

A photograph of a courtroom with wood-paneled walls and a judge's bench. The words "IN GOD WE TRUST" are inscribed above the bench. An American flag stands to the left of the bench. The scene is overlaid with a large, semi-transparent teal and green geometric shape on the left side, which contains the main text.

# LESSONS LEARNED FROM THE PG&E CRIMINAL TRIAL

Environmental Essentials for  
In-House Counsel Webinar Series

September 13, 2016

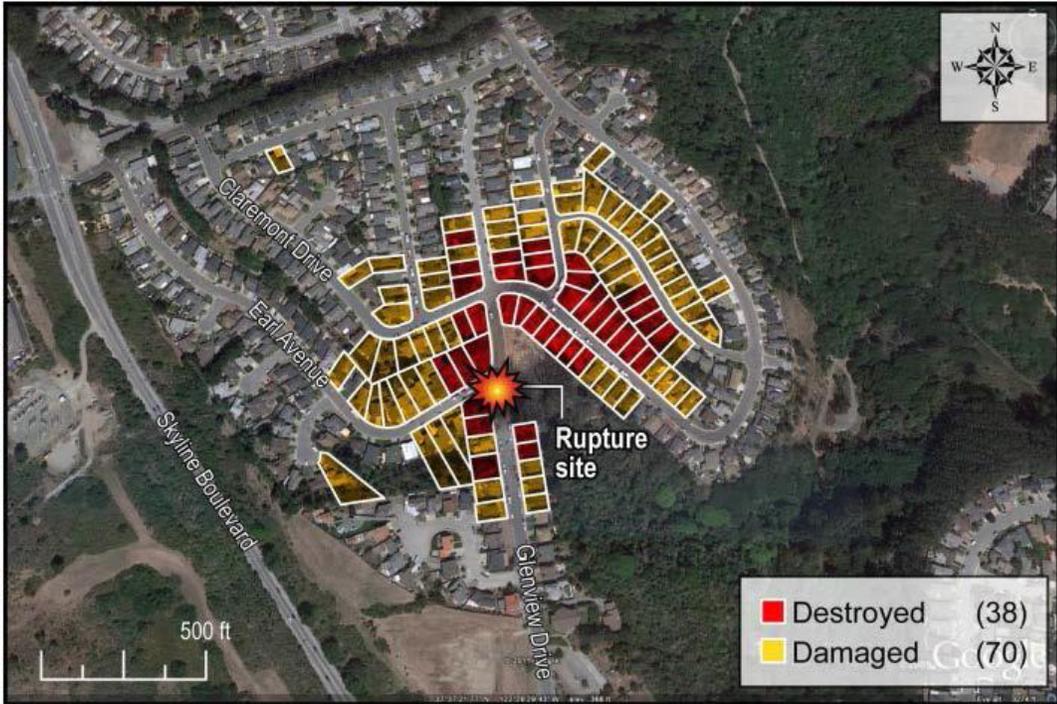
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# AGENDA

- San Bruno Explosion Background
- Proving “Corporate Intent” For Regulatory Counts
- Is Financial Evidence Admissible?
- The Alternative Fines Act
- Other Topics for Future Discussion

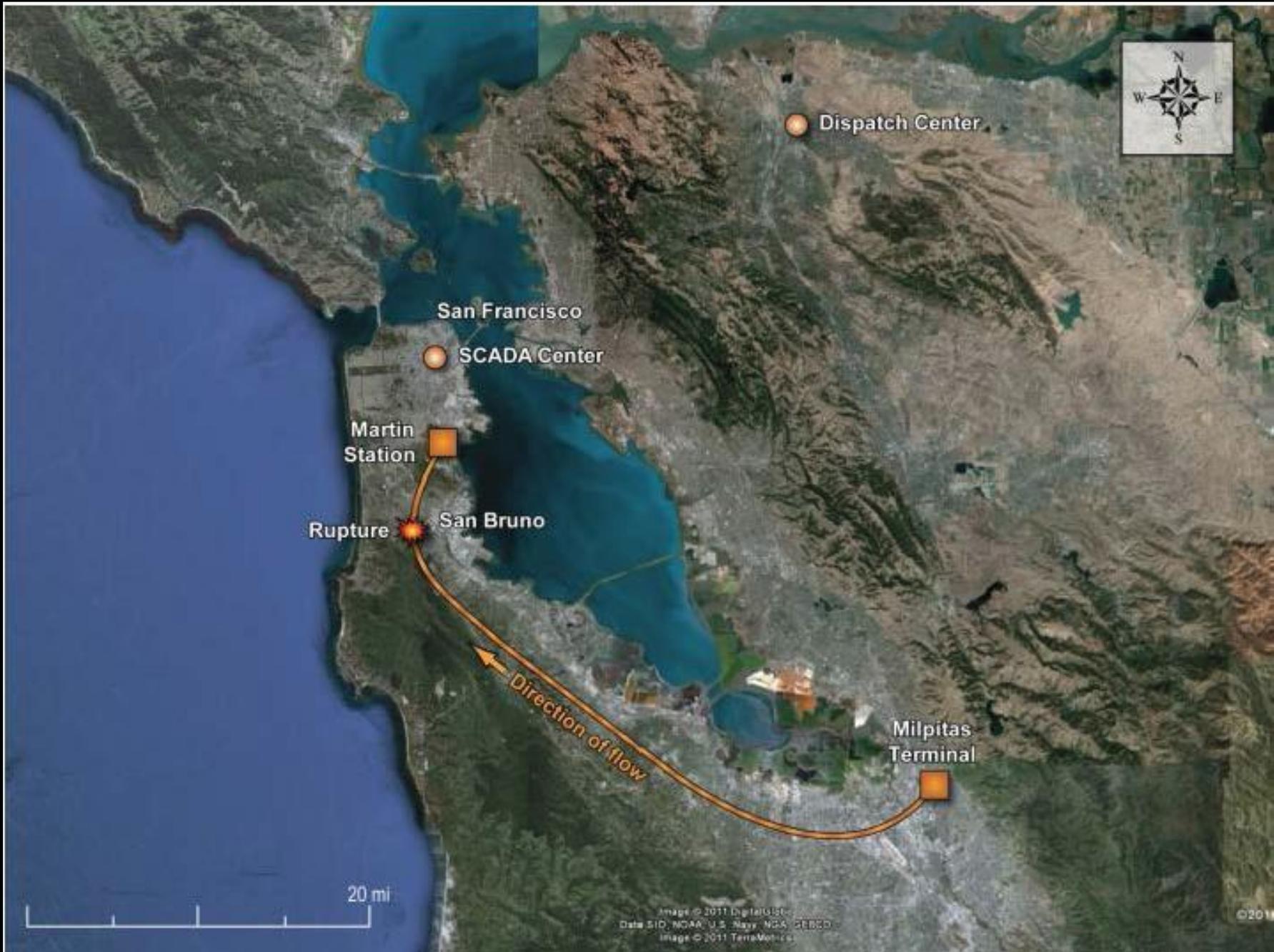
# BACKGROUND



- September 9, 2010
- 30-inch-diameter segment of an intrastate natural gas transmission pipeline known as Line 132 ruptured in a residential area of San Bruno
- Created crater about 72 feet long by 26 feet wide
- 3,000 pound section of Line 132 was found about 100 feet south of the crater
- 47.6 million standard cubic feet of natural gas was released
- Fire destroyed 38 homes, damaged 108, and killed 8 people

## CALIFORNIA PUC FINDINGS

- 2,425 violations of 49 C.F.R. Part 192
- 18,447,803 days in violation
- Does the proposed fine have a “deterrent effect without adversely impacting ratepayers?”
- \$1.6 billion fine







**Ruptured section of pipe**

**Crater with exposed gas pipe**

**Glenview Drive looking south**

**Earl A**

# CRIMINAL VIOLATIONS OF PIPELINE SAFETY ACT

## 49 U.S.C. § 60123(a)

A person knowingly or willfully violating . . . a regulation prescribed or order issued under this chapter shall be fined under Title 18, imprisoned for not more than 5 years, or both.



## GOVERNMENT'S CASE

- Agent summarized line-segment violations
- Two unlawful practices and one incomplete report
- GIS data was incomplete
- Failed to gather evidence on historic line leaks (Line 132 in 1988 and Line 109 in 1977)
- Long-term integrity management plan review team failed
- PG&E chose wrong assessment method to address manufacturing and seam threats
- PG&E did not re-prioritize & re-test after pressure increase

## PG&E'S RESPONSE

- No “objective” criminal intent: Regulations are not clear
- No “subjective” criminal intent: No evidence of evil intent or subjective belief that an employee was violating a clear legal duty
- Government did not prove a specific covered segment of a line to support each count
- Imperfect data should not be a crime

## GRAND JURY INSTRUCTION

### **Collective Knowledge Theory of Intent**

“It’s the idea that you are imputing to a company the actions of all of its employees to get to the state of showing the company willfully violated the law. . . . The idea being that the company, *not any individual*, but the company through actions of its employees, that liability imputes to the company.”

– Assistant U.S. Attorney during grand-jury presentation

## NO. 26: KNOWLEDGE OF CORPORATION

- The knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation. Accordingly, if a specific employee knows something within the scope of employment, then the corporation can be said to know the same thing.
- The corporation is also considered to have acquired the collective knowledge of its employees. The corporation's "knowledge" is therefore the totality of what its employees know within the scope of their employment.

## NO. 27: WILLFULLY DEFINED

“An act is done willfully if the defendant voluntarily and intentionally violates a known legal duty. A good-faith misunderstanding of the law or a good-faith belief that one is not violating the law negates willfulness.”

## NO. 28: WILLFUL INTENT OF A CORPORATION

- The willfulness of corporate employees acting within the scope of their employment is imputed to the corporation.
- Accordingly, if a specific employee acted willfully within the scope of employment, then the corporation can be said to have acted willfully.

## GUILTY VERDICTS: REGULATORY VIOLATIONS

- Failing to identify all potential threats to each covered segment of pipeline.
- Violating data gathering and integration requirements on the entire pipeline that could be related to a covered segment.
- After identifying threat of manufacturing and construction defects, failing to analyze segment and determining risk of failure.
- Failing to select appropriate assessment technology and prioritizing as high risk segment.

## KEY TAKEAWAY ON CORPORATE INTENT

“Where a corporation has a legal duty to prevent violations, and the knowledge of that corporation’s employees collectively demonstrates a failure to discharge that duty, the corporation can be said to have ‘willfully’ disregarded that duty.”

– Judge Henderson

# IS FINANCIAL EVIDENCE ADMISSIBLE?

Government: Yes

- Profit motives are probative of willfulness
- Profit motives drive cost-cutting decisions, which are really “safety-cutting decisions”
- PG&E knew that updating records and testing was expensive/chose to spend money elsewhere

PG&E: No. Court should exclude evidence of:

- Profits
- Revenue
- Budget-setting process
- Employee compensation
- All financial evidence unrelated to charged conduct

## EVIDENTIARY FRAMEWORK

- Evidence is relevant if it has any tendency to make a fact more or less probable and the fact is of consequence in determining the action
- Relevant evidence is presumed admissible
- Relevant evidence can be excluded if its value is substantially outweighed by danger of unfair prejudice, confusion, deception, delay, wasted time, or cumulation

## WHEN DOES PROFIT SEEKING SUGGEST POOR SAFETY CULTURE?

- PG&E's inclination to make money actually informed its decision-making in a way that informs its mental state on the charged regulatory crimes.
- Evidence that PG&E's profit motives drove its compliance (or non-compliance) with the charged regulations is not substantially outweighed by risk of unfair prejudice.
- Such proof would be direct evidence of the required mental state for the regulatory counts.

## FEW EXAMPLES: ADMISSIBLE FINANCIAL EVIDENCE

- Email request for \$5.4 million in funding to conduct External Corrosion Direct Assessment (“ECDA”) testing that considers the various “alternatives” PG&E may take to achieve compliance with the Integrity Management regulations
- Budget forecasts vs. actual expenditures
- Emails discussing PG&E employee Personal Incentive Plan criteria and payouts
- Budget meeting notes

## EXAMPLE

### **Pipeline Integrity Management: Risks of Not Funding**

“Deferral would result in significant risk of being in noncompliance with the DOT pipeline inspection requirements and would increase the expense requirements in 2010 to achieve the required compliance by 2012. Additionally, the cost of this work would increase from \$600k to about \$725k due to the cost of demobilizing and remobilizing. GT&D has already deferred \$1.8 million of work into 2010 from 2009, which is believed to be the maximum amount feasible to avoid significant compliance risk.”

## KEY TAKEAWAY ON FINANCIAL EVIDENCE ADMISSIBILITY

“PG&E seems to suggest that only a ‘smoking gun’ – perhaps an email about executives pocketing dollars earmarked for hydrotesting or recordkeeping decisions – would be admissible ‘financial evidence’ in this prosecution. Not so.”

– Judge Henderson

## ALTERNATIVE FINES ACT

“If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.”

## *APPRENDI AND SOUTHERN UNION*

- Any fact that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond reasonable doubt.
- Applies to criminal fines.

## INDICTMENT ALTERNATIVE FINE ACT ALLEGATIONS

¶ 76: For the purposes of the AFA, PGE derived gross gains of approximately \$281 million and the victims suffered losses of approximately \$565 million.

## TWO-STEP APPROACH

- Court dismissed “loss-based” allegations pretrial because too complicated
- PG&E moved for dismissal of gain-based allegations after close of evidence
- Government withdrew Alternative Fines Act allegation
- Decreased potential criminal fine from \$530+ million to \$3 million

## COMPLICATING FACTORS IN DEFENSE OF AFA CHARGE:

- a) establishing what foregone maintenance, assessment or replacement activity can be attributed to the segments that formed the basis of a conviction;
- b) identifying the costs of that foregone activity;
- c) allocating that cost in some manner to the segments of conviction; and then
- d) assessing to what extent those allocated costs amount to a “pecuniary gain” under the AFA statute—that is, determining to what extent those costs have been or would have been offset in CPUC rate-making proceedings.

## JUDGE HENDERSON PARTING SHOTS

“The proposed exhibit arose as a result of the unhelpful and unproductive gamesmanship that has, unfortunately, been a hallmark of this case.”

“This therefore appears to be a case of sloppy Government lawyering, done in PG&E-induced haste, rather than a bad-faith attempt by the Government to mislead PG&E or the Court. . . .”

## ADDITIONAL TOPICS

- Is an NTSB investigation a “proceeding”?
- How did the obstruction count impact pretrial discovery?
- Are government documents protected by the deliberative-process privilege?
- How do you reduce the scope of admissible safety-culture evidence?
- Corporate *mens rea* in the Obstruction count

THANK YOU



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