

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

UNITED STATES OF AMERICA

-v-

10-CR-219-S

TONAWANDA COKE CORPORATION and
MARK L. KAMHOLZ

Defendants.

**GOVERNMENT'S RESPONSE TO DEFENDANT
MARK L. KAMHOLZ'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 response to the sentencing memorandum (hereinafter "Memorandum") filed by Defendant Mark L. Kamholz ("Defendant Kamholz") (Dkt. #238).

I. Defendant Kamholz's "Overview of the Trial Evidence" is Incomplete and Misleading

Defendant Kamholz begins his Memorandum with a discussion entitled "Overview of the Trial Evidence," which seeks to explain in more detail the 15 counts of conviction for Defendant Kamholz. A review of this section illustrates numerous factual misstatements and a failure to present the significant body of evidence presented at trial which established

that Defendant Kamholz had complete control over the environmental compliance activities at Defendant Tonawanda Coke Corporation (“Tonawanda Coke”) and acted knowingly in committing the 15 criminal offenses. Instead, Defendant Kamholz continues to assert arguments that were flatly rejected by the jury when they evaluated both defendants’ entrapment by estoppel defense, and in doing so, there is no basis for Defendant Kamholz to argue that he has now accepted responsibility for these offenses.

Regarding the issues of baffles in the quench towers, it is true as Defendant Kamholz points out that he had conversations with New York State Department of Environmental Conservation (“NYS-DEC”) Inspector Gary Foersch about the effectiveness of baffles as a pollution control device. *See* Dkt. #238, pp. 4-5. Notably however, Defendant Kamholz now ignores the trial testimony of Inspector Foersch that at no time did he tell Defendant Kamholz he could operate the tower without baffles and sometime after 1997, he observed a lack of baffles in Quench Tower #2, at which time he specifically told Defendant Kamholz that baffles were required. During an inspection the following year, Inspector Foersch testified that he asked Defendant Kamholz if baffles had been re-installed in the quench tower, to which Defendant Kamholz responded “yes.” We now know that Defendant Kamholz’s response was a lie, as it was clear that after the 1996/1997 correspondence with the NYS-DEC, baffles were not reinstalled in the quench tower and the tower was operated up until 2009 without baffles. The moment Defendant Kamholz chose to lie to Inspector Foersch regarding the re-installation of the baffles is one of those defining moments that provide the government with the basis to conclude that Defendant Kamholz must be held

fully accountable for the environmental travesty that occurred at Tonawanda Coke, and that a substantial guideline sentence of imprisonment is warranted.

With regard to the bleeder valve (also known as the pressure relief valve (“PRV”)), there is no basis in the trial testimony for Defendant Kamholz’s statement 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.” Dkt. #238, p. 5. Maybe that was Defendant Kamholz’s understanding of the bleeder valve, however, he chose not to testify and that information was not developed at trial. Rather, witness after witness testified to the regularity of releases from the bleeder valve, which were tied to the every 20 minute reversal of the heating flues in the coke oven battery. Moreover, Defendant Kamholz’s assertion that the PRV was “expressly referenced” in the 2003 Hazardous Air Pollutant (“HAP”) Emission Inventory submitted to NYS-DEC is simply untrue. There is no basis to conclude that the HAP’s reference to a leaking pressure relief valve on the coke oven gas line was sufficient to provide the operational details and location of the bleeder valve to the NYS-DEC.¹ The fact that Defendant Kamholz continues to argue that the HAP Inventory was sufficient notice to the NYS-DEC highlights that he has yet to accept the fact that it was his actions that were responsible for the longstanding operation of this unpermitted emission source.

With respect to the Resource Conservation and Recovery Act (RCRA) offenses of conviction, Defendant Kamholz attempts to either blame the prior owner of the site for the

¹ In addition, the government identified at trial that there was a PRV on the light oil scrubber that fits the description in the HAP report; and in its Sentencing Memorandum (Dkt. #216, pp. 10-11) the fact that a third source, a second bleeder valve was present on the coke over gas line, which was referred to by Tonawanda Coke employees as the water seal bleeder and was located in the vicinity of the boiler house.

hazardous waste stored on the ground around the Barrett Tanks, or blame the regulatory agencies for failing to stop the defendants' criminal conduct after having allegedly been provided notice of such conduct. *See* Dkt. #238, pp. 5-6. Defendant Kamholz significantly misconstrues the evidence presented during the trial as none of the historical RCRA inspection reports noted where the K087 waste was being mixed with the coal, and NYS-DEC RCRA Inspector Corbett testified at trial that in June of 2009, he was not told where Tonawanda Coke intended to mix the hazardous contents of the Barrett Tanks with the coal.

Defendant Kamholz concludes this initial section in his Memorandum by discussing the obstruction of justice charge he was convicted of, and how it was the result of a "single remark." *See* Dkt. #238, p. 7.² Certainly Pat Cahill acted in response to Defendant Kamholz's remark, but, when the entire context of the obstructive conduct is examined, it is apparent that Defendant Kamholz also acted with the singular purpose of obstructing the U.S. Environmental Protection Agency ("EPA") in identifying any unpermitted emission sources of coke oven gas at the facility. Prior to Defendant Kamholz's "single remark" to Mr. Cahill, Defendant Kamholz was aware of the benzene problem in the Tonawanda community and that substantial evidence had been developed that Tonawanda Coke was responsible for such elevated levels of benzene. Moreover, Defendant Kamholz knew that the EPA would be conducting an extensive inspection at Tonawanda Coke with a focus on the By-Products Department and its compliance with the Title V permit. Following Defendant Kamholz's "single remark" to Mr. Cahill, he told EPA officials during the

² The government also notes that Defendant Kamholz's attempt to argue the facts of the case as being inconsistent with his position regarding his objections to the PSR. In that document the defendant claims he did not argue the facts but admitted them and relied solely upon an entrapment defense.

opening conference of the inspection that there were no pressure relief valves at the facility, and provided a coke oven gas flow diagram which did not identify the bleeder valve. When asked about the bleeder valve during course of the inspection, Defendant Kamholz claimed to have no knowledge as to the how long the valve was in operation, and referred all inquiries about the valve to Mr. Cahill. Subsequent to the inspection, Defendant Kamholz told the NYS-DEC that the pressure setting for the bleeder valve had been raised, yet, the by-products logbooks do not bear this out. Finally, in response to a request for information, Defendant Kamholz provided additional details regarding the operation of the bleeder valve. Attached hereto as **Exhibit 1** is a copy of EPA's Request for Information sent to Defendant Kamholz on September 1, 2009, and attached hereto as **Exhibit 2** is a copy of Defendant Kamholz's response to the Request for Information. Importantly, Defendant Kamholz responded in his response that the PRV "opens very rarely" and that "emissions have not been reported because they are believed to be de minimus." *See* Exhibit 2, ¶ 20. Incidentally, Defendant Kamholz also noted in his response that he consulted "P. Cahill" in making his response regarding the PRV, yet at trial, Mr. Cahill testified that after receiving Kamholz's "single remark," he never spoke to Defendant Kamholz about the PRV again.³

Therefore, when the defendant's "single remark" is viewed in the context of all of the above-described conduct, there is no doubt that the defendant was intent on obstructing the EPA when he stated "we can't have that going off while they're here." Defendant Kamholz's comment to Mr. Cahill is another defining moment in this case; at that moment

³ Defendant Kamholz's response to EPA's Request for Information, as it relates to the pilot light on the battery flare stack, further illustrates Defendant Kamholz's lack of candor with the EPA. As the Court heard at trial, beginning in the mid-1990's, Defendant Kamholz was aware that the pilot light to the battery flare stack was inoperable, yet, failed to disclose this information to the EPA when asked. *See* Exhibit 2, ¶ 32.

the defendant had a choice, and by instructing Mr. Cahill in the manner he did, he acted with a criminal obstructive purpose worthy of a substantial punishment.

II. Defendant Kamholz has not Accepted Full Responsibility

In his Memorandum, Defendant Kamholz argues that a probationary sentence is warranted based on the fact that he has now accepted responsibility for the offenses of conviction. The government has fully responded to this argument in its response to Defendant Kamholz's objections to the PSR. However, simply stated here, Defendant Kamholz's Offense Statement is a self-serving document in which he never truly accepts responsibility for himself committing the crimes, rather, he rationalizes the crimes as some sort of miscommunication between him and others. This falls well short of acceptance of responsibility, and as such, a guideline sentence of incarceration is should be imposed by the Court.

III. A Guideline Sentence of Imprisonment is Warranted based on Prior Sentences of Other Defendants Convicted of Similar Offenses

To support his argument that a probationary sentence is appropriate, Defendant Kamholz discusses several other prior environmental criminal offenses, and attaches a table to his Memorandum listing almost 200 prior sentences in environmental. Certainly, this Court must make an individualized assessment of the § 3553(a) factors as applied to this case. Moreover, none of the cases cited by Defendant Kamholz involve convictions arising out of operations at a coke oven battery under similar facts to those present here, and therefore, any comparisons to other cases admittedly have limited value. However, since Defendant Kamholz is advocating for a sentence of probation, the government has

attempted to obtain a list of all prior Clean Air Act (CAA) and RCRA criminal cases that involved some imprisonment as part of the sentence for this Court's review. Attached hereto as **Exhibit 3** is a list of cases involving violations of the CAA that resulted in a sentence of imprisonment, with the non-asbestos violations presented first. Attached hereto as **Exhibit 4** is a list of cases involving RCRA violations that resulted in a sentence of imprisonment. Although direct comparisons are difficult to make, the convictions of the Atlantic States Cast Iron Pipe Company and several of its employees, provide somewhat analogous facts to the present case. In Atlantic States, the jury heard evidence of a corporate culture of environmental non-compliance and repeated obstruction of the regulatory agencies tasked with investigating environmental and worker safety violations. The defendants were convicted of numerous environmental offenses, including violations of their Title V permit by burning tires and hazardous waste paint in their furnace. Importantly, John Prisque, the plant manager for Atlantic States, was sentenced to 70 months imprisonment, and based on his control over the environmental matters at Atlantic States, is similarly situated to Defendant Kamholz in the present case. As such, based on a full application of the § 3553(a) factors in the present case, which includes the need to avoid unwanted sentencing disparities, Defendant Kamholz should be sentenced to a substantial term of imprisonment.

CONCLUSION

For the foregoing reasons, and for the reasons previously set out in the government's Sentencing Memorandum, the government respectfully recommends 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 30, 2013.

Respectfully submitted,

WILLIAM J. HOCHUL, JR.
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S/ AARON J. MANGO

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013, I electronically filed the foregoing GOVERNMENT'S RESPONSE TO DEFENDANT MARK L. KAMHOLZ'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

AARON J. MANGO