

# Criminal Enforcement: Federal Appellate Court Addresses Challenge to RCRA Convictions

## Arkansas Environmental, Energy, and Water Law Blog



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The United States Court of Appeals for the Second Circuit ("Court") Addressed in a January 11, 2016 opinion whether the conviction of Tonawanda Coke Corporation ("TCC") on three counts of violations of the Resource Conservation and Recovery Act ("RCRA") should be reversed. *See United States v. Tonawanda Coke Corp., No. 14-1091-CR, 2016 WL 105805 (2d Cir. Jan. 11, 2016).*

One of the alleged violations was the storage of hazardous waste without a RCRA permit.

TCC alleged that it lacked fair notice that its conduct was criminal under the RCRA. TCC further argued that its charged conduct of storing hazardous waste (count 17) should be reversed because the conduct was outside of the statute of limitations period. Finally, TCC claimed that the District Court "abused its discretion" in requiring that the company, as a form of community service, to fund two studies to evaluate the effects of its conduct.

As an initial matter, TCC argued it was not provided "fair notice" of certain regulatory terms. Judicial decisions have held that an agency must provide fair notice of its regulatory interpretations to the regulated public. However, the Court held that TCC did not properly argue the lack of fair notice in its lower court motions. The claim was therefore not considered.

TCC argued that Count 17 of its indictment in 2010 was outside of the statute of limitations and therefore should have been dismissed as time-barred. Count 17 alleged that TCC knowingly stored hazardous waste without a permit, in violation of 42 U.S.C. § 3282 (a).

The government responded that Count 17 had no statute of limitations because the storage of hazardous waste is considered a continuing offense. The Court agreed.

A continuing offense was deemed one that involves a prolonged course of conduct. Its commission was not deemed complete until the conduct has run its course. However, TCC claimed, among other things, that the gravamen of its unlawful conduct was "active management" (not storage) and, therefore, not a continuing offense. The Court rejected this argument, concluding that the statutory language in 42 U.S.C. § 3282 (a) describing the offense contemplated a prolonged course of conduct. As a result, TCC's storage of the hazardous waste was considered a continuing offense and there was no statute of limitations.

Finally, TCC also argued that the District Court abused its discretion in imposing, as a special condition of probation, a requirement that TCC fund two evaluative studies designed to investigate the effects of its

conduct on human health and the environment. The Court held that in view of the district judges' wide discretion in determining what sentence to impose, that it acted within its broad authority to fashion a just sentence.

The Appellate Court affirmed the indictment of the District Court.

[A copy of the decision can be downloaded here.](#)