

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

UNITED STATES OF AMERICA

v.

TONAWANDA COKE CORPORATION

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Criminal No. 10-cr-219-WMS-HKS

**DEFENDANT TONAWANDA COKE CORPORATION’S
RESPONSE TO THE GOVERNMENT’S SENTENCING MEMORANDUM**

Defendant Tonawanda Coke Corporation (“Tonawanda Coke” or the “Company”), through undersigned counsel, hereby submits this Response to the Government’s Sentencing Memorandum, filed September 16, 2013 [Docket No. 216].

INTRODUCTION

Pursuant to its memorandum, the government recommends that the Court impose a sentence on Tonawanda Coke involving: (1) a total criminal penalty of \$57,141,699, including a criminal fine of \$44,347,517 and the funding of \$12,749,182 in community service projects; (2) an order requiring Tonawanda Coke to conduct a remedial investigation to assess the nature and extent of possible contamination of the coal field at the plant; (3) the submission of a corporate-wide environmental regulatory compliance program; and (4) a five year term of probation.

Rather than undertake a good faith analysis of the sentencing factors set forth in 18 U.S.C. §§ 3553 and 3572 and in the applicable United States Sentencing Guidelines (“U.S.S.G.” or “Sentencing Guidelines”) to propose a sentence for Tonawanda Coke that is sufficient, but not greater than necessary, the government has submitted a sentencing recommendation that is fundamentally flawed and flatly ignores the statutory and U.S.S.G. sentencing factors and far exceeds the bounds of reasonableness. Tonawanda Coke strongly urges the Court to reject the

government's extreme sentencing recommendation for the following reasons: First, the government repeatedly mischaracterizes the evidence presented at trial as well as other alleged and unproven conduct that it has deemed relevant to the Court's sentencing determination in a misguided effort to portray certain events as aggravating sentencing factors. Viewed as a whole, the government's repeated mischaracterizations of these events undermine the credibility of its entire sentencing analysis.

Second, the government's recommendation that the Court order Tonawanda Coke (as a condition of probation) to fund specific community service projects does not conform to the limitations promulgated by the Sentencing Guidelines with respect to the Court's authority to impose such a condition. The government's injection of what it characterizes as "victim impact statements" to justify community service payments is also inflammatory and improper under the controlling statutory standard and the Sentencing Guidelines. Moreover, the community service projects proposed by the government are not reasonably designed to repair harm caused by the Company's conduct, as is required under U.S.S.G. § 8B1.3, but are instead an attempt by the government to use this Court to address issues that are being properly adjudicated in civil litigation and administrative enforcement proceedings.

Third, the astronomical criminal penalty recommended by the government is premised upon a totally unreliable analysis of the Company's ability to pay. The numerous deficiencies that taint this analysis are such that Tonawanda Coke believes the Court will be compelled to dismiss consideration of this analysis in its entirety.

Fourth, the government has entirely ignored the very extensive parallel administrative and civil enforcement proceedings that have been prosecuted by the United States Environmental Protection Agency ("US EPA") and the New York State Department of Environmental

Conservation (“NYS DEC”) over the past four years. Tonawanda Coke’s actions in response to the proceedings filed by US EPA and NYS DEC during this time have produced significant changes in plant operations, have required the expenditure of more than \$11 million dollars by Tonawanda Coke, and have substantially vindicated many of the enforcement interests at issue in the criminal case. Tonawanda Coke has not undertaken any administrative or legal challenge to any issue raised by US EPA or NYS DEC. Instead, the Company has agreed to undertake the work necessary to address the concerns raised by US EPA and NYS DEC, and has maintained a strong, cooperative working relationship with the agencies.

Finally, the government’s request for an order requiring Tonawanda Coke to investigate the contamination of the coal field and, if necessary, to remediate that area, overlooks the fact that the Company has already undertaken such an investigation under the regulatory auspices of the NYS DEC, and determined that there is no meaningful contamination of the coal field.

Tonawanda Coke has stated repeatedly that it is prepared to accept full responsibility for its conduct, and the Company’s opposition to the government’s sentencing recommendation does not alter this acceptance of responsibility. Nevertheless, Tonawanda Coke is compelled to bring to the Court’s attention the factual misrepresentations and distortions, as well as the fundamental legal deficiencies that pervade the sentencing recommendation proposed by the government.

ARGUMENT

I. THE GOVERNMENT’S MISCHARACTERIZATIONS OF THE EVIDENCE DISTORT THE GOVERNMENT’S APPLICATION OF THE SENTENCING FACTORS PERTAINING TO TONAWANDA COKE

The government’s application of the sentencing factors under 18 U.S.C. §§ 3553(a) and 3572 to the Court’s sentencing determination includes repeated mischaracterizations of the evidence presented at trial and misleading assertions with respect to other conduct that the

government views as relevant to the Court's sentence. Viewed in the aggregate, these distortions of the evidence relied upon by the government in the application of the sentencing factors pertaining to Tonawanda Coke significantly discredit the government's entire sentencing recommendation to the Court.

A. Sentencing Factors Related to the Conduct Underlying the Offenses of Conviction

The government asserts that it views Tonawanda Coke's convictions with regard to the operation of the pressure relief valve ("PRV") on the coke oven gas line in the Byproducts Department as the most egregious of the Clean Air Act offenses because of the Company's "active steps to conceal the existence of the bleeder valve." *See* Gov't's Sentencing Memorandum at p. 9.¹ In support of this assertion, the government claims that the reference to a PRV in Table 4-1 on page 4-2 of the Hazardous Air Pollutant Emission Inventory ("Emission Inventory") provided by the Company to the NYS DEC in July 2003, and offered into evidence at trial, failed to disclose the presence of the PRV that is the subject of the Clean Air Act offenses in Counts 1 through 5 because the PRV reference in the Emission Inventory is unreliable and ambiguous. *See* Gov't's Sentencing Memorandum at pp. 10-11, and the related Exhibit 3. This argument is predicated on the government's newly developed proposition that the reference to the PRV contained in Table 4-1 of the Emissions Inventory may instead have been a reference to a different pressure release valve – the water seal bleeder valve – which was located further downstream on the coke oven gas line.

This new argument regarding the supposed unreliability of the reference to the PRV in Table 4-1 of the Emissions Inventory is plainly disingenuous. The reference to the PRV in the

¹ The government fails to address the truth that is most inconvenient for their argument, *i.e.*, that since at least the early 1980s, the PRV, although somewhat elevated, was situated in the Byproducts Department on the coke oven gas line in an open and obvious location that was immediately adjacent to the main east-west roadway in the plant. *See* Exhibit A.

Emissions Inventory appears in a section of the document entitled “Emissions From Byproduct Plant Equipment Components,” and the left-hand column heading in Table 4-1 reads “Byproducts Plant Area.” As the government is well aware, the water seal bleeder valve was not in the Byproducts Department, but was located to the east of the Boiler House approximately 1,100 feet away from the Byproducts Department. *See* Defendant’s Trial Exhibit HHHH with the locations of the PRV, the water bleeder valve and Light Oil Scrubber highlighted, attached as Exhibit B. Likewise, although the government further speculates that reference to the PRV in Table 4-1 of the Emissions Inventory may have related to the pressure release valve situated on top of the light oil scrubber column, the government simply ignores the fact that the reference to the PRV in Table 4-1 is in a section related to the coke oven gas line, and there is a separate section in the table that relates to the Light Oil System. The government declines to acknowledge the fair and reasonable meaning of the reference to the PRV in Table 4-1, *i.e.*, that the Company voluntarily notified the NYS DEC of the existence of the PRV that is the subject of Counts 1 through 5 in July 2003. Instead, the government incredulously suggests that the PRV reference in the Emissions Inventory relates to a valve that is 1/5 of a mile away from the Byproducts Department on the other side of the plant. This transparently misleading characterization of the reference to the PRV in the Emissions Inventory thoroughly discredits the government’s argument that Tonawanda Coke sought to conceal the existence of the PRV from government regulators.²

² Moreover, as the government clearly knows, Tonawanda Coke was not convicted of obstruction of justice based on statements made to Patrick Cahill regarding the PRV prior to the US EPA inspection in April 2009. Accordingly, Tonawanda Coke vigorously disputes the government’s argument that a more severe sentence is warranted for the Company because it “actively concealed” the existence of the PRV from government regulators.

The government also argues in favor of a substantial punishment for Tonawanda Coke's unpermitted operation of the PRV on the grounds that it emitted "approximately 172 tons of coke oven gas" per year. *See* Gov't's Sentencing Memorandum at p. 12, citing the trial testimony of US EPA employee Harish Patel. Based on information that is in the government's possession, this estimate of volume is both exaggerated and misleading. First of all, despite the fact that, in its response to a US EPA Section 114 information request ("114 Information Request") dated September 7, 2009, the Company provided Mr. Patel a time range of five to ten seconds that the PRV typically remained open per release event, he elected to use the highest estimated duration to perform his calculations. Obviously, if he had chosen to use the lower end of the range or even the mid-point in the range, his estimate of volume would have been reduced between 25% to 50%. In addition, Mr. Patel chose to rely on another data point from the Company's response to the US EPA 114 Information Request that is not reasonably applicable to the calculation he performed. In the US EPA 114 Information Request, the Company was asked to identify the pounds of coke oven gas that could be released through the PRV in an hour, and Mr. Patel presumed incorrectly that he could calculate the flow rate per release event by simple arithmetic calculation. Mr. Patel erred by not taking into account the fact that some release events may not have caused the PRV to open fully, or that each release event necessarily involved time periods when the butterfly valve was opening and then closing, both of which would substantially reduce the flow rate through the valve. Lastly, Mr. Patel did not address the fact that, in a separate response to another US EPA 114 Information Request submitted in August 2009, Tonawanda Coke provided US EPA with a 1999 chemical analysis of the coke oven gas after it was processed through the Byproducts Department which demonstrated that the coke oven gas that would have been released through the PRV was essentially devoid of the hazardous constituents

that are of regulatory interest. The government's failure to discuss or even acknowledge this information demonstrates again that its sentencing recommendation is premised on hyperbole and distortion rather than a reasonable analysis of the relevant facts.

With respect to its application of the sentencing factors for the three offenses of conviction related to the Resource Conservation and Recovery Act ("RCRA"), the government completely ignores the substantial trial testimony, described at length in prior submissions to the Court, concerning the history of Tonawanda Coke's positive interactions with regulators from the NYS DEC and the regulators' approval of Tonawanda Coke's management of its decanter tank tar sludge over a period of 20 years.³

³ The government notes in its sentencing memorandum that it disputes the veracity of many of the statements contained in Tonawanda Coke's Offense Statement, appended to the Pre-sentence Investigation Report, including Tonawanda Coke's assertion that Mark Kamholz disclosed to NYS DEC RCRA Inspector Thomas Corbett, during a RCRA inspection at the facility on June 17, 2009, that the material removed from the Barrett Tanks would be placed on the coal piles in the coal fields before being recycled into the coke ovens. *See* Gov't's Sentencing Memorandum at p. 33, n. 8. The government's challenge to Tonawanda Coke's assertion is erroneous.

According to a transcript of Mr. Corbett's testimony, Mr. Corbett testified as follows:

[Linsin]: Is that your recollection, Mr. Corbett, that in June Mr. Kamholz told you just generally that the recycling [of the material in the Barrett Tanks] was occurring on the coal fields, and in September, when you went back, he said it was being recycled on the piles?

[Corbett]: Well, the clarification is it's being spread on coal in the coal field.

[Linsin]: All right. But the question I was asking you, and it's a narrow one, did Mr. Kamholz tell you that the recycling was occurring on the coal piles?

[Corbett]: Coal pile located in the coal field.

[Linsin]: Fair enough. Coal piles in the coal field, correct?

[Corbett]: Correct.

[Linsin]: All right. Now, this is information you had during the June 17th, 2009, RCRA compliance inspection, correct? Where the recycling was occurring, you knew that, correct?

[Corbett]: Yes.

See Transcript of Proceedings held before the Hon. William M. Skretny, U.S. Courthouse, 2 Niagara Circle, Buffalo, New York on March 13, 2013 at p. 147, lines 2-20.

Mr. Corbett further testified as follows:

Specifically, as to Counts 17 and 18 concerning Tonawanda Coke's storage and disposal of the tar-like material contained in and around the Barrett Tanks, nowhere in its sentencing memorandum does the government acknowledge that a significant mitigating circumstance

[Personius]: You told us a lot about the inspection. I'm not going to go back through all of what happened on June the 17th. But one thing I am interested in, you—it's clear now you knew that the recycling practice at Tonawanda Coke as it related to the—what we call the decanter tar sludge involved using a front end loader and taking that tar sludge out and mixing it with the coal in the coal field. You knew that?

[Corbett]: I did know that.

[Personius]: And you knew that Mr. Kamholz had indicated to you that there was, what he understood to be K087, inside one or more of these abandoned tanks that he was going to also recycle, fair?

[Corbett]: Yes.

[Personius]: You knew that?

[Corbett]: Yes.

[Personius]: All right. And Mr. Linsin asked you did you caution Mr. Kamholz that it was, at least your view, that that was improper, and you said no, I did not, right?

[Corbett]: Right.

[Personius]: And what I understand your explanation to be as to why you didn't is because you weren't sure if it was K087?

[Corbett]: No. The collective group of the inspectors, including myself, Ellen Banner, and Lenny Grossman—I was in a supportive role. Lenny was the lead inspector. He was the one gathering most of the information during the inspection, and I was there to support him.

[Personius]: All right. But again, you didn't know until you got there that Mr. Kamholz would tell you that there was what he thought was K087 in these tanks that he intended to have recycled. You didn't know that before you got there, right?

[Corbett]: No, we didn't.

[Personius]: So that comes up when you're there. And my question is, again, then why did you not immediately say whoa, whoa, whoa, if you're going to recycle that the same way you're recycling the decanter tar sludge, don't do it? Why didn't you tell him that?

[Corbett]: Because I was not—I was not the lead inspector. I was trying to help Lenny with the inspection. He was gathering information. He didn't feel as if he had enough information yet.

Id., pp. 173-175, lines 5-25, 1-25, 1. Notably, Mr. Piaggione did not revisit the issue of what Mr. Kamholz had disclosed to Mr. Corbett in June 2009 with respect to the placement of the material from the Barrett Tanks on the coal piles on the coal field, despite the fact that his testimony to Messrs. Linsin and Personius appeared to differ with what he had stated on direct examination.

related to Tonawanda Coke's conduct underlying these offenses is the regulatory uncertainty pertaining to the tar-like material, due to the tanks' abandonment by historic owners of the property prior to 1978. The government also fails to acknowledge that despite the jury's determination regarding "active management" of the material in and around the Barrett Tanks, another significant mitigating circumstance is the undisputed trial testimony establishing that the spreading of the coke breeze on the material around the Barrett Tanks constituted essentially trivial contact on the surface of what was subsequently determined to be a large sub-surface pool of material that was released from the Barrett Tanks prior to 1978.

As to Count 19, the government ignores the trial testimony that demonstrated that the concrete pad was constructed in the coal field to temporarily store off-site decanter tank tar sludge until it could be mixed into the production process. The government also fails to acknowledge that Tonawanda Coke ceased mixing the K087 on coal piles in the coal fields as soon as it was first requested to do so by NYS DEC and the US EPA in December 2009, which is yet another example of the Company's well-established history of promptly acting on concerns from regulators.

The government also claims, despite its knowledge to the contrary, that the extent of contamination of the coal field has yet to be investigated. Moreover, the government further argues that, 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, "widespread contamination of the soil and groundwater in the coal field will be found." *See Gov't's Sentencing Memorandum at p. 17.* This argument is totally unfounded, flatly ignores the extensive parallel administrative and civil compliance orders that have addressed this

precise issue over the past four years, and the historic actions taken by the Company in concert with NYS DEC at the plant dating back to the early 1980s.

As Tonawanda Coke discussed at length in its sentencing memorandum, the Company has in fact already evaluated the potential impacts on the groundwater resulting from potential contamination of the coal storage area, which was done in accordance with regulatory oversight by NYS DEC, and determined that any contamination of the groundwater caused by placing coal tar sludge on the coal piles in the coal fields was *de minimis*. See Tonawanda Coke's Sentencing Memorandum, filed Sept. 16, 2013 [Docket No. 229], at pp. 24-27. Moreover, in order to further address potential future concerns associated with runoff from the coal storage area, US EPA, in conjunction with NYS DEC, required a series of significant upgrades to the Company's stormwater detention pond system in the area surrounding the coal storage area, all of which have been completed.

The government's proposition that the Barrett Tank project justifies an investigation into, and potential remediation of, the coal field ignores the fundamental differences between the two circumstances. The Barrett Tanks were part of a complex that was used to store large volumes of tar-like material by the prior historic operators of the Company's facility. The activity in the coal field consisted of using front-end loaders to mix small quantities of tar-like material with coal for material recycling. The mixing of this material with the coal was accomplished on top of large piles of coal above the ground; the tar-like material was not placed directly on the ground. The government's attempt to equate these circumstances is simply another example of exaggeration and hyperbole.

Furthermore, as Tonawanda Coke detailed in its sentencing memorandum, and as the government well knows, the Company undertook to excavate and remove the tar-like material in

the vicinity of the former Barrett Tanks from an area 18 times larger than originally identified by US EPA based on pre-project modeling estimates. NYS DEC had a daily presence on-site observing all action that took place during this project, and the Company worked cooperatively with the agency to allay any concerns that arose throughout the project. The Company submitted a final report to the US EPA in June 2012 documenting its compliance with the requirements of the Consent Agreement and Final Order that embodied all of EPA's remediation requirements. *See* Tonawanda Coke's Sentencing Memorandum at pp. 26-27.

B. Sentencing Factors Related to Other "Relevant Conduct" Cited by the Government in Support of its Sentencing Recommendation

The government also mischaracterizes certain other events and conduct as aggravating factors in support of its sentencing recommendation to the Court. In this regard, it cites, for instance, an incident involving a potential spill of polychlorinated biphenyls ("PCBs") from electrical transformers located at the facility. Tonawanda Coke strongly disputes the government's sinister and inaccurate characterization of this incident. The preliminary investigative records regarding this matter state that the transformers in question were found to be staged on a concrete pad and that a "small amount" of leaked oil had reached "a small area of grass/soil." *See* Gov't's Sentencing Memorandum, Exhibit 32, at TCC-00138995 – 96. This record also shows that the small spill area was promptly cleaned-up, with the assistance of an outside environmental consultant. *Id.* at TCC-00138997. However, perhaps because it was inconsistent with the aggravating narrative the government seeks to weave, it chose not to provide the Court with the ultimate findings made by NYS DEC regarding this incident as set forth in an Order on Consent entered on July 17, 2008. In that order, the agency specifies that the only violations even alleged by NYS DEC were the improper *storage* and *labeling* of PCBs, and the agency determined that matter was appropriately resolved through a civil penalty of

\$9,000, and a requirement that Tonawanda Coke properly dispose of the materials stored more than 180 days and properly label the remaining materials. *See* NYS DEC Order on Consent entered July 17, 2008, attached as Exhibit C. This resolution reflected the NYS DEC's regulatory judgment, notwithstanding the incidental leakage of oil that had been observed and remediated, that the incident related to *storage* and *labeling* issues and warranted only a reasonable administrative disposition. Here again, the government has patently mischaracterized the facts of this incident in an effort to vilify the Company, while withholding from the Court the ultimate regulatory conclusions reached by the NYS DEC.

The government also cites to the removal of an unknown oily liquid purported to contain a high concentration of benzene from a rail tank car situated along the southern border of the Tonawanda Coke site as an aggravating factor in support of its sentencing recommendation. *See* Gov't's Sentencing Memorandum at pp. 21-25. The Court is well aware that the government has made repeated and unsuccessful attempts to introduce evidence regarding this alleged conduct. For the same reasons that the Court dismissed any consideration of this alleged conduct at trial, Tonawanda Coke now urges the Court to decline to take the government's one-sided and incomplete rendition of the alleged event into consideration in making its sentencing determination. Specifically, the US EPA's chemical analysis that the government claims is indicative of the oily liquid's high concentration of benzene has in fact been ruled by this Court to be inconclusive and unreliable, yet the government still propounds it as an aggravating factor. *See, e.g.,* Decision and Order of the United States District Court for the Western District of New York, dated February 22, 2013 [Docket No. 138], at p. 16. In addition, the Court ruled that evidence regarding this alleged conduct was inadmissible at trial pursuant to Fed.R.Evid. 404(b), because it would require a trial within a trial to evaluate the factual and regulatory issues related

to used oil and/or the use of product under the RCRA regulations. *Id.*, pp. 16-17. Undeterred by the prior findings of the Court, the government now: offers its own rendition of the “facts,” including the unproven assumption that the material in question was used oil and not product; provides its own interpretation of the incomplete and unreliable laboratory analyses; offers its own opinions regarding Tonawanda Coke’s knowledge of testing requirements for used oil, while ignoring the fact that a wholly different set of testing requirements would apply if the material in the rail tank car was a product; and, then concludes that this house of cards it has erected demonstrates “defendants’ belief that they could dispose of any type of unwanted material at Tonawanda Coke by simply burning it in the coke ovens.” *See Gov’t’s Sentencing Memorandum* at p. 25. Arguments such as this far exceed the proper bounds of zealous advocacy and are wholly unworthy of consideration by this Court in its determination of a fair and just sentence.

The government also asserts that, based upon a NYS DEC Field Inspection Report dated November 14, 2012, Tonawanda Coke allowed widespread petroleum contamination to occur. *See Gov’t’s Sentencing Memorandum* at pp. 28-29. This assertion is a distorted accounting of the outcome of this NYS DEC inspection, as all of the concerns alleged by NYS DEC were limited to discrete areas of the plant. In fact, Tonawanda Coke has taken the results of the November 2012 NYS DEC inspection extremely seriously by engaging an outside third party professional environmental firm to review the inspection report, and to identify those areas that require remediation. Environmental regulatory counsel for Tonawanda Coke and representatives of the consultant met with NYS DEC to discuss how to address NYS DEC’s concerns from the November 2012 report, and the Company has since submitted a plan to NYS DEC, for the agency’s review and approval, regarding the action to be taken.

In highlighting this inspection report, the government insinuates that Tonawanda Coke has failed to take any meaningful actions to address environmental compliance generally at the facility in the wake of its criminal indictment and subsequent conviction. *See* Gov't's Sentencing Memorandum at pp. 28-29. Tonawanda Coke rejects this implication. As detailed in its sentencing memorandum, the Company is committed to resolving the outstanding issues raised by the US EPA and NYS DEC by working closely with outside environmental regulatory counsel, and professional environmental consulting firms, which includes taking further action at significant expense, such as the installation of a new bag house, a component designed to control emissions from the push side of ovens. The Company has also significantly strengthened its environmental compliance program to ensure that appropriate training and compliance oversight is built into the operation and management of the Company going forward. *See* Tonawanda Coke's Sentencing Memorandum at pp. 7, 19.

The government also asserts that Tonawanda Coke has not taken any steps to discipline Mark Kamholz in order to "prevent a recurrence" of the offenses of conviction. *See* Gov't's Sentencing Memorandum at p. 37. This assertion is factually incorrect. As Tonawanda Coke has stated in several prior submissions, the Company removed Mr. Kamholz from his responsibilities for daily oversight and control of the Company's environmental compliance activities following the Company's indictment on the criminal charges in the instant case. And since 2009, the Company has continued to work with outside environmental professional firms to assist with environmental matters.

II. THE GOVERNMENT’S RECOMMENDATION FOR THE COURT TO ORDER TONAWANDA COKE TO FUND COMMUNITY SERVICE PROJECTS IS INAPPROPRIATE, AS IS THE GOVERNMENT’S INJECTION OF “VICTIM IMPACT STATEMENTS” IN AN ATTEMPT TO JUSTIFY ITS RECOMMENDATION

The government’s recommendation for the Court to order Tonawanda Coke to fund certain community service projects is inconsistent with the applicable statutory provisions and the Sentencing Guidelines which provide for community service payments as a condition of probation only where such community service is “reasonably designed to repair the harm caused by the offense.” *See* U.S.S.G. § 8B1.3; *see also* 18 U.S.C. § 3563(b)(12). The government’s misguided recommendation for community service payments demonstrates once again its willingness to seek an unduly harsh sentence in this case that is neither authorized by, nor warranted under, the controlling statutory authority or the advisory Sentencing Guidelines.

A. The Bases Upon Which the Government Justifies its Recommendation for the Funding of Community Service Projects are Inflammatory, Unsupported and Inconsistent with the Statutory Definition of Crime Victims

Tonawanda Coke strongly disputes the basis for the government’s recommendation that the Court’s sentence include an order for the Company to fund certain community service projects. The government has failed to make a sufficient showing of harm related to Tonawanda Coke’s offensive conduct, and its injection of what the government characterizes as “victim impact statements” should have no place in the Court’s consideration of the government’s recommendation for community service payments.

The government claims that “widespread contamination of the air and ground” has caused “all of Tonawanda” to suffer. *See* Gov’t’s Sentencing Memorandum at p. 32. No evidence however has been offered to support this allegation of widespread harm. In fact, with respect to the issue of potential off-site impact of Tonawanda Coke’s offense conduct, any harm

is speculative and, as a result, is not appropriately addressed through an order to fund community service projects under 18 U.S.C. § 3563(b)(12) or § 8B1.3 of the Sentencing Guidelines.

Moreover, in Tonawanda Coke's view, to the extent any of the conduct that led to the offenses of conviction involved environmental harm at the Tonawanda Coke facility, that harm has already been evaluated and remedied through the sweeping administrative compliance orders issued by the NYS DEC and US EPA since 2009. *See* Exhibit 2 to Tonawanda Coke's Sentencing Memorandum at pp. 18-22. Yet the government, apparently by design, simply fails to address the extensive, parallel regulatory involvement of the NYS DEC and US EPA in evaluating and addressing any environmental harm that resulted from the offense conduct. As discussed *infra*, the government instead invites the Court to substitute its own judgment for that of these regulatory agencies by ordering a remedial investigation of the Tonawanda Coke facility where substantial investigation, and related work, has already been completed.

Beyond all of this and in a transparent effort to inflame the sentencing process, the government has sought to inject what it characterizes as "victim impact statements" into its argument in favor of Court-imposed community service payments without any basis to do so under controlling statutory authority or the Sentencing Guidelines. For sentencing purposes, a Court may consider restitution to victims under 18 U.S.C. § 3563(b)(2) or U.S.S.G. § 8B1.1, only where there is an "identifiable victim," defined as a "person directly related and proximately harmed as a result of the commission of an offense." *See* 18 U.S.C. §§ 3556, 3563(b)(2) and 3663A(a)(2), and U.S.S.G. § 8B1.1. As Tonawanda Coke noted in its sentencing memorandum, the Pre-sentence Investigation Report found that the instant offense "did not involve victim injury or loss," *see* Pre-Sentence Investigation Report at ¶ 53, a finding that the government adopted, along with "all findings of the Pre-sentence Report with respect to

sentencing factors in this action.” *See* Statement of the Government with Respect to Sentencing Factors, filed Sept. 16, 2013 [Docket No. 236], at p. 1.

Notwithstanding this fact, the government disingenuously attempts to “have its cake and eat it too,” by requesting payments in the nature of restitution in its sentencing memorandum that it knows are clearly improper. It does not reject its adoption of the findings of the Pre-Sentence Investigation Report outright, nor does it ask the Court to order Tonawanda Coke to pay an amount in restitution.⁴ Instead, the government purports to justify its recommendation that the Court order the Company to fund certain community service projects under U.S.S.G. § 8B1.3 based on the nebulous claim that the “entirety of the community surrounding Tonawanda Coke” qualifies as the primary victim of Tonawanda Coke’s offensive conduct.⁵ *See* Gov’t’s

⁴ In fact, the government acknowledges that it “cannot point to any particular individual victim” of Tonawanda Coke’s crimes. *See* Gov’t’s Sentencing Memorandum at p. 32. Moreover, though the government indicates that it will ask that several community members be permitted to testify regarding the impact of Tonawanda Coke’s operations if a sentencing hearing is held, *see* Gov’t’s Sentencing Memorandum at pp. 32-33, it does not seek to have these individuals designated victims under the Crime Victims’ Rights Act (“CVRA”), 18 U.S.C. § 3771. Such a designation permits victims of a federal crime to appear and be heard in court during a sentencing proceeding. *See* 18 U.S.C. § 3771(a). In order to designate individuals as victims under the CVRA, the government must show that the offense conduct directly and proximately caused harm to them. *See United States v. CITGO Petroleum Corp.*, 893 F. Supp. 2d 848, 851-54 (S.D. Tex. 2012). The government has already conceded that it cannot satisfy this standard.

⁵ Tonawanda Coke notes that case authority does not support the characterization of an entire community as meeting the standard for a victim to whom restitution is available in this case under 18 U.S.C. § 3663. For instance, in *United States v. Bold*, 412 F. Supp. 2d 818 (S.D. Ohio 2006), the court denied restitution to a nonprofit community group in a case in which the defendants were convicted of widespread mortgage fraud, on the grounds that a neighborhood community cannot qualify as a “victim” under 18 U.S.C. § 3663A, a parallel statute to 18 U.S.C. § 3663. Section 3663(c) of Title 18 of the United States Code and § 5E1.1(d) of the Sentencing Guidelines are also instructive, as both of these provisions authorize “community restitution” in cases in which there is “no identifiable victim.” Both of these provisions, however, are limited to cases in which the defendant is convicted for certain drug offenses. *See, e.g., United States v. Martin*, 128 F.3d 1188, 1192 (7th Cir. 1997) (stating that the legislative history of 18 U.S.C. § 3663(c) made clear that it was designed for the specific purpose of compensating local communities impacted by drug crimes). The presence of 18 U.S.C. § 3663(c) and U.S.S.G. §

Sentencing Memorandum at pp. 32, 38. Section 8B1.3 of the Sentencing Guidelines does not require the Court's consideration of victims impacted by the defendant's conduct. Yet, having opened the door to this line of reasoning, the government then appends 128 "victim impact statements," written by anyone who "felt they had been affected" by Tonawanda Coke's conduct to its sentencing memorandum. *See* Gov't's Sentencing Memorandum at p. 32, Exhibits 46-47.

The government's effort to inject these "victim impact statements" into the record of this sentencing proceeding is not supported by any authority, and they should have no place in the Court's determination of a fair and just sentence in this case. Indeed, in Tonawanda Coke's view, the government's decision to incorporate these statements into its sentencing memorandum underscores its overall inflammatory and improper approach to the Court's sentencing determination and represents a transparent appeal to public emotion in support of an unduly harsh sentence against Tonawanda Coke. Tonawanda Coke further notes that more than 25 percent of the impact statements submitted by the government were authored by named plaintiffs in a mass tort action against Tonawanda Coke claiming property damage and/or personal injury. It is believed that the majority of the remaining individuals who submitted impact statements would qualify as members of a pending class action lawsuit against Tonawanda Coke involving area residents asserting property damage and seeking ongoing medical monitoring.⁶ In this light,

5E1.1(d) indicate fairly clearly that both Congress and the U.S. Sentencing Commission have had the opportunity to consider the possibility of community restitution, but have chosen to limit such a condition of sentencing to a very narrow set of crimes. The offenses for which Tonawanda Coke has been convicted do not fall into this category of crimes, and accordingly, the government's characterization of the Tonawanda community as the victim in this case is inappropriate.

⁶ A full list of the civil lawsuits pending against Tonawanda Coke, Mr. Crane and/or Mr. Kamholz in Erie County Supreme Court is included in the Declaration of Rick W. Kennedy, Esq., appended as an exhibit to Tonawanda Coke's sentencing memorandum. *See* Tonawanda Coke's Sentencing Memorandum, at pp. 13-14. Specifically, the mass tort action against

the proposed epidemiological study and the air/soil investigation that are discussed in more detail below, appear designed to enable the plaintiffs involved in these pending tort actions to circumvent the civil discovery process in favor of Tonawanda Coke-funded impact studies.⁷

B. The Community Service Projects Proposed by the Government are Incompatible with the Sentencing Guidelines

Community service is a specialized order that, under the Sentencing Guidelines, is only properly ordered by the Court where it is reasonably designed to repair the harm caused by the offensive conduct at issue. *See* U.S.S.G. § 8B1.3; *see also* 18 U.S.C. § 3563(b)(12). Here, however, the essence of the two principal community service projects that the government seeks to require Tonawanda Coke to fund is evaluative in nature; that is, the stated purpose of the projects is to *evaluate* the nature of any harm in the first instance, rather than to repair a known harm caused by the offense conduct. These two projects include an epidemiologic study of health effects and coke oven emissions from Tonawanda Coke (\$11,448,021) and a study determining the environmental impact of coke oven emissions originating from Tonawanda Coke on the surrounding residential community (\$711,161).

Tonawanda Coke is *Abbott v. Tonawanda Coke, et al.*, (Index No. 2011-2327) and the class action matter against Tonawanda Coke is *DeLuca v. Tonawanda Coke, et al.*, (Index No. 2010-10280).

⁷ The obvious connection between the “victim impact statements” and the pending civil litigation is highlighted in a letter submitted by Charles H. Cobb, Esq. of Collins & Collins, LLC, which is the law firm that has brought the pending class action lawsuit against Tonawanda Coke and also represents plaintiffs in individual tort actions against the Company. *See* Gov’t’s Sentencing Memorandum, Exhibit 47 at pp. 38-47. Mr. Cobb’s letter urges the Court to avoid imposing a criminal fine that would bankrupt the Company and potentially jeopardize the firm’s clients from obtaining relief through civil litigation. Mr. Cobb’s letter also provides support for Tonawanda Coke’s view that the Court’s consideration of the “victim impact statements” in the instant case would interfere with pending civil litigation against the Company. Mr. Cobb specifically states that “[t]he best way to make victims whole would be to ensure the viability of the civil litigation.” The letter further states that “[t]he civil justice system is the best place to vet whether a particular individual is a victim of Tonawanda Coke’s actions.”

The government's recommendation that the Court order Tonawanda Coke to fund these two projects is particularly disingenuous given that the projects are principally designed to examine current health and environmental conditions rather than the impact of the conduct underlying the offenses of conviction.⁸ Specifically, the "Tonawanda Health Study" is designed to gain an understanding of the "health risks posed by exposure to emissions from Tonawanda Coke" and to "investigate the current health status of the Tonawanda and Grand Island communities, and to monitor residents for a period of time." *See* Gov't's Sentencing Memorandum at p. 39, Exhibit 49. Similarly, the purpose of the air/soil testing study is to "examine the impact of Tonawanda Coke's foundry coke emissions, specifically particulate organic material, in the immediate surrounding environment." *See* Gov't's Sentencing Memorandum at pp. 40-41, Exhibit 51. In addition to not addressing the conduct attendant to the underlying convictions, these proposed studies would be meaningless without considering the impact of other operations in the industrialized corridor in which Tonawanda Coke operates, which is well beyond the intended scope of community service payments.

Like the Tonawanda Health Study and the air/soil testing study, the government's proposal for the Court to order Tonawanda Coke to fund a collaborative "industrial pollution prevention project" (\$250,000), is not offered as a preventive or corrective action directly related to the offense. Instead, it appears geared towards eliminating prospective emissions of hazardous pollutants by other manufacturers in the Tonawanda, Riverside and Grand Island area,

⁸ As Tonawanda Coke has noted in prior submissions to the Court, the Company has remediated the conditions and changed the practices that formed the bases for the criminal charges before the return of the Indictment in this case in 2010. *See, e.g.,* Sentencing Memorandum on Behalf of Tonawanda Coke Corporation, at pp. 6-7.

a purpose that is incompatible with the applicable Sentencing Guidelines. *See* Gov't's Sentencing Memorandum at p. 41.

The remaining three community service projects that the government recommends to the Court are inconsistent with the Sentencing Guidelines requirement that an order for community service payments relate to the convicted organization's "knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense." U.S.S.G. § 8B1.3. Nothing about funding a "citizen science lending library," a "worker and community toxics education project" designed to educate workers and residents working at or living near industrial facilities, or a tree planting in the Riverside community relate to Tonawanda Coke's knowledge as a foundry coke operator, its coke manufacturing facilities or its expertise in the foundry coke business. Accordingly, these projects are not appropriate community service projects for the Court to order that Tonawanda Coke fund under § 8B1.3 of the Sentencing Guidelines.

III. THE COURT SHOULD DECLINE TO CONSIDER THE GOVERNMENT'S ANALYSIS OF TONAWANDA COKE'S ABILITY TO PAY A CRIMINAL FINE IN REACHING ITS SENTENCING DETERMINATION

The ability to pay analysis submitted by the government in support of its recommendation that the Court impose a total criminal penalty of \$57,141,699, is wholly unreliable as it is based upon incomplete and inaccurate information and ignores fundamental principles of financial analysis. Accordingly, Tonawanda Coke urges the Court to decline to take the government's analysis into consideration in reaching its sentencing determination.

Most significantly, the financial analysis prepared by the government states at the outset that the information considered in preparing the report does not meet an acceptable standard of reliability. *See* Gov't's Sentencing Memorandum, Exhibit 48 at p. 3. In preparing his report,

EPA cost recovery expert Leo Mullin⁹ appears to have considered a very limited set of information. The limited scope on the information considered is obviously problematic as it includes no current financial information. Mr. Mullin apparently relied on a subset of the financial records seized from Tonawanda Coke during the execution of a federal search warrant in December 2009. Thus, he relied solely upon incomplete monthly internal financial statements for Tonawanda Coke from March 31, 2005 to October 31, 2009,¹⁰ and no accurate sales information.¹¹ *See* Gov't's Sentencing Memorandum, Exhibit 48 at pp. 3, 7. Tonawanda Coke notes that the Pre-sentence Investigation Report contains a detailed summary of the extensive financial information the Company provided to the United States Probation and Pretrial Services Office for the Western District of New York (the "Probation Office"), including audited financial

⁹ Though Tonawanda Coke has not had the opportunity to conduct an in-person examination of Mr. Mullin's qualifications, it notes that he has not included a curriculum *vitae* with his submission and that, according to his submission to the Court, his expertise lies primarily in conducting assessments pursuant to EPA's "General Policy of Ability to Pay Determinations" ("ATP Policy"), which relates solely to civil matters.

¹⁰ Mr. Mullin notes in his analysis that the balance sheet and income statements for the periods between July 31, 2005 and March 31, 2007, and for the months ending February 28, 2009 and September 30, 2009 appear to be missing. It is not clear why Mr. Mullin did not have certain of this information, as the government has it in its possession. Specifically, the government has balance sheet and income statements for the months ending August 31, 2005 (beginning Bates No. TCC00130388), February 28, 2009 (beginning Bates No. TCC00028200) and September 30, 2009 (beginning Bates No. TCC00008262). As to the remaining balance sheet and income statements that Mr. Mullin notes are missing, it does not appear that the government seized these records during its execution of the search warrant at Tonawanda Coke in December 2009.

The income and cash flow statement phase analysis that Mr. Mullin undertakes in his analysis involved calculating a four-year average based upon income statement items from the periods ending June 30, 2005, June 30, 2007, June 30, 2008 and June 30, 2009. *See* Gov't's Sentencing Memorandum, Exhibit 48 at p. 7. His analysis does not include figures for 2006 and, notably, Mr. Mullin does not explain how his analysis is impacted by the fact that he calculated a four year average from a time period of five years.

¹¹ Mr. Mullin relied solely upon sales estimates obtained from public databases that he acknowledged are "rarely accurate."

statements, proforma tax returns and coke sales information from 1998 through 2011. It is incomprehensible that the government chose not to seek leave of the Court to provide the current financial information contained in the Pre-sentence Investigation Report to Mr. Mullin for his consideration in preparing his ability to pay analysis or, at a minimum, to correct the elements of Mr. Mullin's report that the government itself knew to be inaccurate based upon its knowledge of the current financial information contained in the Pre-sentence Investigation Report.¹²

Besides its reliance on incomplete and inaccurate information, in Tonawanda Coke's view, the government's financial analysis is defective because of the manner in which it was performed. Specifically, Mr. Mullin's analysis is premised on several fundamentally flawed assumptions that violate generally accepted principles of finance and economics, as well as the proper methodology for valuing a company.

The first flawed assumption incorporated into Mr. Mullin's ability to pay analysis is the equation of past performance with future results in order to predict the Company's ability to pay a criminal fine. In so doing, the analysis averages the Company's unaudited internal monthly income statements from 2005 through 2009 to predict its ability to pay a fine in 2014 and beyond. Notwithstanding the acknowledged inaccuracies contained in the internal financial statements, Mr. Mullin's claim that he can predict future earnings based upon average historical performance from a period dating back more than four years strains any measure of credulity and flies in the face of generally accepted principles of financial analysis.¹³ Mr. Mullen's reliance on

¹² While Tonawanda Coke opposed the government's motion for disclosure of the underlying financial records that the Company had provided to the Probation Office, an extensive and detailed summary of the Company's *current* financial records is contained in the presentence investigation report which has been available to the government since September 11, 2013.

¹³ In fact, Mr. Mullin's analysis appears inconsistent even with EPA's own guidelines for conducting an ATP analysis. According to EPA's General Policy on Superfund Ability to Pay

figures dating back to 2009 is particularly troubling given the government's awareness that Tonawanda Coke's financial performance declined sharply in 2010 due to a drop in coke sales, information that is expressly provided in the Pre-sentence Investigation Report.

Mr. Mullin's analysis of Tonawanda Coke's ability to pay a criminal fine is also defective in its assumption that capital expenditures required to maintain the operating capabilities of the plant for a period of three to five years or that are associated with injunctive relief costs designed to ensure current and future business activities are compliant with environmental requirements are not relevant to his determination of the Company's ability to pay a fine. *See Gov't's Sentencing Memorandum, Exhibit 48 at p. 2, n. 2.* The government is fully aware of the pending civil enforcement actions against Tonawanda Coke, of the more than \$11.4 million that the Company has already expended to ensure its compliance going forward with environmental regulations, and of the expectation that additional capital expenditures and civil penalties will be imposed in the near term in order to resolve the pending civil claims and ensure the Company's regulatory compliance going forward. Accordingly, failure to take these costs into consideration grossly overlooks factors that will have a major financial impact upon Tonawanda Coke's cash resources,¹⁴ and hence, its ability to pay a criminal fine.

A third manner in which Mr. Mullin's ability to pay analysis is fatally flawed is his failure to consider the state of the economy, industry and business environment in assessing the

Determinations, dated December 11, 1998, an income and cash flow statement analysis that reviews financial statements from prior years to predict future earnings potential is properly done by analyzing prior year financial information to "determine if a trend exists and if there is an explanation for this trend. If a trend is identified, financial projection should reflect the impact of the trend." *See EPA's General Policy on Superfund Ability to Pay Determinations* dated December 11, 1998, page 11. Calculating a simple four year average of financial information does not reflect any meaningful consideration of trend data to predict future earnings capacity.¹⁴ Tonawanda Coke notes that under current circumstances, the Company is unable to borrow against its assets.

trend of Tonawanda Coke's financial performance. Events external to the Company's immediate operations, including commodity prices, the well-being of the steel and automobile markets and the country's overall economic outlook, have a direct impact on Tonawanda Coke's business. Failure to consider these factors substantially weakens the credibility of his analysis.

Fourth, nowhere in his analysis does Mr. Mullin offer any conclusions with respect to Tonawanda Coke's balance sheet. Though he provides a schedule of Tonawanda Coke's assets and liabilities for the years ending June 30, 2005, June 30, 2007, June 30, 2008 and June 30, 2009 and notes that the working capital and equity position of Tonawanda Coke are much higher than is expected for a company that is in this industry, he fails to indicate the significance of this opinion or draw any conclusions regarding the Company's ability to pay a criminal fine. In the Company's view, a comprehensive balance sheet valuation is critical to any identification of current and future sources of cash to make penalty payments. Such an analysis should incorporate factors such as the coke industry's economic outlook, the book value of the Company and the financial condition of its business and the Company's earning capacity.¹⁵

¹⁵ Internal Revenue Service Ruling 59-60 ("IRS Ruling 59-60") provides guidelines for the valuation of closely held businesses. The ruling states that all relevant factors should be taken into consideration, including the following:

- The nature of the business and history of the enterprise;
- The economic outlook, and the condition and outlook of the specific industry;
- The book value of the stock and the financial condition of the business;
- The company's earning capacity;
- The company's dividend-paying capacity;
- Whether or not the enterprise has goodwill or other intangible value;
- Sales of the stock and the size of the block to be valued; and,
- The market prices of stocks of corporations engaged in the same or similar lines of business whose stocks are actively traded in a free and open market, either on an exchange or over the counter.

IRS Ruling 59-60.

Finally, Mr. Mullin's discussion of Erie Coke and the ability of that company to pay a civil fine amount to the Pennsylvania Department of Environmental Protection and to implement a series of environmental improvements, *see* Exhibit 48 to Gov't's Sentencing Memorandum at p. 8, has no bearing whatsoever on Tonawanda Coke's ability to pay a criminal fine in the instant case.

The financial analysis submitted by the government in support of its recommendation for the Court to impose a total criminal penalty in excess of \$57 million is wholly unreliable. For the aforementioned reasons, Tonawanda Coke urges the Court to decline to consider the government's analysis of the Company's ability to pay in reaching its sentencing determination.

IV. THE GOVERNMENT'S RECOMMENDATION FOR A REMEDIAL ORDER FAILS TO FULLY CONSIDER THE FACTORS OUTLINED IN THE SENTENCING GUIDELINES

The government recommends that the Court enter a remedial order as a condition of probation requiring Tonawanda Coke to 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. *See* Gov't's Sentencing Memorandum at pp. 6, 44. Notably, the government's citation to U.S.S.G. § 8B1.2 as the basis for its recommendation overlooks commentary to the guideline indicating that the remedial order the government seeks is in fact not warranted in the instant case. Specifically, the government states that 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." *See* Gov't's Sentencing Memorandum at p. 6. In referencing § 8B1.2, the government fails, however, to acknowledge commentary to the guideline that provides: "In some cases in which a remedial order potentially

may be appropriate, a governmental regulatory agency, *e.g.*, the *Environmental Protection Agency*. . . , may have authority to order remedial measures. *In such cases, a remedial order by the court may not be necessary.*” Commentary to U.S.S.G. § 8B1.2 (emphasis added). This is precisely the situation that applies to the instant case.

As Tonawanda Coke detailed at length in its sentencing memorandum, the Company has already conducted an investigation of the contamination of the coal field in concert with administrative oversight by NYS DEC, and determined that any contamination of the coal field is *de minimis*. See Tonawanda Coke’s Sentencing Memorandum at pp. 24-27. Furthermore, as referenced previously, US EPA in concert with NYS DEC, required a series of upgrades to the stormwater detention pond system associated with runoff from the coal storage area, all of which have been completed. Clearly, the NYS DEC and the US EPA have previously considered the potential environmental issues associated with the coal field, and required the actions which the agencies believed to be proper. Accordingly, a Court order for Tonawanda Coke to again investigate potential contamination of the coal field would only result in this Court second-guessing the substantial amount of environmental oversight already exercised by both agencies. This type of conflict is precisely what the commentary to U.S.S.G. § 8B1.2 appears designed to avoid.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Tonawanda Coke's Sentencing Memorandum, Tonawanda Coke urges the Court to reject the government's sentencing recommendation. The Company further submits that the recommendation proposed in Tonawanda Coke's Sentencing Memorandum is a more appropriate sentence than that recommended by the government and reflects a punishment that is sufficient, but not greater than necessary, to serve the purposes of sentencing.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of September 2013, I electronically filed the foregoing DEFENDANT TONAWANDA COKE CORPORATION'S RESPONSE TO THE GOVERNMENT'S SENTENCING MEMORANDUM with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following CM/ECF participants on this case:

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