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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. 09CR65-DMS, 07CR484-DMS
The Honorable Dana M. Sabraw, District Judge

BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANTS-APPELLEES URGING AFFIRMANCE

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[1] This amici brief is being filed with the consent of all parties.

and international affiliate members. An affiliate of the American Bar Association, the NACDL promotes due process, fair administration of the criminal justice system, and defends the adversary system and U.S. Constitution. NACDL has appeared in many cases as an amicus supporting these principles.

PRELIMINARY STATEMENT

In the interests of judicial economy, amici adopt by reference the Counterstatement of the Case and Facts presented in Appellees' Brief. Defendants were unjustly prosecuted and convicted for allegedly violating work practice standards promulgated under the Clean Air Act regarding the removal and disposal of asbestos-containing material (ACM) found in a multi-layered pipe wrap. There was no evidence that a single asbestos fiber was released into the air or soil. Amici urge this Court to affirm the district court's order granting a new trial on its own merits, or alternatively, on the grounds that the regulations that govern whether ACM exceeds the one percent threshold level of asbestos content necessary for federal jurisdiction are not "ascertainably certain" and that the prosecution violated the principle of fair notice and the rule of lenity. At most, under applicable guidelines by the Environmental Protection Agency and the Department of Justice, this matter should have been handled administratively or civilly rather than by a felony criminal prosecution.

ARGUMENT

I. DUE PROCESS REQUIRES BOTH THAT AN AGENCY PROVIDE FAIR NOTICE OF WHAT CONDUCT IS PROHIBITED BEFORE A SANCTION CAN BE IMPOSED AND THAT THE LAW NOT AUTHORIZE OR ENCOURAGE ARBITRARY AND DISCRIMINATORY ENFORCEMENT

The Supreme Court has repeatedly affirmed the fundamental principle that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Lanier*, 520 U.S. 259, 265 (1997) (internal citations and quotations omitted). Due process, whether in the civil or criminal context, requires that "parties receive fair notice before being deprived of property." *General Elec. Co. v. Environmental Protection Agency*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). To provide fair notice, "a statute or 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. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008) ("*Shark Fins*") (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

Similarly, "[v]agueness may invalidate a criminal law for . . . authoriz[ing] and even encourag[ing] arbitrary and discriminatory enforcement." *City of*

Chicago v. Morales, 527 U.S. 41, 56 (1999); *see also Hill v. Colorado*, 530 U.S. 703, 732 (2000). "To avoid unconstitutional vagueness, an ordinance must (1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner." *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997). The Seventh Circuit has determined that limiting prosecutorial discretion is the primary purpose of this doctrine. *See Kucharek v. Hanaway*, 902 F.2d 513, 518 (7th Cir. 1990).

This "fair warning" requirement has three related manifestations regarding notice. *Lanier*, 520 U.S. at 266. First, the vagueness doctrine bars enforcement of statutes which forbid or require acts "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* (internal citations omitted). Second, the "canon of strict construction of criminal statutes or rule of lenity ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Id.* (internal citations omitted).[2] Third, due process "bars courts from applying a novel construction of a criminal statute to conduct that neither the

[2] The Rule of Lenity will be discussed in greater detail, *infra.*

statute nor any prior judicial decision has fairly disclosed to be within its scope[.]" *Id.* (internal citations omitted). The Supreme Court has explained that "the touchstone is whether the statute [or regulation], either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267.

These requirements of fair notice clearly apply to the imposition of criminal liability under administrative actions. If a 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." *Shark Fins*, 520 F.3d at 980 (internal citations and quotations omitted). The lack of minimal guidelines impermissibly permits "standardless sweeps" that allow prosecutors and juries to pursue their personal predilections. *See Kolender v. Lawson,* 461 U.S. 352, 358 (1983).

In a civil matter, a court may defer to an agency's interpretation of an ambiguous rule so long as the agency's interpretation was logically consistent with the language of the regulation. The imposition of a fine or penalty, however, requires that a person can identify the agency's interpretation with "ascertainable certainty" from the regulations. *See General Electric*, 53 F.3d at 1330.

The decision in *United States v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998) is particularly instructive because that case, as does the case at bar, involves the application of a confusing testing standard to determine compliance with a safety rule. In *Chrysler*, the government argued that the company had run afoul of National Highway Traffic Safety Administration ("NHTSA") rules by failing to conduct the proper technical test to determine the safety of seat belt restraints. *Id.* at 1352. The court held that the company "cannot be found to be out of compliance with a standard if NHTSA has failed to give fair notice of what is required by the standard." *Id.* at 1354. The court further explained that: (1) the applicable standard, as written, lacked any indication regarding the relevant testing procedure the government sought to establish through litigation; (2) the agency's notice in the *Federal Register* also lacked any relevant guidance; and (3) the government's position that Chrysler should have looked to another, inapplicable standard in order to understand the testing procedure lacked merit. *Id.* at 1355-56. As the court aptly put it, the law does not require that a business satisfy a regulation "with the exercise of extraordinary intuition or with the aid of a psychic[.]" *Id.* at 1357.

Here, the Test Method used to determine the level of asbestos in multi-layer materials was sufficiently vague or ambiguous at the time of the conduct

such that a reasonable party would be forced to guess at its application, thereby enabling the government to enforce the standards in an arbitrary and discriminatory manner.

In the 1990 NESHAP amendments, the EPA did not specify *how* to combine or otherwise average the layer-specific results for determining asbestos quantity in multi-layered material. *See* Appellees' Br. at 11, 57; *see also* Emissions Standards Division, U.S. Envtl. Prot. Agency, EPA-450/3-90-017, National Emission Standards for Asbestos—Background Information for Promulgated Asbestos NESHAP Revisions 4-16 (1990). Before trial in this case, the government argued that *only* volumetric averaging was permissible, and the district court improperly found support for this view by referencing a different aspect of the regulation. *See* Appellees' Br. at 59. In fact, however, the Test Method also allows for measurement by area and by weight in certain circumstances. *See* Section 1.7.2.4. Indeed, the EPA reports and manuals, even as late as 2006, refer to determining asbestos content by weight. *See* Appellees' Br. at 61.

Subsequent "clarifications" by the EPA in 1994 and 1995 have only served to confuse the regulated community further with respect to the proper procedures under the Test Method. Section 1.7.2.1 requires that analysts average results of

testing across all layers in a multi-layered sample. Yet, the clarifications specifically required testing results reported by layer, 59 Fed. Reg. 542 (Jan. 5, 1994), and that once "any one layer is shown to have greater than one percent asbestos, further analysis of the other layers is not necessary." 60 Fed. Reg. 65,243 (Dec. 19, 1995). The notion that the duly promulgated Test Method, which explicitly instructs technicians to average the results of each layer of multi-layered samples, actually means, via these "clarifications," that the layers should **not** be averaged, is far from a "clarification" -- indeed, the opposite is true. No person could reasonably review the Test Method alongside these "up is down" and "down is up" Alice-in-Wonderland “clarifications” and determine with "ascertainable certainty" how multi-layered samples will be tested to determine asbestos content levels.

Indeed, the presence of “confounding factors” in the specified PLM test methodology and the allowance for the analyst's personal preference in testing help explain the reason why the test results of the pipe wrap samples presented by the government in this case range wildly from 1.55% to 50%-60%. Under these circumstances, there is no way for a business or individual, in advance of government enforcement, to determine with ascertainable certainty what PLM testing methodology the government will deem appropriate in evaluating ACM.

Given these ambiguities, regulated parties, acting reasonably, will not be able to conform their conduct to the NESHAP standards. More troubling, the ability to obtain such wide results under the testing using unclear guidelines permits "standardless sweeps" that impermissibly allow prosecutors and juries to pursue their personal predilections. *See Kolender*, 461 U.S. at 358.

A. The Rule of Lenity Requires Ambiguity of the Test Method Be Construed in Favor of the Accused

"The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 128 S.Ct. 2020, 2025 (2008) (plurality opinion). The rule of lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979) (citations omitted). *See also Rewis v. United States*, 401 U.S. 808, 812 (1971). "When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).

As described in Section I, there is substantial ambiguity surrounding the

Test Method under asbestos NESHAP. A reasonable person could not be expected to have a clear understanding of how multi-layer asbestos containing materials will be tested to determine the threshold percentage. The "responsibility to promulgate clear and unambiguous standards is on the [agency]." *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) (quoting *Marshall v. Anaconda Co.*, 596 F.2d 370, 377 n.6 (9th Cir. 1979)). Accordingly, any reading of the Test Method must be read in a manner that favors the defendant and is the least harsh for the accused. The rule of lenity "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain . . . ." *Santos*, 128 S.Ct. at 2025.

There is no question that the rule of lenity applies in the criminal enforcement of environmental regulations as well as statutes. In *United States v. Apex Oil Co.*, 132 F.3d 1287 (9th Cir. 1997), the government sought to hold defendants criminally liable for allegedly violating regulations governing the discharge of oil by ships. The regulation in question was not a model of clarity. *Id.* at 1291. Puzzled by what the regulation meant, this Court stated that "[t]he line to be drawn in this complex and comprehensive area of environmental protection was supposed to be drawn by an agency with expertise in the subject:

it was incumbent on that agency to draw the line in language that the common world will understand." *Id.* (internal citations and quotation omitted). In invoking the rule of lenity, the *Apex* court also noted that there, like here, the federal government had not tried to enjoin the practice or to subject the defendants to civil sanctions, instead electing to proceed under less-than-clear criminal statutes. *Id.* at 1291. Until the EPA appropriately clarifies the Test Method, the rule of lenity dictates that the ambiguous standard, to the extent it is applied in the criminal law context, be interpreted in favor of the defendants.

B. Affirming the District Court Would Not Hamper Enforcement

The government's complaint that upholding the district court's ruling would stymie its enforcement efforts rings hollow. The government can use debris samples after a demolition as long as they are representative samples and properly tested. In this case, inspectors had plenty of opportunities to take a whole and intact sample from any portion of miles of pipe wrap over a period of several months but failed to do so.

Furthermore, EPA is free to promulgate the Test Method to include the two "clarifications" that the government claims are necessary to make its job easier. Indeed, when the agency issued its 1995 "clarification" of the Test Method that precluded the test results based on multi-layer samples from being

combined to determine the average asbestos content, the agency announced that "EPA intends to amend the asbestos NESHAP in the near future to refer specifically to these procedures." 60 Fed. Reg. 65,243 (Dec. 19, 1995). EPA has had over 13 years to make good on its plans, but apparently has failed to carry them out. In any event, the EPA has ample administrative and civil remedies available, where the burden of proof is much lower, where financial penalties can be imposed that would have, under EPA Penalty Policy, a sufficient deterrent and punitive effect, and which are more appropriate in many cases than criminal prosecution. But in the criminal context, although protecting the environment is important, such "a salutary end may not be accomplished by unlawful means. The protection of individual liberty, as embodied in the requirement that no person be subjected to criminal sanctions except pursuant to lawful authority, is also an important value in a free society. When the twain conflict, the former must yield to the latter." *United States v. Alexander*, 938 F.2d 942, 946 n.7 (9th Cir. 1991) (Kozinski, J.).

II. THE LACK OF FAIR NOTICE OF HOW THE TEST METHOD WOULD BE APPLIED IS MADE MORE EGREGIOUS BY ITS UNFAIR AND ARBITRARY CRIMINAL ENFORCEMENT, PARTICULARLY WHERE, AS HERE, NO ENVIRONMENTAL HARM HAS BEEN SHOWN

As discussed in the previous section, it is evident that the Test Method is

opaque as to *how* the multiple layers of the pipe wrap are to be combined to determine whether the asbestos content exceeds the over one percent threshold level, and thus violates fundamental notions of fair notice as to what conduct is prohibited. However, the arbitrariness of enforcing the Test Method is further exacerbated because a person cannot reasonably ascertain whether a violation of the unclear standard would be met with administrative, civil, felony criminal sanctions, or all three, even where there was no evidence of environmental harm.

A. Limiting Arbitrary Environmental Criminal Enforcement: The Devaney Memorandum

The EPA conducts roughly over 20,000 inspections a year with regard to all federal environmental laws, any one of which can turn into a criminal enforcement action. Accordingly, it is imperative that the EPA provide clear case selection guidance to its enforcement staff. On January 12, 1994, EPA did just that when it updated its criminal enforcement policy in a Memorandum, *The Exercise of Investigative Discretion*, by Earl E. Devaney, Director, Office of Criminal Enforcement, for all EPA enforcement personnel.[3] The so-called "Devaney Memo," which is the current operative EPA policy on case selection criteria, was issued in apparent response to criticism about EPA's aggressive and

[3] *http://www.epa.gov/compliance/resources/policies/criminal/exercise.pdf.*

indiscriminate use of criminal investigations and enforcement. Hence, the Devaney Memo "sets out the specific factors that distinguish cases meriting criminal investigation from those more appropriately pursued under administrative or civil judicial authorities." *Id.* at 1. Notably, the Devaney Memo recognizes the seriousness of EPA's criminal enforcement duties:

> [T]he Office of Criminal Enforcement has an obligation to the American public, to our colleagues throughout EPA, the regulated community, Congress, and the media to instill confidence that EPA's criminal program has the proper mechanisms in place *to ensure the discriminate use of the powerful law enforcement authority entrusted to us.*
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> * * *
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> The criminal provisions of the environmental laws are the most powerful enforcement tools available to EPA. *Congressional intent underlying the environmental criminal provisions is unequivocal: criminal enforcement authority should target the most significant and egregious violators.*

Id. at 2 (emphasis added). The Devaney Memo further emphasizes congressional intent, noting that criminal enforcement is *not* appropriate for "minor or technical variations from permit regulations or conditions." *Id.* Accordingly, the memo specifies that the case selection criteria for criminal prosecution "will be guided by two general measures - *significant environmental harm* and *culpable conduct*." *Id.* at 3 (emphasis added).

The Devaney Memo defines "significant environmental harm" as "actual

harm" that "has an identifiable and significant harmful impact on human health or the environment" or the "threat" of such significant harm. *Id.* at 4. Simple failure to report emission data or information to the EPA, although a regulatory violation, should be subject to criminal investigation only when the failure to report "is coupled with actual or threatened environmental harm." *Id.*

1. Lack of Environmental Harm

Tellingly, there was no evidence in this felony Clean Air Act case that a single asbestos fiber was emitted into the air or soil at the site, although the government certainly had more than ample opportunity to conduct such tests to determine whether there were any health or environmental concerns. Indeed, as SDG&E points out, the evidence was to the contrary. SDG&E Br. at 1, 23. According to an unrebutted defense expert, from September 2000 to early 2001, 337 air samples and 181 soil samples were taken, and no asbestos was found in either the air or soil. Testimony of Stephen C. Davis RT 4454:19-4455:13; RT 4462:5-7 (Dkt. No. 235, Vol. 20, July 5, 2007). According to Mr. Davis, the absence of any asbestos in the air or soil tended to show that the pipe wrap was not rendered friable by the machine removal process, and hence, not subject to the work practice standards, regardless of the percentage amount of asbestos

content. *See id*. at 4471:4-20.

As a follow-up, the Department of Toxic Substances Control of the California Environmental Protection Agency issued a report in December 2002, *No Asbestos Found at Encanto Gas Holder Station*, confirming the absence of asbestos at the site. After taking over 200 air and soil samples, the "tests showed **no** asbestos in the air or soil." Defense Exhibit 3333 (emphasis in original) (copy attached hereto in Addendum).

The government will likely reply that it does not have to produce any evidence that any asbestos fiber was emitted, and that all they need to prove is that the defendant violated a regulation, however minor or technical. Unfortunately, it is not uncommon in criminal environmental cases for the government to file motions *in limine*, as they apparently did here, to preclude a defendant from showing that no environmental harm occurred; a mere violation of some EPA regulation is sufficient. Nevertheless, amicus contends that the lack of any environmental harm in this case, coupled with the vague and confusing Test Method, only further underscores the district court's concern with the "`arbitrary and discriminatory enforcement' of the law" (ER 33) by instituting a criminal felony prosecution when more fair, reasonable, and effective administrative and civil remedies are readily available and easier to

enforce.

In short, not only is there a lack of fair notice of *what* conduct is prohibited because of the unclear Testing Method, but there is also a lack of fair notice of *when* such conduct will bring persons within the sights of an overzealous prosecutor. The consequences of such prosecution cannot be overstated. Personal liberty interests are at stake, including the prospect of receiving lengthy prison sentences if convicted, the imposition of punitive fines, the denial of the right to vote, the loss of livelihoods and savings, the destruction of reputations, and other adverse and collateral consequences.[4]

First, as to the lack of any evidence of asbestos fibers being released, it is important to keep in mind that the defendants were prosecuted for violating the Clean *Air* Act. The CAA provides the Administrator of the EPA with the authority to set "emission standards" of statutorily listed "hazardous air pollutants." 42 U.S.C. § 7412(f)(2). Those emission standards are generally

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[4] *See, e.g.*, Craig S. Lerner & Moin A. Yahya, *"Left Behind" After Sarbanes-Oxley*, 44 Am. Crim. L. Rev. 1383, 1404 (2007) (discussing how arbitrary criminal enforcement of environmental and other laws that have lax mens rea standards has a tendency to cause "adverse selection" by deterring competent managers from assuming certain positions for fear of being unfairly prosecuted). *See also* Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 Am. Crim. L. Rev. 1417 (2007).

expressed in terms of parts per million of a substance released into the air by a stationary source. The enforcement of these emission standards, the bulk of which are handled through non-criminal remedies even for violations of clear standards, involve presenting evidence of the excessive level of pollutants emitted into the atmosphere.

If it is "not feasible" to "prescribe" an emission standard for a hazardous air pollutant, a "work practice" standard can be promulgated, such as the asbestos standard, for the removal and disposal of asbestos containing materials (ACM), but only if the ACM satisfies the threshold regulatory definition of asbestos in terms of both content and friability, i.e., regulated asbestos containing material (RACM). These work place standards are prophylactic in nature, designed to minimize the release into the air of asbestos from materials that meet the jurisdictional standard; nevertheless, the object or focus of such standards is the same as it is for regular emission standards, namely, the reduction of harmful emissions.

Thus, the asbestos work practices are designed not to eliminate any asbestos emissions, but only, according to the EPA, to limit "asbestos emissions to an acceptable level." SDG&E Br. at 9, n.2 (citing App. 68). Indeed, the regulatory history of the Category II nonfriable asbestos, at issue in this case,

makes this clear: "The intent of the policy determination was that it [with respect to nonfriable ACM being rendered friable] *apply narrowly* to specific instances where otherwise nonfriable materials would be damaged during demolition or renovation to the extent that *significant amounts* of asbestos fibers *would be released* to the atmosphere." 55 Fed. Reg. 48,408 (Nov. 20, 1990) (emphasis added). Throughout this commentary in the Federal Register, the emphasis by EPA is on preventing "significant amounts" of asbestos from being released; there is no zero emission standard.[5]

In this case, if the government had any concern that the failure to comply with any of these work place standards led to the emission of asbestos, one would think the EPA or its state agency counterpart, would do everything in its

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[5] Notably, the EPA's threshold for RACM for pipe wrap is 260 linear feet, regardless of the size of the diameter of the pipe, whether it is three inches or, as here, thirty inches. 40 C.F.R. § 61.145(a)(4). Consider the following hypothetical: Assume that the 30-inch pipes at the Encanto facility had been only 259 feet in length, that a one-inch thick pipe wrap was friable on the pipe by simple hand pressure, and that the wrap contained over 75 percent asbestos. Using simple geometry, the square footage of the wrap would be approximately 2,100 square feet and the volume would be approximately 175 cubic feet. Yet *all* of that friable asbestos could be sent airborne without any requirement of notice, wetting, or containment since the length of the pipe falls below the 260 linear foot threshold. In sharp contrast to this unregulated scenario, no asbestos fibers, let alone "significant amounts," were released into the atmosphere by the defendants in this case, and yet the government arbitrarily chose to target them for felony prosecution.

power to take air or soil samples to obtain evidence of emission of the asbestos fibers -- especially in a case like this, in which regulators were on site throughout the process. Instead, the case ultimately proceeded down a much more punitive path.[6]

2. Lack of Culpable Conduct.

As for "culpable conduct," the other prong along with "significant environmental harm" that may justify criminal enforcement, the Devaney Memo lists several factors for enforcement personnel to consider, such as a history of repeated violations and concealment of misconduct or falsification of records. Significantly, a "major factor" indicating culpable conduct is "deliberate" misconduct: "[a]lthough the environmental statutes *do not require proof of specific intent*, evidence, either direct or circumstantial, that a violation was *deliberate* will be a major factor indicating that criminal investigation is warranted." *Id.* at 5 (emphasis added). Thus, despite the erosion of *mens rea* or criminal intent under the "knowing" standard, the Devaney Memo, to its credit, calls for a heightened showing of intent to warrant a criminal investigation.

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[6] Incredibly, despite weeks of the pipe wrap removal operation and continuous presence of regulators, the indictment alleges only two substantive violations -- failure to wet and failure contain the material -- each occurring only on a single day rather than over a period of time, further underscoring the absence of any harm or concern that the operation will cause any harm.

More importantly, the Devaney Memo concludes with a cautionary note on bringing criminal enforcement actions:

> EPA has a full range of enforcement tools available - administrative, civil-judicial, and criminal. *There is universal consensus that less flagrant violations with lesser environmental consequences should be addressed through administrative or civil monetary penalties and remedial orders, while the most serious environmental violations ought to be investigated criminally.* The challenge in practice is to correctly distinguish the latter cases from the former.

Id. at 6 (emphasis added).[7]

As to culpable conduct and intent, there was no showing that the defendants were the "most significant and egregious violators" as the Devaney Memo envisions. The defendants in this case were not the classic "midnight dumpers" who disposed of hazardous waste in leaking drums under the cover of

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[7] Unfortunately, EPA's criminal enforcement efforts appears to be partly driven by a desire to increase enforcement statistics rather than to improve environmental quality. Indeed, the EPA sets yearly targets or goals for the number of criminal cases it should generate. For example, for fiscal year 2004, the target number set by EPA for criminal investigations was 400; the actual number was 425. (Table 1, EPA FY 2004 GRPA). In order "to meet or beat its numbers," EPA enforcement personnel are therefore likely to treat what should be a civil or administrative matter as a criminal one. In fact, EPA criminal agents report that they have a quota of two criminal referrals a year. EPA REVIEW OF THE OFFICE OF CRIMINAL ENFORCEMENT, FORENSICS, AND TRAINING 56 (Nov. 2003); *see also id.* at 58 (noting that there is "little distinction between important and trivial cases, and a preoccupation with traditional statistics rather than real accomplishments, in this case in preventing pollution.").

dark, or unscrupulous and unlicensed building renovators who hired homeless people off the street to rip out clearly regulated asbestos materials without any protective equipment. *See, e.g., United States v. Newman*, No. 97686 CR JLK (S.D. Fla. 1998) (defendant criminally prosecuted for using homeless persons to remove asbestos tiles in Miami warehouse renovation without following protective standards).[8]

On its face, then, the Devaney Memo gives notice to the public that EPA's criminal enforcement of environmental laws should be used sparingly, to be undertaken only where there is both significant environmental harm *and* genuine culpable conduct, taking into account any past history of violations. Yet, those enforcement standards were seemingly ignored in this case. There was no environmental harm, nor was there a substantial threat of environmental harm because there was no showing that either the initial or continued use of the machine to remove the pipe wrap resulted in a release of any asbestos fibers, let

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[8] EPA's Assistant Administrator for Enforcement, Granta Nakayama, has vowed to "protect the public by criminally prosecuting *willful, intentional, and serious* violations of the federal environmental laws." 2006-2011 EPA STRATEGIC PLAN: CHARTING OUR COURSE at 128 (2006) (emphasis added). The use of these three modifiers suggests a strong reaffirmation of the Devaney Memo guidance on criminal case selection. "Willful" violations generally require a finding of specific intent rather than the general intent standard associated with "knowing" violations.

alone a "significant amount," which EPA was concerned with when it promulgated its work practice standards. In short, this case involved a genuine dispute between the company and the regulators as to whether the pipe wrap should be considered RACM, not only in terms of the wrap's threshold asbestos content but also as to its friability as the wrap was removed by the stripping machine. At best, the two substantive counts were technical and isolated violations of the NESHAP work practices that should have been more appropriately handled by available administrative or civil remedies rather than by a felony prosecution against the company and two of its employees (a company environmental supervisor and specialist), and a third individual contractor.

The contractor did provide advance written notice to the San Diego Air Pollution Control District on September 1, 2000, and twice more on the agency's notification form about the proposed removal or renovation operation. Regulators had ample time to (and did) visit and check out the site to determine whether they disagreed with the contractor's position that this ACM was not friable. In fact, after regulators swarmed the site over a period of time giving conflicting views on the suitability of the site conditions, the defendants *voluntarily* ceased the renovation when they received the notice of alleged

violations. In short, the defendants did not hide, alter test results, or otherwise engage in egregious conduct or flaunt the law by ignoring or disobeying any agency or court order to stop their challenged practices. Rather, the record shows that the defendants cooperated with the regulators.

In short, according to EPA's own enforcement policy embodied in the Devaney Memo, the defendants could have fairly expected that this case would *not* have been treated as a criminal investigation in the first place, let alone referred to the U.S. Attorney for criminal prosecution. Rather, this case should have been, and could easily have been handled with administrative and civil proceedings and penalties, just as other such cases -- including those with worse facts -- are often handled. *See, e.g.*, *In re Lyon County Landfill*, 2000 EPA ALJ LEXIS 20 (Apr. 4, 2000) (administrative penalty of $45,800 assessed for violating asbestos NESHAP standards for active waste disposal sites, including failure to provide notice, failure to cover asbestos waste material, presence of ripped plastic bags containing asbestos); *In re Lu Vern G. Kienast*, 2003 EPA ALJ LEXIS 51 (Aug. 7, 2003) (administrative penalty of $35,000 assessed for nine counts of violating asbestos NESHAP standards, including failure to remove ACM from building before demolition, failure to wet ACM, and failure to properly disposed of material); *United States v. City of Winslow*, 2008 WL

4343853 (F.R.) (D. Ariz., Sept. 25, 2008) (civil penalty of $240,400 per consent decree for demolishing four of nine buildings without proper notice and inspection; remaining five were demolished after being advised by authorities on the proper disposal procedures, and yet, city hauled debris to vacant lot where it was burned, resulting in additional asbestos release and exposure to workers and the public).

B. Limiting Arbitrary Criminal Prosecution

Like the Devaney Memo, DOJ's *Principles of Federal Prosecution*, reprinted in DOJ's United States Attorneys' Manual (USAM),[9] properly recognizes the serious nature of filing criminal charges against individuals and corporations, regardless of the subject matter of the offense, and further underscores the underlying regulatory fair notice problem caused by the manner in which the Test Method was applied in this case.

> *The manner in which Federal prosecutors exercise their decision-making authority has far-reaching implications*, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens. A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances -- recognizing both that *serious violations* of Federal law must be prosecuted, and that *prosecution entails profound consequences for the accused and the family of the accused whether or not a conviction*

[9] *http://usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm.*

ultimately results.

> The availability of this statement of principles to Federal law enforcement officials and to the public serves two important purposes: ensuring the fair and effective exercise of prosecutorial responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that *important prosecutorial decisions will be made rationally and objectively on the merits of each case.*

USAM 9-27.001 **Preface** (emphasis added).

The judicious use of criminal enforcement powers is all the more important with respect to prosecuting environmental and other regulatory offenses, such as the case at bar, since those offenses are not inherently wrongful or *malum in se* crimes, such as bank robbery or fraud. Rather, they are regulatory or *malum prohibitum* offenses often involving a mass of complex and confusing laws and regulations that can be easily violated without even knowing that the law or regulation exists, or without any resulting harm. More importantly, unlike *malum in se* offenses, which cannot be appropriately addressed by non-criminal remedies such as those imposed by an Administrative Law Judge, non-criminal alternatives are readily available and should be used to address regulatory offenses such as those alleged to have occurred here.

Indeed, DOJ's *Principles of Federal Prosecution* for U.S. Attorneys outlines the options available to them once they receive a referral from the EPA

or other regulatory agency:

> USAM 9-27.200 **Initiating and Declining Prosecution–Probable Cause Requirement.**
>
> A. If the attorney for the government has probable cause to believe that a person has committed a Federal offense within his/her jurisdiction, he/she should consider whether to:
>
> 1. Request or conduct further investigation;
> 2. Commence or recommend prosecution;
> 3. *Decline* prosecution and refer the matter for prosecutorial consideration in another jurisdiction;
> 4. *Decline* prosecution and initiate or recommend pretrial diversion or other non-criminal disposition; or
> 5. *Decline* prosecution without taking other action.

Id. (emphasis added).

This policy of utilizing non-criminal remedies is further explained in the USAM as follows:

> USAM 9-27.250 **Non-Criminal Alternatives to Prosecution**
>
> A. In determining whether prosecution should be declined because there exists an adequate, non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including:
>
> 1. The sanctions available under the alternative means of disposition;
> 2. The likelihood that an effective sanction will be imposed; and
> 3. The effect of non-criminal disposition on Federal law enforcement interests.
>
> B. **Comment**. When a person has committed a Federal offense, it is important that the law respond promptly, fairly, and effectively. *This does not mean, however, that a criminal prosecution must be initiated. In recognition of the fact that resort to the criminal process*

is not necessarily the only appropriate response to serious forms of antisocial activity, Congress and state legislatures have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction. Examples of such non-criminal approaches include civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory [environmental] laws; . . . Another potentially useful alternative to prosecution in some cases is pretrial diversion. See USAM 9-22.000.

Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them if they are available in a particular case.

Id. (emphasis added).

Moreover, similar guidelines and considerations of non-criminal remedies are applicable with regard to charging a corporation. The Thompson Memorandum, *Principles of Federal Prosecution of Business Organizations*,[10] which was in effect from January 2003 through December 2006, provides in relevant part:

X. Charging a Corporation: Non-Criminal Alternatives

* * *

B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation. *In other cases, however, these goals may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the*

[10] *http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm*.

> *prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution.* These factors include: the strength of the regulatory's interest; the regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority's enforcement action is upheld; and the effect of a non-criminal disposition on Federal law enforcement interests. *See* USAM §§ 9-27.240, 9-27.250.

Id. (emphasis added).

Especially in the absence of a showing of environmental harm, the public is left to wonder in cases like this about the actual reasons underlying a costly felony prosecution. *See, e.g., United States v. Stein*, 541 F.3d 130 (2d Cir. 2008) (prosecutors improperly pressured company to curtail paying defense attorney fees to employees). The public interests at stake demand a faithful application of EPA and DOJ enforcement guidelines.

* * *

The criminal prosecution of the defendants in this case brings to mind the sound advice offered by former Attorney General Robert Jackson:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . . Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character. . . . [He should] select the cases for prosecution . . . in which the offense is *the most flagrant, the public harm the greatest, and the proof most certain*.

Attorney General Robert H. Jackson, Second Annual Conference of U.S. Attorneys (April 1940) (emphasis added).

The district court did not clearly and manifestly abuse its discretion by ordering a new trial when it concluded that the "admission of both the non-representative samples and samples tested under methods of debatable validity, combined with the manner in which such results were argued to the jury, caused unfair prejudice and confusion of issues" causing a "serious miscarriage of justice" to occur. ER 41. If there was any abuse of discretion in this case, it was on the part of the government for bringing felony criminal charges against these defendants under the Clean Air Act where there was no showing of the emission of a single asbestos fiber, let alone a showing of any environmental harm.

CONCLUSION

For the foregoing reasons and those provided by SDG&E, the judgment of the district court should be affirmed in all respects.

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A D D E N D U M

December 2002

ENCANTO GAS HOLDER STATION
LEMON GROVE, CALIFORNIA

No Asbestos Found at Encanto Gas Holder Station

DTSC is one of six Boards and Departments with in the California Environmental Protection Agency. The Department's mission is to restore, protect and enhance the environmental quality and economic vitality, by regulating hazardous waste, conducting and overseeing cleanups, and developing and promoting pollution prevention.

State of California

California Environmental Protection Agency

View of Encanto site taken at the north corner of San Altos Place and Broadway Ave.

No Asbestos Found

As you may know, last June we took over 200 samples of the air and soil to see if there was asbestos at the former San Diego Gas & Electric Encanto Gas Holder Station site. The tests showed **no** asbestos in the air or soil.

This site is a 16-acre parcel at 1350 San Altos Place in Lemon Grove. It has residential areas on three sides. On the other side is Imperial Avenue.

Our agency is the Department of Toxic Substances Control. Our role is to oversee the testing to protect human health and the environment.

We looked for asbestos from gas pipe wrapping

The Encanto site used to be a storage area for natural gas. It had over 9 miles of pipes buried under the ground to store the gas until it could be sent to gas customers for use. The storage site closed in 1995. In 2000 the gas company (SDG&E) dug up the pipes.

The pipes were coated with a coal tar rust-proofing material which included a layer that contained asbestos. At first the gas company stripped the pipes at the site. Then they moved the pipes away from the site to scrape them after residents said they had concerns about noise and mess.

To see if asbestos or any other chemicals had gotten into the air or soil, we took 181 soil samples and 43 air samples. Residents helped us pick out some places to test, and we took samples at all those places.

We are going to take more samples to see if there are risks from other chemicals

We found no asbestos, or any other suspicious material. But we did find some chemicals called PAHs (polynuclear aromatic hydrocarbons). These may have come from coal tar in the pipe wrapping. PAHs are a group of chemicals that result from burning coal and other materials. They stick to the soil and do not move very much in the environment. PAHs can cause health problems if people are exposed to very high amounts. We only found **small** amounts of PAHs. However, we want to take more soil samples to see if there are unsafe levels of PAHs anywhere at the site.

We plan to take these samples in December 2002. We will not only sample the places where we found PAHs, but we will also take random samples all across the 16-acre site.

We will let you know what we find after we finish sampling

After we finish taking these samples we will send you a fact sheet like this one to let you know what we found. If we find that there are unsafe levels of PAHs, we will look at ways to clean up the site. We will find the way that we think is best, and will ask you to look at our plan and tell us what you think.

More Information at the Library and Our Agency's Office

We invite you to learn more about what is happening at the Encanto site. All the reports and other information are at the public library at 600 W. Graham in Lemon Grove. Call them at (909) 674-4517 to see what hours they are open. We also have this information at our agency's office. We are at 5796 Corporate Avenue in Cypress, California. Please call Julie Johnson in the File Room at (714) 484-5337 to make an appointment. The File Room hours are 8 a.m. to 4 p.m. Monday through Friday.

Who to Call at Our Agency

If you have questions or comments about the Encanto site, please call or email either of these two people at the Department of Toxic Substances Control:

Jackie Spiszman
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(714) 484-5460
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CERTIFICATE OF COMPLIANCE

I am an attorney for amici curiae the Washington Legal Foundation, *et al*. Pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the foregoing brief of amici curiae is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the brief contains less than 7,000 word not including the corporate disclosure statement, table of authorities, certificate of service, and this certificate of compliance.

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PAUL D. KAMENAR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of November, 2008, I served two copies of the corrected brief of amici curiae Washington Legal Foundation, *et al*. by overnight delivery, addressed to the following counsel for the parties:

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