

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

UNITED STATES OF AMERICA

v.

1:10-CR-219-WMS-HKS

TONAWANDA COKE CORPORATION

Defendant.

AMICUS CURIAE BRIEF FOR THE COUNTY OF ERIE

The County of Erie (the “County”) respectfully submits this *amicus curiae* brief to provide the Court with additional information in conjunction with the United States of America’s (the “Government”) petition charging Tonawanda Coke Corporation (“Tonawanda Coke”) with probation violations in the above-captioned matter. More specifically, the County submits this brief to inform the Court as to the position of the County in support of the Government’s request that Tonawanda Coke be found to have violated the terms of its probation and require that Tonawanda Coke immediately comply with all applicable environmental laws and, if necessary, cease all operations, until it is able to fully comply with same; or for such other and further relief this Court deems appropriate.

STATEMENT OF INTEREST OF AMICUS CURIAE

Tonawanda Coke operates a plant for the production of foundry coke on approximately 188 acres in the Town of Tonawanda, County of Erie (the “Plant”). *See* Tonawanda Coke Corporation, Operations, <http://www.tonawandacoke.com/operation.html> (last visited Sept. 11, 2018). As part of its operations, Tonawanda Coke emits coke oven gas into the environment. These operations are governed by State and Federal Law. Given that the Plant operates 24 hours a day, 365 days per year (*see id.*), it is paramount that the emissions at the Plant are in

compliance with applicable laws and regulations designed to protect the health and well-being of the citizens who live and work in the area in and around the Plant. Unfortunately, despite being convicted of serious criminal charges – including 14 felonies – in 2014, Tonawanda Coke’s Plant continues to operate in a manner that harms the citizens of the County.

The County, as a local government, is responsible for, and in fact has a constitutional duty to protect of the health and well-being of the County’s nearly one million citizens. N.Y. Const. Art. IX, §(2)(c)(10). As the Plant is situated in a populous area of the County, it is of critical importance to the County that the Plant operates in a manner that does not negatively impact the health and well-being of the County’s citizens.

Before the Court is the Government’s Petition alleging serious and persistent violations of Tonawanda Coke’s terms of probation. These allegations primarily relate to pollution that directly affects the air quality in the County. Accordingly, the County submits this *amicus curiae* brief in order to highlight local concerns and to protect the interests of its residents who are directly affected by the actions of Tonawanda Coke.

INTRODUCTION

On March 19, 2014, the Court, among other things, sentenced Tonawanda Coke to five years of probation, imposed a fine of \$12,500,000.00, and ordered Tonawanda Coke to fund two community impact studies in an amount not to exceed \$12,200,000.00. (Dkt. No. 281). In conjunction with Tonawanda Coke’s probationary sentence, the Court ordered Tonawanda Coke not to commit “another federal, state, or local crime.” *Id.* On August 23, 2018, the Court issued a summons in response to the Petition for Offender under Supervision (the “Petition”) filed by the Probation Department. (Dkt. No. 365). The basis for the Petition, was the charge that Tonawanda Coke violated its terms of probation when the “defendant organization violated the Clean Air

Act, in violation of Title 42 U.S.C. §7413(c)(1), §7412.” *Id.* The Petition details serious allegations of persistent environmental noncompliance that negatively affects the air quality in the County.

As a result of Tonawanda Coke’s serious and repeated violations of the Clean Air Act along with its long history of utterly disregarding the citizens of the County, on September 4, 2018, the Government filed a motion for an immediate hearing. (Dkt. No. 366). The Court thereafter ordered Tonawanda Coke to appear on September 14, 2018 for a hearing on its probation violations.

In advance of this hearing, the County submits this *amicus* brief in support of the Government’s request that Tonawanda Coke be found to have violated the terms of its probation and that this Court therefore take action it deems appropriate in order to protect the health and well-being of the County’s residents.

There can be no serious question that the County’s interests in the outcome of the hearing are significant inasmuch as it is charged with promoting the health and well-being of its residents. It is axiomatic that clean air is a significant factor in good health. Although the County is not technically a party to this case, each and every resident of the County is, willing or not, impacted by the actions of Tonawanda Coke. The County therefore asks that this Court consider the impact upon the residents of the County when making its determination.

As is more fully set forth below, Tonawanda Coke’s actions have seriously harmed and/or put at risk, the health of the County’s residents.

ARGUMENT

As set forth above, although not parties per se, the residents of the County of Erie have a vested interest in their own well-being. The health and well-being of the County’s residents is

central to the Government's allegations that Tonawanda Coke has violated the terms of its probation by persistently violating the Clean Air Act. The stated purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). As set forth by the Clean Air Act, State and local governments are primarily responsible for the prevention and control of air pollution. *Id.*, at 7401(a)(3).

As air quality is of paramount importance to the residents of the County, "the County is in the position of being able to advise the Court on matters of public interest that are implicated in this case." *Andersen v. Leavitt*, No. 03-CV-6115 DRHARL, 2007 WL 2343672, at *5 (E.D.N.Y. Aug. 13, 2007) (internal quotations omitted); *see also Citizens Against Casino Gambling in Erie Cty. v. Kempthorne*, 471 F. Supp. 2d 295, 329 (W.D.N.Y. 2007), *amended on reconsideration in part*, No. 06-CV-0001S, 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007).

As is outlined in the Government's Supplemental Memorandum Regarding the Motion for an Immediate Hearing, in the four years followings its sentencing, Tonawanda Coke has repeatedly violated State and Federal environmental laws and regulations. (Dkt. No. 373). Moreover, as outlined in that same memorandum, Tonawanda Coke continues to violate the law by exceeding its emissions (opacity) limitations from the Plant's waste heat stack. Of critical importance to the residents of the County is the fact that emissions from coke ovens include volatile organic compounds such as benzene, toluene, and xylene. *See* 66 Fed. Reg. 35326, 35329 (July 3, 2001). Long term inhalation exposure to coke oven omissions "results in conjunctivitis, severe dermatitis, and lesions of the respiratory system and digestive system." *Id.* In fact, coke oven gas is a listed hazardous air pollutant. *See* 42 U.S.C. §7412; 40 C.F.R. §63.7296. The Government's data from air-quality monitoring demonstrates that Tonawanda

Coke has violated opacity limits this year on January 16-17, 19, 20, 22; February 1, 11, 15, 18; March 1-5, 9, 10, 13, 14, 16-18, 23, 24, 29-31; April 1-4, 7-10, 12, 14-28; and then every day from May 2 to at least September 5. (Dkt. No. 373).

The New York State Department of Environmental Conservation (“DEC”) also supports the Government’s Petition, having submitted a letter to the Court further outlining Tonawanda’s disregard for the citizens of the County, stating in pertinent part as follows:

Since May 2018, the DEC has documented 227 violations of the state’s opacity regulations and issued seven Notices of Violation. . . . Starting May 2, 2018, Tonawanda Coke Corporation has violated the federal opacity limit every day, frequently recording 24-hour average opacity levels more than double the legal limit. Such blatant *disregard for the environment and the health and welfare of the surrounding community* must be stopped.

(Dkt. No. 366-1) (emphasis added).

The above is merely a snapshot of a number of serious and continuing violations of State and Federal environmental laws and regulations that are well-documented in the Government’s various submissions (*See e.g.* Dkt. Nos. 365, 366, 373 383). It is clear to the County that Tonawanda Coke has and continues to place the financial success of its operations before the health and well-being of the County’s residents. For these reasons, the County urges this Court to find Tonawanda Coke in violation of its terms of probation and require that Tonawanda Coke immediately comply with all applicable environmental laws.

CONCLUSION

In light of the foregoing, the County, on behalf of its citizens, respectfully requests that this Court immediately require Tonawanda Coke to come into full compliance with all applicable environmental laws and, if necessary, cease all operations, until it is able to fully comply with same.

Dated: Buffalo, New York
September 12, 2018

Respectfully submitted,

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