Nos. 08-50072, 08-50073

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

SAN DIEGO GAS & ELECTRIC COMPANY,
KYLE RHEUBOTTOM, AND DAVID WILLIAMSON,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
Nos. 06CR65-DMS, 07CR484-DMS
The Honorable Dana M. Sabraw, District Judge.

BRIEF *AMICUS CURIAE* OF THE AMERICAN GAS ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae American Gas Association ("AGA") is a 501(c)(6) tax exempt trade association incorporated in Delaware as a nonstock membership corporation. It has no parents, subsidiaries or affiliates and no ownership interest in any other corporations. AGA's membership represents over 200 natural gas distribution utilities located in all 50 states.

Amicus curiae National Association of Manufacturers is a non-profit trade association. It is a membership association, and is not a stock company and has no shareholders. No publicly-held company has any ownership interest in the NAM.

Amicus curiae NFIB Small Business Legal Center is a 501(c)(3) public interest law firm, established under the laws of Tennessee. It is affiliated with the National Federation of Independent Business, a 501(c)(6) business association, which supports the NFIB Small Business Legal Center through grants and exercises common control of the NFIB Small Business Legal Center through officers and directors. No publicly-held company has 10% or greater ownership of the NFIB Small Business Legal Center.

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INTEREST OF *AMICI*[1]

The American Gas Association ("AGA"), founded in 1918, represents 202 local energy companies that deliver natural gas throughout the United States. There are nearly 70 million residential, commercial and industrial natural gas customers in the U.S., of which more than 64 million receive their gas from AGA members. Natural gas meets almost one-fourth of the United States' energy needs. AGA members include publicly traded energy utilities, municipally owned energy utilities, and privately held utility companies and natural gas distributors, pipelines, marketers and storage facilities. AGA is an advocate for local natural gas utility companies and provides a broad range of programs and services for members including the filing of *amicus* briefs on issues that affect its members and/or their customers. San Diego Gas & Electric Company ("SDG&E") is a member of AGA.

During routine pipeline safety repair and maintenance projects, some of AGA's members have encountered asbestos coal tar pipe wrap on some of their natural gas transmission lines, and they are directly affected by the lack of clarity and fair notice in the asbestos NESHAP sampling and testing rules resulting from EPA's inconsistent interpretation of its rules as applied to asbestos coal tar pipe wrap.

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[1] All parties have consented to the filing of this *amicus* brief. Letters of consent are being submitted separately.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing approximately 11,000 small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth in the United States and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM frequently files *amicus* briefs in cases that will impact its members.

The NFIB Small Business Legal Center is a 501(c)(3) public interest law firm. It is affiliated with the National Federation of Independent Business, a 501(c)(6) business association, the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB supports the NFIB Small Business Legal Center through grants. The NFIB Small Business Legal Center was established to protect the rights of America's small-business owners. The NFIB Small Business Legal Center acts as the voice of small business in the courts and frequently files *amicus* briefs in cases that will impact small businesses. NFIB's national membership owns a wide variety of America's independent businesses and is represented in virtually every industry such as construction, hospitality and agriculture. NFIB's more than 300,000 members

independently own and operate their businesses and are not dominant in their field of operations. The average NFIB member business has five employees, gross sales of approximately $350,000 per year, and net annual profits of $40,000 to $50,000. This case is of particular importance to small businesses because they bear a disproportionate burden of complying with environmental regulations – a September 2005 United States Small Business Administration study found that compliance with environmental regulations costs small firms 364 percent more as a share of firm revenues than large firms. *See* W. M. Crain, "The Impact of Regulatory Costs on Small Firms," United States Small Business Administration, Office of Advocacy (September 2005), available at www.sba.gov/advo/research/rs264tot.pdf (last accessed November 4, 2008).

Many small business owners consider government regulation to be one of their most formidable business problems. Over 40 percent of small employers see regulation as a "very serious" or a "somewhat serious" problem. *See* W. J. Dennis, Jr., 1 *NFIB Small Business Poll*, "Coping with Regulation"(2001). NFIB members viewed environmental and land use regulations – such as the regulation at issue in this case – along with tax related and occupational licensing regulations as the three most burdensome type of regulation. *Id.* Many small business owners have trouble understanding their obligations under complicated regulatory regimes: almost one-

quarter of small business owners said that they have difficulty understanding what they must do to be in compliance with regulations. *Id.*

The NAM, the NFIB and their members have an important interest in this case because businesses, and especially manufacturers, bear a disproportionate share of the burden imposed by federal environmental regulation.

Affirmance of the trial court's order on the basis of lack of fair regulatory notice would be a step toward reducing the burden and the risks imposed by the regulated community by ambiguous and highly technical regulations and interpretation through enforcement and penalty. An affirmance would send the message to federal agencies that they must do better at providing businesses with fair notice of how regulations will be interpreted and applied to them.

ISSUE PRESENTED

Whether the government has shown that the district court clearly and manifestly abused its discretion by ordering a new trial on Clean Air Act charges on the ground that artificially inflated test results and the government's closing argument to the jury were confusing, misleading, and unfairly prejudicial, resulting in a miscarriage of justice.

PRELIMINARY STATEMENT

This appeal arises from the government's application of asbestos work practice standards under the Clean Air Act. The pipe removal operation at issue was monitored by enforcement agencies. There was no evidence that asbestos fibers were released into the air or soil; in fact, the evidence shows that no emissions occurred. After most of the pipe wrap samples underlying the prosecution had been destroyed, the government secured an indictment.

Following a lengthy trial, a jury returned convictions against appellees San Diego Gas & Electric Company ("SDG&E"), David Williamson, and Kyle Rheubottom. After extensive briefing, the district court granted a new trial under Fed. R. Crim. P. 33. Relying on Fed. R. Evid. 403 and its own observations during the trial, the district court concluded that the convictions cannot stand. The government on this appeal asks this Court to reverse the well-reasoned decision below.

This case originates with SDG&E's sale of a 16-acre parcel of land in Southern California, and SDG&E's decommissioning and removal of natural gas storage pipes, covered with a multi-layer coal tar wrap, one layer of which contained asbestos material.

The Clean Air Act regulates asbestos-containing material in demolition or renovation projects only (1) if it is "friable" (*i.e.*, can be crumbled, pulverized or reduced to powder by hand) or has a high probability of becoming friable during removal; and (2) if it contains more than 1% asbestos as determined under a specified test method.

The United States Environmental Protection Agency ("EPA") has promulgated guidelines specifying the methods for determining whether material contains more than 1% asbestos. Two aspects of that test method are at issue: the taking and preparation of a "representative sample" and the method for performing a quantitative analysis of the representative sample to determine asbestos content.

Defendants argued at trial that the government (1) relied on samples and test methods of questionable validity[2] that led to results much greater than the government's test results for the one sample that was representative and had been

[2] For example, the government's principal analyst conceded that using plastic ruler instead of an electron microscope to measure an asbestos-containing layer, which was less than one millimeter thick, ER 1282-88; SER 2246, may have inflated her results by as much as 100%, ER 1288.

preserved; and (2) in closing argument urged the jury to convict defendants based on the inflated test results.[3]

District Judge Sabraw held that the unreliable test results and the prosecutor's misleading argument to the jury resulted in "undue prejudice and confusion of issues" causing a "miscarriage of justice" and that defense evidence preponderated against the verdict, and granted defendants' motion for a new trial. ER 39-41, 43-45.

Amici agree with appellees that Judge Sabraw correctly granted a new trial, and that he incorrectly rejected defendants' argument that they lacked fair notice of how the regulations would be interpreted and applied by EPA. Defendants' due process lack of fair notice argument provides an alternative basis for granting a new trial and the trial court's order should be affirmed on that ground as well.

[3] The prosecutor urged the jurors to ignore the test results based on the one remaining sample (SD- 2) deemed to have contained all layers of the wrap when taken and to rely instead on test results of other samples (SER 1951) which had been lost or compromised and which the trial court determined not to be representative of the material to be tested. ER 44-45.

ARGUMENT

I. THE DISTRICT COURT'S GRANT OF A NEW TRIAL ON THE WORK PRACTICE COUNTS IS CORRECT BECAUSE DEFENDANTS LACKED FAIR NOTICE AS TO HOW THE GOVERNMENT WOULD APPLY THE TEST METHOD

This Court should affirm the district court's new trial order on an alternative ground, not adopted by the district court, that the Defendants were not given fair notice as to how the government would interpret its regulations -- the long-ignored provisions of the Test Method that call for combining results for multi-layered samples -- or how the government's actual application of the Test Method would be used at trial, notwithstanding that the district court's new trial order is based on unfair prejudice and confusion.

This Court may affirm a district court's order granting a new trial on any ground supported in the record. *See United States v. X-Citement Video, Inc.,* 513 U.S. 64, 78 (1994) ("a prevailing party . . . is entitled under our precedents to urge any grounds which would lend support to the judgment below"), citing *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 419 (1977); *Schiro v. Farley*, 510 U.S. 222 (1994); *accord Atel Fin. Corp. v. Quaker Coal Co.,* 321 F.3d 924, 926 (9th Cir. 2003); *Cigna Property & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418-419 (9th Cir. 1998). "If the decision below is correct, it must be affirmed, even if the district court relied on the wrong grounds or wrong reasoning." *Unigard Sec. Ins. Co. v. Lakewood*

Eng'g & Mfg. Corp., 982 F.2d 363, 367 (9th Cir. 1992) (quoting *Jackson v. Southern Cal. Gas Co.*, 881 F.2d 638, 643 (9th Cir. 1989)).

We submit that a decision by this Court, *United States v. Approx. 64,695 Pounds of Shark Fins*, 520 F.3d 976 (9th Cir. 2008), rendered subsequent to the district court's ruling on defendants' motion for a new trial, compels affirmance of the order for a new trial on independent ground that the Government did not provide fair notice of its interpretation of the regulations and test methods at issue.

A. The Constitutional Requirement of Fair Notice

This case presents a recurring question of administrative law: What constitutes sufficiently fair notice of an agency's interpretation of a regulation to justify punishing someone for violating it? This question has been answered most often and most clearly by the District of Columbia Circuit: "Due process requires that parties receive fair notice before being deprived of property," and "In the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability." *General Electric Co. v. EPA,* 53 F.3d 1324, 1328-1329 (D.C. Cir. 1995); *see Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000); *see also Gates & Fox Co. v. OSHRC,* 790 F.2d 154, 156 (D.C. Cir.1986) ("Due process prevents the doctrine of [judicial] deference [to agency

interpretation] from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.")

The notion that lack of fair notice directly implicates the right to due process is not new: it was articulated by the Supreme Court more than 50 years ago in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) and reiterated more recently in *Grayned v. City of Rockford,* 408 U.S. 104 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." 408 U.S. 104, 108).

The doctrine of fair notice has been recognized by this Court also. Thus in *Newell v. Sauser*, 79 F.3d 115 (9th Cir. 1996), this Court held that "It is clearly established, both by common sense and by precedent, that due process requires fair notice of what conduct is prohibited before a sanction can be imposed." (79 F.3d 115, 117, citing *Grayned v. City of Rockford*). In *Stillwater Mining Co. v. Federal Mine Safety and Health Review Comm'n*, 142 F.3d 1179 (9th Cir. 1998), this Court said: "We recognize, of course, that "due process requires fair notice of what conduct is prohibited before a sanction can be imposed," citing *Newell v. Sauser*, 142 F.3d 1179, 1182. Most recently, the doctrine was recognized in *United States v. Approx. 64,695 Pounds of Shark Fins,* 520 F.3d 976 (9th Cir. 2008), decided after the district court entered its new trial order in this case: "Due process requires that an agency provide

'fair notice of what conduct is prohibited before a sanction can be imposed.'" (quoting *Stillwater Mining*, in turn quoting *Newell v. Sauser*).

A majority of the "regulatory fair notice" cases arise in the context of civil penalties – denial or revocation of a license or permit (*e.g. Trinity Broadcasting*), imposition of a civil fine (*e.g. General Electric*), or civil forfeiture of property (*e.g. United States v. Approx. 64,695 Pounds of Shark Fins*). "Fair notice" as a due process requirement arose in the context of criminal liability and that the 'no punishment without notice' rule is most commonly applied. Thus in *General Electric*, 53 F.3d 132at 1328-1329, the D.C. Circuit cited *United States v. National Dairy Corp.,* 372 U.S. 29, 32-33, 83 S.Ct. 594, 598, 9 L.Ed.2d 561 (1963) for the proposition that "criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed."

B. The Legal Standard of Fair Notice

Different courts of appeals have used somewhat different verbal formulae to describe their respective tests for determining whether an agency has given regulated entities adequate notice. The D.C. Circuit has used terms such as "clarity" (*Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir.1968)), "reasonably comprehensible to people of good faith" (*McElroy Electronics Corp. v. FCC,* 990 F.2d 1351, 1358 (D.C. Cir.1993)) (internal punctuation, citations, and emphasis omitted); or a

"reasonable person's understanding" (*General Electric*, 53 F.3d 1324 at 1330).[4] Earlier this year, this Court held that "a regulation must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.'" *United States v. Approx. 64,695 Pounds of Shark Fins,* 520 F.3d 976, 980 (9th Cir. 2008) (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)).

There appears to be a clear consensus that no liability – civil or criminal – should attach to failure to comply with statutes or regulations unless "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ***ascertainable certainty***, the standards with which the agency expects parties to conform...." *General Electric,* 53 F.3d at 1329 (emphasis supplied); *see also Trinity Broadcasting*, 211 F.3d 618 at 629; *United States v. Hoechst Celanese Corp.,* 128 F.3d 216, 224 (4th Cir. 1997); *Georgia Pacific Corp. v. Occupational Safety and Health Review Comm'n,* 25 F.3d 999, 1005 (11th Cir. 1994); *In re Metro-East Mfg. Co.,* 655 F.2d 805, 811 (7th Cir. 1981).

[4] *General Electric* is particularly instructive because not only did it involve the same agency as in this case, but it, too, arose from highly technical regulations which even the agency could not seem to interpret consistently.

C. EPA's Asbestos Sampling and Testing Regulation Do Not Meet the "Ascertainable Certainty" Test

The EPA regulation at issue does not provide fair notice of how multi-layered asbestos-containing material must be averaged for the purpose of determining asbestos content when measured against the "ascertainable certainty" standard.

EPA regulates asbestos emissions by requiring owners and operators of facilities which contain "regulated asbestos containing material" ("RACM") to follow certain procedures that include the asbestos "work practice" standards at issue here. Not all asbestos is RACM, however. Under EPA's regulatory scheme, to be RACM, asbestos-containing material ("ACM") must "contain[] more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 C.F.R. Part 763, section 1, Polarized Light Microscopy" (the "Test Method"). 40 C.F.R. § 61.141. The central issue in this case is whether the coating of the pipes SDG&E's contractor removed contained more than one percent asbestos. Determining asbestos content must comply with specified sampling and quantification requirements.[5]

[5] The "Test Method" was codified in 1982 as part of the Toxic Substances Control Act (TSCA). *See* 15 U.S.C. § 2642; 47 Fed. Reg. 23360 (May 27, 1982). In 1990, the EPA substantially amended the asbestos NESHAP and incorporated the Test Method by reference into the definitions of ACM and RACM. *See* 55 Fed. Reg. 48406, 48415 (Nov. 20, 1990); 40 C.F.R. § 61.141. The Test Method itself states that "Bulk samples of building materials taken for asbestos identification are first examined for homogeneity and preliminary fiber identification." (40 C.F.R. Part 763, Subpt. E, App. E, sect. 1.1., at App. 14.)

i. The Test Method Prescribed in the Asbestos NESHAP

The Asbestos NESHAP Test Method specifies a two-step process for determining whether ACM exceeds the one percent threshold. *See* 40 C.F.R. Part 763, Subpart E, Appendix E, Section 1.7 ("Procedures"), App. 15, *et seq.* The first step describes on-site sampling methods (Section 1.7.1 ("Sampling")); the second step prescribes analysis and measurement ("quantitation") of the asbestos in "representative" samples properly taken (Section 1.7.2 ("Analysis")).

40 C.F.R. Part 763, Subpart E, Appendix E, Section 1.7.1 ("Sampling") states:

> Samples for analysis of asbestos content *shall be taken* in the manner prescribed in Reference 5 and information on design of sampling and analysis programs may be found in Reference 6. If there are any questions about the *representative nature* of the sample, another sample should be requested before proceeding with the analysis.[6]

App. 16 (emphasis supplied). The regulation is clear that it is essential to ensure that samples be taken in a prescribed manner and that they be representative of the

[6] An EPA guidance manual incorporated in the asbestos NESHAP (Reference 5) states that "The sampling and analysis of the friable material are *extremely important*." *Asbestos-Containing Materials in School Buildings: A Guidance Document, Part 1* at 9 (EPA, Mar. 1979) (emphasis supplied) (App. 156). Throughout, this guidance manual refers to "bulk samples." (*E.g.,* "Bulk sampling and analysis of this friable material itself is the only method to determine whether or not asbestos is present in the material." (App. 157) and "It is important that analysis of bulk samples are performed by the recommended technique."(App. 158)). Reference 6, *Asbestos-Containing Materials in School Buildings, Guidance for Asbestos Analytical Programs* (EPA, June 1980) (App. 212, *et seq*.), another EPA manual incorporated into the asbestos NESHAP, recites: "Improper sampling could result in incorrect decisions, even when the accompanying laboratory analysis and quality assurance programs are excellent." (App. 221) This manual (which describes its sampling instructions as a "refinement" of the methodology described in the March 1979 manual, App. 221), requires that "bulk samples [are] to be taken." App. 222.

material as a whole.[7] The district court found that the sampling method requirements explicit. ER 31-34.

40 C.F.R. Part 763, Subpart E, Appendix E, Section 1.7.2 ("Analysis"), describes how a representative sample is to be analyzed and how the results should be quantified to determine whether its asbestos content exceeds the one percent threshold. Section 1.7.2.1 ("Gross Examination") directs how a multi-layered samples, such as those at issue in this case, must be evaluated: "When discrete strata are identified, each is treated as a separate material so that fibers are first identified and quantified in that layer only, and then the results for each layer are combined to yield an estimate of asbestos content for the whole sample." App. 16.

If a sample is bulky and heterogeneous, and thus it is difficult to obtain "representative subsamples," Section 1.7.2.2, "Sample Preparation," contains instructions for preparing such representative subsamples, and states that "in most cases the best preparation is made by using forceps to sample at several places from the bulk material.* * * Alternatively, attempts may be made to homogenize the sample before further characterization." App. 16.

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[7] Reference 5, the EPA guidance manual, directs inspectors to take a "representative sample" that includes "all the layers of the material." App. 156-57. Reference 6 states that "sampling of the suspect material is considered the single most important step in the process" and that "[i]f the suspect material is inappropriately sampled, the analyses that follow will be compromised." App. 216.

After an appropriate subsample has been prepared, Section 1.7.2.3, "Fiber Identification," provides criteria for determining the type of asbestos is present (six types are listed and described). App. 17-21.

Section 1.7.2.4, "Quantitation of Asbestos Content," instructs analysts how to quantify each layer's asbestos content before averaging for the entire sample. For each layer, the analyst must "provide[] a determination of the area percent asbestos." App. 21. The Test Method also provides that "conversion of area percent to percent of dry weight" is feasible if "the specific gravities and relative volumes of the materials are known." *Id.*

ii. The 1994 and 1995 EPA "Clarifications"

In 1994 and 1995, the EPA issued "clarifications" of the Test Method, which are inconsistent with each other and inconsistent with the Test Method incorporated in the Asbestos NESHAP. The 1994 "clarification" stated "when a sample consists of two or more distinct layers or materials, each layer should be treated separately and the results reported by layer (discrete stratum)." 59 Fed. Reg. 542 (Jan. 5, 1994). The 1995 "clarification" stated that "all multi-layered systems . . . must be analyzed as separate materials, and *[the] results [are] not allowed to be combined to determine average asbestos content.*" 60 Fed. Reg. 65243 (Dec. 19, 1995) (emphasis added). "If any layer contains greater than one percent asbestos. . .that layer *must* be treated as asbestos-containing. . . . Once *any one layer* is shown to have greater than one

percent asbestos, *further analysis of the other layers is not necessary." Id.* (Emphasis added).[8]

Section 1.7.2.1 of the Test Method directs analysts to average results across layers in a multi-layered sample, but the "clarifications" gave the opposite instruction: "[A] multi-layered sample which previously was determined to be nonasbestos-containing may now have layers which will be classified as asbestos-containing based on the presence of asbestos in greater than 1 percent." 59 Fed. Reg. 38970 (Aug. 1, 1994). However, 40 C.F.R. Part 763, Subpart E, Appendix does not specify *how* the results for each layer are to be combined so that asbestos content for the sample can be estimated *(i.e.,* whether by weight, by volume, by number of fibers, or in some other way). *See* Section 1.7.2.1.

Despite the language of the Test Method, the "single-layer" method became the standard. Beginning in August 1994, laboratories were directed to implement EPA's "latest revision of the method" in order to be certified under government-approved standards. *See* E. B. Steel, *et al.,* NATIONAL INSTITUTE OF STANDARDS & TECHNOLOGY HANDBOOK 150-3, NAT'L VOLUNTARY LAB. ACCREDITATION PROGRAM, BULK ASBESTOS ANALYSIS (1994) (App. 280). The district court held that the single-layer method required by the "clarifications," as applied to multi-layered

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[8] The 1995 "clarification" stated that the "clarifications" reflected an "*unwritten policy"* against averaging. 60 Fed. Reg. 65243 (emphasis supplied).

material, did not amend the Test Method and violated the Administrative Procedure Act. *See United States v. San Diego Gas & Electric Company, et al.,* No. 06-CR-0065-DMS, 2006 WL 3913457, at *9 (Nov. 21, 2006). In other words, they were unenforceable and not binding on regulated persons.

iii. The Regulations and the Government Own Interpretation Are Inconsistent and Ambiguous

The Test Method itself does not specify how results for each layer of multi-layered material are to be combined. Before the district court dismissed the first indictment in this case, EPA's analysts followed the 1994 and 1995 "clarifications" that were inconsistent with the Test Method. The test samples were either destroyed (ER 1241) or compromised and they could not be tested in accordance with the Test Method (ER 1020, ER 1246). The one sample deemed to have contained all layers when taken ("SD-2") was no longer intact and the layers could not be reconstructed (ER 1246, ER 733). The defendants had no opportunity to test those samples after they were indicted.

The confusion infected the trial. Before trial the government argued that the Test Method permits *only* volumetric averaging (ER 2500-05) and the district court adopted the government's theory that *only* volumetric averaging is permissible, ER 2504-05 (citing Section 1.7.2.4), and allowed the trial to proceed on that theory.

However, in its closing argument the government disavowed that theory (SER 1890-96, 1949-51).[9]

The language requiring volumetric analysis refers only to how individual layers are to be analyzed, not how multiple layer results must be combined. The Test Method permits weight-based analysis in certain circumstances. Section 1.7.2.2 states that if a sample is "heterogeneous" *(e.g.,* multi-layered with the layers consisting of different materials or combinations of materials), and if "ashing" (heat) treatment or acid or solvent treatment is required to "homogenize" the sample to prepare it for fiber counting, "[u]se of these procedures . . . requires a correction for percent weight loss." Thus one section of a regulation *explicitly does not* prohibit weight averaging, another section *implicitly does* prohibit it, but in other circumstances is not "reasonably comprehensible" to a "person of ordinary intelligence" (*Shark Fins,* 520 F.3d 976, at 980) . "On their face, the regulations reveal no rule or combination of rules providing fair notice" that they require one

[9] The prosecutor's closing argument was an important factor in the district court's decision to grant a new trial. Contrary to the trial court's – and defendants' – belief that "the focus of argument to the jury regarding the asbestos content element would center on SD-2" (ER 38-39), the prosecutor argued that "nowhere in [the regulation] does it say you must have a representative sample" (SER 1949) and that, despite the court's pretrial orders, that the volumetric averaging method is "not the law" (SER 1950-51) and urged the jurors to ignore the test results based on the one preserved sample deemed to have contained all layers of the wrap when taken (SER 1951). After trial, the district court acknowledged that test results admitted into evidence were based on methods of "debatable validity" that "should have been addressed pretrial" (ER 40-41).

method of combining readings taken from multiple layers or prohibit other methods. *General Electric*, 53 F.3d 1324, 1330.

The standard or method is not clear.[10] It certainly does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" (*Shark Fins,* 520 F.3d 976, at 980); it is not reasonably comprehensible to people of good faith" (*General Electric*, 53 F.3d 1324, 1330); the appropriate measure of asbestos content is not apparent even to "a reasonably prudent person familiar with the. . . industry" (it certainly was not recognized by SDG&E and its licensed and experienced asbestos remediation contractors or the state and federal inspectors on site) (*Stillwater Mining*, 142 F.3d 1179, 1182); and a regulated party acting in good faith would surely not be able to identify, with *"ascertainable certainty"* the standards with which the agency expects parties to conform. (*General Electric*, 53 F.3d 1324, 1329).

As in *General Electric*, the regulations' lack of clarity is heightened by the agency's inconsistent and confusing practice. EPA's 2006 National Enforcement

[10] The sentence following the language relied on by the district court explicitly permits area-based *(i.e.,* single-layer volume) calculations to be expressed by weight under certain circumstances. Section 1.7.2.4 states "Reliable conversion of area percent to percent of dry weight is not currently feasible unless the specific gravities and relative volumes of the materials are known." Thus, if the specific gravities and relative volumes are known, the Test Method acknowledges that percent by *weight* can be determined. Section 1.7.2.4 is the only part of the regulation that addresses multi-layered material, and it is could be read to permit using weight, rather than volume, as a measure of asbestos content.

Investigation Center (NEIC), *Operating Procedure, Determination of Asbestos in Bulk Building Materials No. NEICPROC/01-002R3* (Effective February 28, 2006) (App. 364) refers to RACM and percent asbestos content ***by weight***. (Section 2.3.7 states "The weight percent asbestos in the sample can be calculated using the following formula.

% asbestos in residue X % residue / 100 = weight in the sample.

App. 381.

As pointed out above, even after the Government initiated its enforcement action, it changed its theory.

Such "confusion does not inspire confidence in the clarity of the regulatory scheme." *Trinity Broadcasting,* 211 F.3d 618, 629 (D.C. Cir. 2000); *see also Rollins Environmental Services (NJ) Inc. v. EPA,* 937 F.2d 649, 653-654 (D.C. Cir. 1991)("When the agency itself is uncertain . . . how to comply with [the regulation] . . . it is arbitrary to find the regulation clear." There can be no fair notice when "depending on which official responded to [an] inquiry, EPA *might* have given . . . the opposite advice") (emphasis in original).

iv. There Was No Pre-Enforcement Notice – Communications From EPA and Its Delegate State Regulating Agency Were Ambivalent and Ambiguous

During removal operations, local, state and federal EPA inspectors visited the site numerous time, and took samples on several occasions. At no time were SDG&E or its consultants and contractors ordered to stop the pipe removal work.[11] An inspector from the San Diego Air Pollution Control District ("APCD") (the state agency responsible for enforcing the asbestos NESHAP in San Diego County under authority delegated by the EPA (ER 1672) concluded that SDG&E's contractors were "taking all the positive steps" required. ER 1737-43; SER 2217-19 and that the process required no APCD permits, and that the removal was in compliance with all applicable APCD rules. SER 282-83, 2122-23; SER 245, 2049, 2220-22.[12]

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[11] SDG&E was aware before it commenced removal operations that the pipe wrapping might contain asbestos. ER 1106; SER 1330. A sample was taken and SDG&E concluded that it contained asbestos. ER 691-93. SDG&E hired a consulting firm to perform a site assessment. ER 3169. That consultant's report was ambivalent: one part of the report stated that the wrap was friable on the pipe; another part concluded that the wrap was in good condition. ER 3184, 3208. At trial, a senior EPA inspector (and government witness) agreed that the wrap was *not* friable on the pipe and that the part of the report saying otherwise was incorrect. SER 1377.

[12] This is not a case in which a regulated entity ignored the rules, proceeded without supervision by regulators and required permits, or tried to cover up violations. When APCD noted potential problems, SDG&E's contractor suspended pipe removal operations (SER 985); when APCD's laboratory reported that test samples taken by an APCD inspector were *not* friable (ER 1767), SDG&E's contractor resumed removal work after notifying APCD (ER 3436-37). Later, after the pipe removal process was well underway and a substantial amount of the pipe wrapping and been removed, when EPA inspectors concluded that the machine SDG&E's contractor was using to remove coal tar pipe wrap rendered the asbestos in one layer "friable," SDG&E and its contractors agreed to treat the pipe wrap as regulated, revised the waste manifests accordingly (ER 3492-93) and changed the site of the abatement work (ER 3492-94).

The government first articulated its interpretation of its regulations in this criminal prosecution. Adequate regulatory notice of agency interpretation of highly technical and ambiguous regulations may consist of pre-enforcement efforts to obtain compliance (*e.g.* denial of, or failure to issue, a permit) (*See General Electric*, 53 F.3d 1324, at 1329), but there were no such pre-enforcement measures in this case. To the contrary, although federal and state environmental inspectors were frequently at the site, none gave any indication that SDG&E and its contractors were not in compliance with environmental requirements.[13]

In *General Electric*, the court noted that when, as in the instant case, "the agency . . . provide[s] no pre-enforcement warning, effectively deciding 'to use a citation [or other punishment] as the initial means for announcing a particular interpretation' - or for making its interpretation clear" . . . such a decision may raise a question about "the adequacy of notice to regulated parties.". (*General Electric*, 53 F.3d 1324 at 1329, citing *Martin v. OSHRC,* 499 U.S. 144, 158 (1991)).

We respectfully submit that EPA's lack of pre-enforcement advice as to its "definitive" interpretation of its own regulations and test procedures, its ambiguous and ambivalent advice to SDG&E and its contractors during the pipe removal

[13] Indeed, a California state monitoring official stated that "SDG&E was. . . very committed to determining actual conditions at the site, and if there was a problem to do whatever was necessary to ameliorate that problem so that the parcel could get a clean bill of health." SER 1633-34.

process, its own inconsistent regulatory scheme, and its change is posture for purposes of prosecution, did indeed make for lack of adequate notice to SDG&E and the individual defendants, the regulated parties, and thus was a denial of due process.

Interpretation initially through enforcement action imposes severe and unwarranted burdens on the regulated community. In addition to the direct penalty imposed – whether deprivation of property or, especially, deprivation of liberty – a criminal conviction can have far-reaching collateral consequences, including debarment from bidding on government contracts, ineligibility for participation in government programs, increased difficulty obtaining bonding or financing, or inability to obtain required permits or licenses.

CONCLUSION

For the reasons stated above, the district court's orders granting a new trial should be affirmed on the alternative ground that the regulations defendants were alleged to have violated are unenforceable as to them because they did not have adequate notice and defendants were denied due process of law.

Dated: November 4, 2008

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Date: November 4, 2008

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that:

I am a citizen of the United States and a resident of the county of Westchester, State of New York.

I am over the age of eighteen years and not a party to the within action.

My business address is 2039 Palmer Avenue, Larchmont, New York 10538.

On this date, I served by First Class Mail at Scarsdale, New York, 2 copies of the Brief *Amicus Curiae* of the American Gas Association, the National Association of Manufacturers and the National Federation of Independent Businesses Small Business Legal Center in Support of Appellees, addressed to the attorneys for the parties shown on the attached Service List.

Dated: Scarsdale, New York
November 4, 2008

_____
Martin S. Kaufman

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Nos. 08-50072, 08-50073

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