interview with Mr. Kamholz regarding this statement. The decision to not interview Mr. Kamholz regarding his offense statement represents a change in

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<sup>4</sup>The defendant’s offense statement is dated August 5, 2013. It references a letter dated June 10, 1977, and a schematic which is associated with the letter, as part of Mr. Kamholz’s discussion of his knowledge of the PRV. Although provided to the Probation Office with the offense statement, the letter and schematic are not appended to the PSR with the offense statement. Copies of both the letter and schematic are annexed as **Exhibit D**.

course on the part of the Probation Office. In the original draft of the PSR, prepared May 28, 2013, at ¶56, it was provided that: “Counsel asserted that a written statement would be submitted as part of the record, once their decision was made, as well as an additional interview with the defendant to be included in the record prior to sentencing for the Court’s perusal.” [Underlining added.]

The legal authority which permits a defendant who elects to proceed to trial to nonetheless receive a downward adjustment for acceptance of responsibility pursuant to *Guidelines* §3E1.1 is set forth in Mr. Kamholz’s separate filing setting out his objections to the PSR and requests for downward departures or adjustments. The details of that argument will not be repeated here; however, controlling case precedent does recognize that a defendant who proceeds to trial and relies upon a defense of entrapment, including entrapment by estoppel, is not foreclosed from receiving the benefit of a downward adjustment for acceptance.

Mr. Kamholz’s Offense Statement, dated August 5, 2013, includes the following categorical acknowledgment that he shoulders responsibility for the offenses of conviction:

- “As Manager of Environmental Control at Tonawanda Coke, I accept responsibility for the conditions I was found guilty of at trial.” Offense Statement, appended to PSR, at 1.
- “As I reflect on this case, I see numerous instances where I must shoulder responsibility for not being a better communicator. As the Environmental Manager I could have done better.” *Id.*
- With respect to his interactions regarding the quench towers with retired NYSDEC Inspector Gary Foersch, Mark observes that “[h]ad we communicated better, Tonawanda Coke would have put baffles in place in tower #2.” *Id.*
- In similar fashion, with respect to the PRV, Mr. Kamholz acknowledges that he “should have communicated with Gary Foersch when I first discovered in 2008 that the releases were too frequent to justify an exemption.” *Id.*

- Regarding his conviction for obstruction of justice, he states: “I deeply regret my comments to Pat Cahill in April 2009 forming the basis for the obstruction charge (Indictment Count 16). While not made with any intent to have him, or anyone else, manipulate the PRV, I should have taken greater care before verbalizing my thought that it would be better if the PRV did not release during the April 2009 inspection by the EPA. . . . But I do take responsibility for what I said.” *Id.* at 1-2.
- With respect to the RCRA convictions, Mr. Kamholz again accepts responsibility for his convictions on these counts as follows: “As the Environmental Manager, and now knowing these are general intent crimes, I acknowledge that I was aware of what was done with the coke breeze, the company’s coal tar sludge, and the Barrett Tank sludge, and therefore accept responsibility for that conduct.” *Id.* at 2.

Mark has never denied the factual basis for this prosecution. He proceeded to trial in reliance upon an entrapment by estoppel defense which found ample support in the trial evidence. He believed that because he had carried out his duties and responsibilities for several decades under the watchful eye of the New York State Department of Environmental Conservation (NYSDEC), and had regular and routine contact with the inspector(s), a jury of twelve of his peers would find in favor of this defense. He believed the jury would agree that the conditions at the plant forming the basis for the counts set forth in the Indictment were either known to or at the very least not concealed from the NYSDEC. The jury did not make this finding. Mark accepts their verdict. His offense statement confirms this is the case. In this circumstance, where the underlying facts were not disputed at trial and a viable entrapment by estoppel defense was mounted, the fact Mr. Kamholz opted to proceed to trial does not constitute an automatic disqualifier to his receipt of a downward adjustment for acceptance of responsibility under the *Guidelines*.

Mark is an avid outdoorsman, and a conservative and diligent follower of environmental laws and procedures. He has a strong respect for the role and responsibilities of Environmental

Compliance Managers, as well as the NYSDEC and the Environmental Protection Agency (EPA) in implementing, monitoring, and ensuring compliance with environmental standards, as is demonstrated through many of the letters of support written on Mark's behalf from industry consultants. He has a long and distinguished history of being a defender and enforcer of environmental regulations at Tonawanda Coke. He deeply regrets and is saddened by any comments or actions on his part that may have contributed to not only his conviction, but the conviction of Tonawanda Coke. His eight page statement, appended to the PSR, regarding the conditions that led to these convictions, provides an explanation for how and/or why they existed. His explanation does not negate his acceptance of responsibility, nor does it diminish his remorse.

#### **VI. SECTION 3553(a)(1) FACTORS**

Giving appropriate consideration to the factors set forth in 18 U.S.C. 3553(a), and applying these factors consistent with the holding in *United States v Booker*, 543 U.S. 220 (2005), and its progeny, a sentence of imprisonment is not required as a specific deterrent, to protect the public, nor to punish the defendant based on his specific actions and/or knowledge with respect to the offenses of conviction.

##### **A. Section 3553(a)(1) The nature and circumstances of the offense and the history and characteristics of the defendant**

The character reference letters summarized above, in addition to providing a meaningful composite of his life, convey a clear and convincing sense that Mark Kamholz truly is a person who exemplifies the phrase, "salt of the earth." He is an earnest, kind, honest man whose life completely

revolves around his family; he has few, if any outside interests that are not directly related to his family life. He has been a positive contributing member of society his whole life, quietly serving and taking care of others. Mark has never relied on anyone else to take care of him or his family and has taught his sons to behave similarly. He has always conducted himself in a dignified, law abiding manner. Anyone of us would be happy to have him as our neighbor.

The true measure of a person's character is most evident in how others are treated when no one else is looking; what is done instinctually rather than with aforethought. Mark's life is replete with examples of exemplary behavior. He is kind to everyone, not just those who can provide him with some sort of reward or advancement. Letters written on his behalf support this – from his co-workers who find him respectfully available to them with a smile on his face all the time, to the waitress at a nearby restaurant who consistently finds Mark to be a kind, gentle, patient soul, to the high student whose mom is too sick to take him to practices or other events for whom Mark quietly steps forward to ensure the kid gets to be a kid, to the elderly neighbor for whom Mark faithfully cleans gutters without being asked simply because it is the right thing to do, to his wife, whom he deeply loves, filling her car up with gasoline regularly so that she does not have to perform this task herself. Mark is a caretaker, and he does so without expectation of anything in return or fanfare. This is who Mark Kamholz is; he does well by doing good.

Mark has an impressive work ethic. Throughout his life he has worked diligently and honestly in carrying out his duties at Tonawanda Coke, as is well represented by the letters of support referenced above. He is deeply respected, not only within the Tonawanda Coke community, but also within the local and national community of professionals who have dedicated their careers to environmental compliance and have a firm grasp on the nuances of the plethora of sometimes

conflicting national and state regulations. Individuals who have dealt with Mark for 10, 15 and 20 years, whose only agenda was and is to assist manufacturing plants in their compliance with regulations, consistently refer to Mark as an industry leader who is ethical, honest, dedicated and cares deeply about the environment and all creatures (people, birds, deer) who inhabit the community.

Mark does not minimize the seriousness of the allegations underlying his 15 counts of conviction. Yet, there are aspects of this case that make it unique and merit sensitive consideration. The trial evidence supports the conclusion Mark never had a specific intent to violate the law. There was nothing maleficent in Mark's actions underlying the counts of conviction save for his single, spontaneous remark regarding the operation of the PRV valve to byproducts supervisor Patrick Cahill in April 2009. Mr. Cahill, a Government witness and the person Mark was found to have encouraged to manipulate the PRV system, has written a letter to the Court indicating that he wished he had half the respect Mark enjoys at Tonawanda Coke. His trial testimony regarding his interpretation of Mark's comments during the pre-inspection walk through of the by-products area notwithstanding, Mr. Cahill has written a compelling letter about the strong character of his co-worker, Mark Kamholz. This letter supports the conclusion that Mark's behavior during the walk through was an aberration; an isolated lapse in judgment for which Mark has accepted full responsibility.

Further complicating this conviction is the undeniable reality that the NYSDEC regularly inspected the plant; nothing was hidden from them. When Tonawanda Coke was found to be deficient or in violation of a regulation, the cited deficiency or violation was promptly remediated

to the satisfaction of the NYSDEC. This represents a crucial distinction between this prosecution and the vast majority of other prosecutions of environmental harm cases.

**B. Section 3553(a)(2)(A) The need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense**

Letters of support written on Mark's behalf establish that he is a conscientious man who would never willfully break the law intentionally, ignore an environmental regulation or deceive the DEC/EPA inspectors. Two of the Government's main witnesses against Mark (Mr. Cahill and Mr. Heukrath) recount in their character reference letters his diligence, competence and trustworthiness. Industry leaders in the environmental regulatory field write of their reliance on Mark and their witness of his principled, honest, diligent approach to carrying out the tenants and responsibilities of his job. That being said, we acknowledge and accept the jury's adverse findings, applying the knowing standard of culpability applicable to the prosecution of federal environmental offenses.<sup>5</sup>

Punishment should fit the offender, not just the offense. In this case, the *United States Sentencing Guidelines* provide little insight on how to consider a case such as this. Instead, the *Guidelines*, based solely on offense characteristics, provide for significant, harsh punishment. The only offender characteristic the *Guidelines* consider is acceptance of responsibility, and even that modest reduction has been denied by the U.S. Probation Office based on the view that, by proceeding to trial, Mark is not eligible for even this level of mitigation. Obviously, we disagree with this

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<sup>5</sup>In accordance with the *mens rea* standard applicable to federal environmental criminal charges, the trial jury was only required to find that Mr. Kamholz was aware of the proscribed conduct underlying the counts set forth in the indictment. *See United States v. Laughlin*, 10 F.3d 961 (2d Cir. 1993).

perspective and believe that Mark has accepted responsibility for the conditions that led to his convictions.

Based on the entrapment by estoppel defense presented at trial, the operative facts were never in dispute and were not contested. Application Notes 2, 4 and 5 to U.S.S.G. 3E1.1 provide further insight and guidance. *“Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt....”* (App note 2) *Conduct resulting in an enhancement under U.S.S.G. 3C1.1 (Obstructing or Impeding Justice) ordinarily indicates that a defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both 3C1.1 and 3E1.1 apply.”* (App note 4) Finally, application note 5 addresses the reality that there are a multitude of considerations that cannot be foreseen and therefore, *“The sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.”*

In considering what is “just punishment” under the peculiar facts of this case, we ask the Court to impose a probationary sentence. Mark is and always has been a law abiding citizen. He did not engage in malicious, deceitful, manipulative conduct in reference to the instant set of offenses. From an industry perspective, person after person describes him as an honest man of integrity, who is reliable and ethical. Given the unique set of circumstances surrounding this case,

regardless of what the mathematically-based *Guidelines* indicate, this is not a defendant who deserves harsh treatment or incarceration.

**C. Section 3553(a)(2)(B) To afford adequate deterrence to criminal conduct and (2)(C) to protect the public from further crimes of the defendant**

Given the trial evidence, including in particular that offered in support of a finding of entrapment by estoppel, coupled with the consistent themes of integrity and service to others reflected in the sentencing letters that accompany this submission, it is not just probable, but rather a certainty, that this man with no prior record will never put himself or his family in a similar position.

Letter after letter from both industry officials and co-workers attest to Mark's strong concern for the environment and adherence to regulations and procedures. This is a consideration that substantially differentiates Mark from the more common environmental harm cases wherein the defendant acted with deliberation, and usually planned indifference. According to both industry consultants and his peers, Mark is highly regarded and respected for his technical knowledge, as well as his adherence to compliance practices.

Further, as indicated in Tonawanda Coke's sentencing submission, the company has worked diligently and robustly to rectify the conditions and practices that resulted in this Indictment and the many counts of conviction.

**D. Section 3553(a)(3) The kinds of sentences available**

According to the U.S. Probation Office (not provided in Mark's report presentence report, however, as gleaned from other presentence reports), the annual cost of incarcerating individuals is approximately \$28,800. The annual cost of supervising an individual in the community is \$3,400. Although even the expending of \$3,400 annually to supervise an individual of Mark's character and integrity might be considered an unnecessary expenditure, it is far preferable to the cost of incarcerating him. Further, there is nothing in Mark's background, behavior or propensities to indicate incarceration is necessary. Mark is a law abiding, conscientious, straightforward, simple and humble man who is an asset to the community. Given his personal history, as well as the circumstances of this case, it is our belief that nothing more severe than a sentence of probation is needed in fashioning a sentence which is sufficient but not greater than necessary to achieve the ends of justice.

**E. Section 3553(a)(6) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct**

As mentioned above, there are unique circumstances surrounding this case, coupled with a compelling demonstration of Mark Kamholz's strong character, that deserve special merit. Unlike the more typical criminal case, there was no specific intent to do harm. All that needed to be shown was that he had knowledge of the proscribed activity. There was no personal benefit to Mark; he did not receive a bonus, raise or promotion for supposedly saving Tonawanda Coke money by cutting corners. In fact, he has consistently (long before this prosecution began) been a stickler for compliance. We accept the jury's verdict; however, environmental criminal cases entail varying

degrees of culpability on the part of the defendant, particularly given the requirement that *mens rea* only be proven to a level of general intent.

Annexed as **Exhibit E** is a table outlining information for fiscal years 2011-2013 contained in an EPA database captioned *Summary of Criminal Prosecutions*. It is understood that this database attempts to capture the results of federal environmental criminal prosecutions nationwide. The table annexed as **Exhibit E** provides an outline of this database which is restricted to the prosecution of individuals (as compared to corporate entities) only.

As a whole, the annexed table demonstrates that sentences for defendants convicted of environmental crimes are seldom as severe as the range reflected in the PSR's *Guidelines* calculation at ¶92, *i.e.*, 78 to 97 months. In fact, more than 75% of the identified prosecutions of individuals resulted in a sentence of one year in jail or less (including probation). The annexed table reflects only six instances during fiscal years 2011-2013 when a sentence of more than five years was imposed on a defendant convicted of an environmental crime.<sup>6</sup>

The three most severe sentences over this three year period involved the following conduct. A defendant named Gunselman was convicted of having engaged in a fraudulent scheme to falsely report the production of bio-diesel fuel on 51 separate occasions, which resulted in payments to the defendant totaling more than \$41 million. A sentence of 15½ years incarceration was imposed. **Exhibit E**, Table at 48, line 95. The next most severe sentence shown in the table was imposed upon a defendant named Hailey, and had reference to the issuance of more than 35 million renewable

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<sup>6</sup>This statement is not intended to suggest that a sentence of five years incarceration is appropriate in this case. As noted, based upon the application of all §3553(a) factors, a probationary sentence is warranted in this instance. The point being made is that a sentence within the *Guidelines* range reflected in the PSR (between 6½ and 8 years) would be extraordinary.

identification numbers, each of which falsely represented the production of renewable fuel by oil companies and brokers. Given the enormity of this scheme, the defendant was sentenced to 12½ years incarceration. (*Id.* at 49, line 198). The third most severe sentence shown on the annexed table concerned a defendant named O'Malley, who was sentenced to ten years imprisonment for having engaged in the unlawful abatement of asbestos in a five story building, and who also pursued this unlawful abatement using untrained workers. (*Id.* at 28, line 113).<sup>7</sup>

While it has not been possible to identify a federal environmental prosecution with facts nearly identical to the prosecution of Tonawanda Coke and Mr. Kamholz, the prosecution of three defendants named Meacham, Davis, and Stewart is instructive. A sentence of one year probation was imposed on each defendant for having allowed sulphur from hydrogen sulfide and sulphur dioxide, which placed the public in danger of death and serious injury, to have been emitted without a permit over a period of years. (*Id.* at 23-24, lines 93, 96, 97). In another case, a defendant named Anglin, a former municipal superintendent of a wastewater treatment facility, was sentenced to a term of two years probation for having negligently failed between 1983 and 2009 to properly monitor and calculate discharge flow rates at the city-owned facility. (*Id.* at 45, line 180).

The attached table discloses a substantial number of cases where defendants were sentenced for having issued false vehicle emission certificates, which enhanced the risk that excessive amounts of benzene would be emitted into the atmosphere. The most egregious example involved a defendant named Waked, who was sentenced to a three year probationary term for having issued 4,000 false vehicle emission certificates. (*Id.* at 11, line 45). Another defendant, named Hinton, was

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<sup>7</sup>Research of Mr. O'Malley's background has revealed that he had prior convictions for obstructing justice and solicitation of murder for hire. While his environmental prosecution was pending, he was charged with both driving under the influence and domestic battery.

sentenced to a period of six months home confinement for having issued 1,400 such false certificates. (*Id.* at 2, line 8). A defendant named Anwar was sentenced to a period of four months imprisonment based upon a finding he issued approximately 1,000 false vehicle emission reports over a 17-month period. (*Id.* at 40, line 162). And, two defendants named Kinard and Haney were sentenced to six month jail terms for being involved in the issuance of 1,280 false vehicle emission reports. (*Id.* at 42-43, lines 171, 172).

The accompanying table also demonstrates that defendants involved in far more egregious conduct than Mr. Kamholz received very lenient sentences. For example, four defendants named Dunn, Ohoff, Copeland, and Allen were sentenced to periods of incarceration of between three days and three weeks for having participated in a ten year scheme to improperly abate asbestos in homes, schools, and other buildings, which included the issuance of false laboratory data. (*Id.* at 14-15, lines 59-62). A defendant named Morris, who had released untreated sewage into a drainage ditch which then flowed into a lake for a period of ten months, and had also been responsible for issuing false sample reports, received a sentence of three months home confinement. (*Id.* at 48, lines 192). As well, a defendant named Riddle received a sentence of five years probation for having stored unpermitted chemicals over a period of 15 years in a building which had been exposed on three separate occasions to flood waters, giving rise to the inference these chemicals had thereby contaminated the water system. (*Id.* at 8, line 34).

In attempting to demonstrate the substantial risk of a disparate sentence in this case as compared to sentences imposed in other federal environmental criminal prosecutions nationwide, it is recognized that care must be taken to not unfairly minimize the seriousness of the conduct at issue. Any violation of federal law is a serious matter. The duration of the improper conduct, as

found by the trial jury, is no doubt an important consideration. The precise nature of the charged criminal conduct, however, is at least of the same or even greater importance. The sentencing submission prepared on behalf of co-defendant Tonawanda Coke Corporation includes specific references to proposed expert testimony and a completed expert analysis that collectively support the conclusion that, unlike the vast majority of federal environmental criminal prosecutions reflected in the table annexed as **Exhibit E**, the environmental harm in this case was *de minimus*. The absent baffles did not pose an environmental harm. Neither did the placement of coat tar, sludge, and coal tar sludge on the coal piles. The data from the NYSDEC's own air monitoring study show that the release of benzene from the PRV, either before or after the shutdown of the light oil system, was well within acceptable parameters. Mr. Kamholz specifically requests that he be permitted to incorporate by reference the statements in the Tonawanda Coke sentencing submission, and accompanying exhibits, as well as the Declaration of Rick W. Kennedy, Esq., dated September 13, 2013, on the subject of environmental harm.

### CONCLUSION

Mr. Kamholz does object to a number of the *Guidelines* calculations set forth in the PSR as reflected in his separate filing on this topic. He also requests that consideration be given to granting a downward adjustment for acceptance of responsibility, as well as departures concerning three environmental enhancements related to ongoing or repetitive emissions into the environment, discharges without a permit, and substantial cleanup expenditure. These requests notwithstanding, the calculation of Mr. Kamholz's offense level under the *Guidelines* is, against the factual backdrop

of this case, not a fair indicator of a sentence which would be sufficient, but not greater than necessary, to meet the goals of sentencing articulated in §3553 of the Federal Criminal Code.

Characterizing Mark L. Kamholz as a good person is an understatement. His commitment and devotion to family is exemplary. The respect and trust he has earned both among his fellow workers at Tonawanda Coke and within the coke industry generally is extraordinary. In all his walks of life, Mr. Kamholz is an example of a fine human being, someone who is a living testament to the movie “Pay It Forward.”

Without minimizing their seriousness, the offenses at issue represent general intent crimes. As compared to the egregiousness of federal environmental prosecutions nationwide, the offenses of conviction, while indicative of ongoing behavior, are characterized by violations which could have been made the subject of different remedial action, such as a notice of violation and entry into a consent order. The right of the Government to nonetheless proceed in the fashion it has chosen, treating these matters as criminal violations, is not to be questioned. Yet, the availability of this alternative remedy is a factor which warrants consideration in the sentencing context.

There is, as well, the defense mounted at trial, not contesting the underlying facts, but rather asserting that the matters at issue had been made known to the state regulators, or at the very least, not concealed over the period that these conditions existed. In addition, there is the matter of environmental harm, which seems to be presumed by the Government, but not shown by the evidence.

Weighing all of the appropriate sentencing factors, as outlined in §3553(a), this record provides a substantial basis for the imposition of a non-*Guidelines* sentence, requiring that Mr. Kamholz serve a period of probation subject to conditions the Court deems appropriate.

Dated: Buffalo, New York  
September 16, 2013.

/s/ Rodney O. Personius  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 16<sup>th</sup> day of September, 2013, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

AUSA Aaron Mango  
U.S. Attorney's Office  
Federal Centre  
138 Delaware Avenue  
Buffalo, NY 14202

Rocky Piagionne  
Senior Counsel  
United States Department of Justice  
Environmental Crimes Section  
601 D Street, N.W.  
Washington, DC 20004

And, I hereby certify that I have mailed by the United States Postal Service the document to the following non-CM/ECF participants:

USPO Susan Murray  
U.S. Probation Office  
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