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Regulatory Confusion, Ignorance of Law, and Deference to Agencies: General Electric Co. v. EPA

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A fundamental tension in the legal tradition of the United States exists between the principle that "ignorance of the law or a mistake of law is no defense" and the contrary "fair notice" principle which holds that persons may not be punished for failing to comply...
with standards of which they could not have been aware.\textsuperscript{2} In recent years, the latter principle has begun to take root in the law of the administrative state, having been invoked in several decisions to strike down punishments prescribed by an agency for violations of unclear regulations.\textsuperscript{3} These decisions have emphasized the invalidity of regulatory interpretations that are not readily ascertainable from either the plain language of the regulations\textsuperscript{4} or the published guidance of which the respondent individual was aware.\textsuperscript{5} This thread of analysis points to a separate tension between the “fair notice” principle and principles of deference to expert agency interpretations\textsuperscript{6} as found in \textit{Chevron, U.S.A. v. Natural Resources Defense Council, Inc.}\textsuperscript{7} and its progeny. Combining each of these various elements, the courts have formed a doctrine that some commentators have labeled “regulatory confusion,”\textsuperscript{8} an apt term for situations in which the meaning or an agency’s interpretations of regulations cannot readily be understood by persons to whom those regulations apply.

In May 1995, the U.S. Court of Appeals for the D.C. Circuit decided \textit{General Electric Co. v. EPA},\textsuperscript{9} a case dealing with the United States Environmental Protection Agency’s (EPA) regulations and interpretations governing the treatment and disposal of toxic polychlorinated biphenyl wastes.\textsuperscript{10} The \textit{General Electric} court concluded that because its regulatory interpretation was so unusual, EPA failed to provide General Electric Company (GE) with constitutionally sufficient fair warning of the standard with which EPA expected it to comply.\textsuperscript{11} Under those circumstances, the court held, the regulatory interpretation in question could not be enforced against GE as a matter of due process.\textsuperscript{12} This Essay will discuss the key background case law leading to \textit{General Electric},\textsuperscript{13} de-

\begin{itemize}
\item \textsuperscript{3} Rollins Envtl. Servs., Inc. v. EPA, 937 F.2d 649 (D.C. Cir. 1991); Gates & Fox Co. v. OSHRC, 790 F.2d 154 (D.C. Cir. 1986); Diamond Roofing Co. v. OSHRC, 528 F.2d 645 (5th Cir. 1976); In re Phibro Energy USA, Inc., EPA, No. CAA-R6-P-9-LA-92002, 1994 WL 594881 (E.P.A. Oct. 5, 1994).
\item \textsuperscript{4} General Elec. Co. v. EPA, 53 F.3d 1324 (D.C. Cir. 1995); Gates & Fox, 790 F.2d at 156-57; Diamond Roofing, 528 F.2d at 649.
\item \textsuperscript{5} Phibro at *4-5.
\item \textsuperscript{6} See, e.g., Rollins, 937 F.2d at 652-53 (sustaining the agency’s interpretation, but also holding that lack of clarity and resulting lack of notice required no penalty to be assessed).
\item \textsuperscript{7} 467 U.S. 837 (1984).
\item \textsuperscript{8} Margaret N. Strand, \textit{The “Regulatory Confusion” Defense to Environmental Penalties: Can You Beat the Rap?}, 22 \textit{Envtl. L. Rep.} 10330 (May 1992), available in \textit{WESTLAW}, 22 ELR 10330.
\item \textsuperscript{9} 53 F.3d 1324 (D.C. Cir. 1995).
\item \textsuperscript{10} Id. at 1325-27.
\item \textsuperscript{11} Id. at 1333-34.
\item \textsuperscript{12} Id. at 1334.
\item \textsuperscript{13} \textit{See infra} part II. A more searching review of the background case law is found in the excellent article by Strand, \textit{supra} note 8.
\end{itemize}
scribe the several iterations of the *General Electric* case itself, and analyze the future prospects of the regulatory confusion defense in light of the *General Electric* court's treatment of the administrative law principles of fair notice and agency deference.

II. THE DOCTRINE OF REGULATORY CONFUSION: PRECURSORS OF *GENERAL ELECTRIC*

The *General Electric* decision is the culmination of an intermittent line of administrative law cases. The precedential thread began with a pair of occupational safety decisions, the first of which appeared in the Fifth Circuit in 1976 and the second of which arrived a decade later in the D.C. Circuit. The doctrine of regulatory confusion received its biggest pre-*General Electric* boost in 1991, however, when that court decided *Rollins Environmental Services, Inc. v. EPA.* Following those earlier precedents on regulatory confusion, *Rollins* explored the issues in question deeply and on the basis of a regulatory confusion-based analysis (despite the company's failure to properly argue regulatory confusion as a matter of constitutional due process) struck down penalties EPA had assessed. The final pre-*General Electric* landmark in the evolution of regulatory confusion doctrine arrived in *In re Phibro Energy USA, Inc. v. EPA,* a case in which EPA's own administrative law judges recognized in strong terms the application of the doctrine as an antidote to conflicting agency interpretations of an ambiguous rule.

A. THE OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION CASES

1. The Diamond Roofing Decision

In 1976, the U.S. Court of Appeals for the Fifth Circuit considered the case of several roofing companies that, by order of the Occupational Safety and Health Review Commission (OSHRC), had been penalized for failing to install railings around level but open-sided roofs upon which their employees worked. The relevant OSHA construction regulations required that a standard railing be placed around open-sided floors.
OSHRC viewed the roofs in question as open-sided floors and, accordingly, penalized the roofing companies for failing to comply with the floor-related provisions.

The Fifth Circuit found several reasons rooted in general principles of statutory construction to reject OSHRC's reading of the regulation, but was soon confronted with a powerful deference argument by the government based on the presumption that the "regulations should be liberally construed to give broad coverage because of the intent of Congress to provide safe and healthful working conditions for employees."\(^{21}\) Relying on the existence of intra-agency conflict over the meaning of the provision in question, policy reasons for insisting upon clarity from regulators, and the principle that ambiguities should be construed against the drafter of a text, the court rebuffed the liberal construction argument, explaining that the regulated community was "entitled to fair notice in dealing with" the agency.\(^{22}\)

Ultimately, the court held that "a regulation cannot be construed to mean what an agency intended but did not adequately express" and that it was the Secretary of Labor's "responsibility to state with ascertainable certainty what is meant by the standards he has promulgated."\(^{23}\) Thus, *Diamond Roofing* stands for the proposition that while deference and liberal construction generally should be afforded an agency's interpretation of its own regulations, this principle has no force if enforcing that interpretation would run afoul of due process-based fair notice requirements.

2. The Gates & Fox Decision

A decade later, the D.C. Circuit confronted a comparable OSHRC order arising from a charge that the Gates & Fox Company had violated a safety regulation requiring companies that excavate tunnels and shafts to provide their workers with rescue equipment.\(^{24}\) OSHRC had read a phrase in the relevant regulation as a "catch-all" clause requiring companies to provide rescue equipment both in specified areas and in "other areas where employees might be trapped by smoke or gas."\(^{25}\)

Following *Diamond Roofing*, the court reversed that final agency decision, properly recognizing that "[c]ourts must give deference to an agency's interpretation of its own regulations."\(^{26}\) The court held that "[w]here the imposition of penal sanctions is at issue, however, the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires."\(^{27}\) Using traditional conventions of statutory construction, the

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22. *Id.* at 649.
23. *Id.*
24. 29 C.F.R. § 1926.800(b)(3).
25. *Gates & Fox*, 790 F.2d at 156.
26. *Id.*
27. *Id.*
court explained that the regulation “would reasonably be read to refer only to” the specified areas and places near such areas requiring rescue equipment. In Judge Scalia’s opinion, the preferred reading of the regulation’s plain language would not support the government’s position. As a consequence, the regulation “fail[ed] to give fair notice that self-rescuers are required in all areas where employees could be trapped by smoke or gas.” Because “the regulation failed to provide adequate notice of the conduct it prohibited,” sanctions could not constitutionally be imposed on the Gates & Fox Company.

Gates & Fox represents a significant development because, unlike Diamond Roofing, it expressly relied on constitutional due process considerations as the basis of the “fair warning” principle, giving respondents a “trump card” in disputes over ambiguous rules. Further, Gates & Fox fleshed out the role of deference to agency interpretations outlined in Diamond Roofing, noting that even if an agency’s interpretation of the regulation is permissible, the regulatory confusion doctrine, where applicable, will bar enforcement thereof. Notably, the court explained that even if the respondent had actual notice or reason to believe it was subject to a rule, the regulatory confusion doctrine would still bar imposition of sanctions unless “warning” had been provided in the form of “an authoritative [agency] interpretation.”

B. The Rollins Case

The D.C. Circuit, in Rollins Environmental Services, Inc. v. EPA, addressed the regulatory confusion doctrine for the first time in an environmental law context. Under EPA regulations, solvents may be used to remove hazardous polychlorinated biphenyls (PCBs) from various equipment or containers. According to the regulation at issue in Rollins, “[t]he solvent may be reused for decontamination until it contains 50 [parts per million] PCB. The solvent shall then be disposed of as a PCB in accordance with [section] 761.60(a)” of the Toxic Substances Control Act. Rollins triple-rinsed a concrete basin with solvent and, finding that it still contained less than 50 parts per million (ppm) of PCBs, destroyed the solvent in an incinerator that had not been approved for PCB disposal by EPA. Six year later, Rollins was surprised to find itself defending an EPA enforcement action. By all appearances, Rollins had logically and literally read the regulation as placing rigorous disposal requirements only on solvents containing PCBs in concentrations exceeding 50 ppm.

28. Id.
29. Id. at 156-57.
30. Id. at 156.
31. Id. at 157.
32. Id. at 156-57.
33. Id. at 157.
34. 937 F.2d 649 (D.C. Cir. 1991).
36. Id. § 761.79(a).
37. Rollins, 937 F.2d at 651.
After a series of hearings, briefings, decisions, and reversals on this issue during EPA's adjudicative process, however, the Chief Judicial Officer of EPA ordered Rollins to pay a $25,000 penalty for the alleged violation. Rollins petitioned the Court of Appeals for the D.C. Circuit for judicial review of this final EPA ruling.

The decision of the Rollins court begins by explaining the competing regulatory interpretations it faced. Rollins read the regulation to mean that solvents could be used until they reached 50 ppm and that "then" they had to be disposed of in a particular fashion. Under this reading, the word "then" conditions application of the heightened disposal standard upon the 50 ppm threshold. EPA, on the other hand, argued that the word "then" simply referred to the end of rinsing, regardless of whether the solvents had reached 50 ppm or not. The solvent, regardless of PCB concentration, had become a PCB through contact with PCBs and needed to be disposed as such. The court described the latter reading as "rather more strained."

While the court recognized that Rollins's interpretation was more plausible than EPA's, it acknowledged that agency interpretations of regulations were due substantial deference. As a result, it decided over a strong opinion, dissenting in part, that EPA's strained interpretation would be upheld as correct based on this deference. Despite this holding, though, the court refused on the basis of Rollins's regulatory confusion argument to impose any penalty. Finding that there had been significant conflict in the guidance that EPA's regional offices had provided on the meaning of the provision in question, the court endorsed Rollins's argument that "the regulated community" cannot "be considered to be 'on notice as to the obligations'... if EPA is uncertain as to what the obligations are."

Notably, the due process argument, which typically supplies the authority for the regulatory confusion defense, was rejected by the Rollins majority on procedural grounds. Rollins had failed to raise that particular basis in its opening brief. Nonetheless, the court reached a result roughly consistent with that found in the previously discussed regulatory confusion cases. As one commentator explained it, "[T]he court held that

38. Id. at 652-53.
39. Id.
40. Id.
41. Id.
42. Judge Edwards's separate opinion insisted that, as a matter of "hornbook law," where a regulation is sufficiently ambiguous that the regulated community "could not reasonably have known what the agency had in mind" there can be neither penalty nor violation. Id. at 654 & n.1. (Edwards, J., concurring in part and dissenting in part).
43. Id. at 652-53.
44. Id. at 654.
45. Id. at 653 n.2 (quoting Respondent's Reply Brief at 8).
46. Strand, supra note 8, at 10,334-36.
47. Rollins, 937 F.2d at 653 n.2.
48. As the separate opinion of Judge Edwards pointed out, the majority's decision merely to bar the imposition of a penalty is not the same as a holding that regulatory confusion prevents any finding of violation. Id. at 655. Judge Edwards would not have
EPA’s regulations were so confusing that even though Rollins had violated the rules, it did not have to pay any penalty.  

The Rollins court offered at least two alternative reasons for its holding. First, a holding by EPA that the regulation was “clear” was found to be arbitrary where (1) the agency itself had admitted internal conflict over the provision’s meaning; and (2) conflicting advice had been given by the agency to the regulated community. Even the officer finding the regulation to be clear acknowledged that the regulatory language was equally supportive of the two conflicting constructions at issue.

Second, under the environmental statute in question EPA is required in assessing penalties to take into account the nature, circumstances, extent, and gravity of the violation; the culpability of the alleged violator; and other matters required to do justice. “In light of the ambiguity of the regulation, the nature of the actions taken by Rollins, and the absence of deleterious consequences, we agree with the second [administrative law judge] that imposing a monetary penalty on Rollins would be without justification.” The court also hinted at a separate basis for its decision given the intra-agency conflict on interpretations of the regulation. Specifically, the court found that “depending on which official responded to the inquiry, EPA might have given Rollins the opposite advice. The imposition of a serious penalty cannot rest on such fortuity.”

Rollins thus implicitly reaffirmed the foundations for a constitutional due process challenge to ambiguous regulations without reaching the constitutional issue, while adding at least two non-constitutional regulatory confusion objections, each of which lead to roughly the same result. Notably, however, Rollins weakened the regulatory confusion doctrine to some degree by expressly limiting the effect of a showing of non-constitutional regulatory confusion to a bar on the imposition of penalties—rather than a voiding of the violation itself—where regulations are ambiguous. Perhaps more importantly, while vindicating Rollins to some degree, the decision left largely unanswered the crucial precedential questions of what standard reviewing courts should apply in assessing regulatory ambiguity.

Id. at 657. Barring monetary penalties alone does not achieve the necessary result because “the violation found is still a significant penalty. Not only has Rollins been unfairly labelled a ‘law breaker,’ but this violation can be used against the company in assessing penalties with respect to any future violations.” Id. at 654 n.2. The Gates & Fox and Diamond Roofing decisions appeared not to have reached the issue raised by this distinction.

49. Strand, supra note 8, at 10,330.
50. Rollins, 937 F.2d at 653.
51. Id.
53. Rollins, 937 F.2d at 654.
54. Id. (emphasis added).
55. Strand, supra note 8, at 10,333.
C. THE PHIBRO CASE

In a somewhat surprising move, EPA itself adopted the reasoning of *Diamond Roofing, Gates & Fox*, and *Rollins* in an administrative law judge’s (ALJ) opinion in *In re Phibro Energy USA, Inc.* In *Phibro*, EPA charged the respondent with failing to timely conduct a performance test on continuous emissions monitors (CEMs). EPA asserted that the regulation requiring the CEMs to be installed at various facilities mandated that performance tests on those units be completed by the same date. The plain reading of the regulations suggested, however, that the performance test was to be completed pursuant to 40 C.F.R. section 60.8, which, read together with the applicable regulation, allowed 210 days following installation to satisfactorily test the performance of the CEMs. The ALJ held:

[T]he regulations simply do not say what Complainant contends that they say, although EPA’s desire to interpret them in this manner is understandable. Moreover, no formal policy statement of which Respondent should have been aware—such as a preamble in a Federal Register publication of the rules—has been pointed to as a contrary indication to the language of the rules. Accordingly, the regulations at issue here did not give fair notice of what EPA expected the regulated community to do by way of compliance.

As a result, the ALJ concluded that “[w]here, as here, a penalty is sought for an alleged violation of an at best ambiguous regulation, and the regulation fails to give fair warning of the conduct it requires, a penalty cannot be assessed against Respondent consistent with the due process clause of the Fifth Amendment.”

Attempting to bridge the constitutional-nonconstitutional confusion created by the *Rollins* court, the ALJ asserted a distinction between two types of cases. In the first type, ambiguous regulations offend due process, and in this instance, no violation may be found. In the second type, the ambiguity renders it unfair to assess a penalty even though enforcing the questionable interpretation may not offend due process. In this instance, a violation may be found, but no penalty may be assessed. Trying to make sense of the reasoning in *Rollins* appears quite difficult; indeed, the stern partial dissent in *Rollins* made much of the oddness of a logic which could result in two dramatically different outcomes over assertions of a regulation’s ambiguity depending upon whether due process was for-

56. *But see Rollins*, 937 F.2d at 655 (Edwards, J., dissenting in part and concurring in part) (“[t]he Agency has repeatedly ruled against enforcement staff where the applicable rules . . . were fatally ambiguous”).
58. *Id.* at *1.
59. *Id.*
60. *Id.* at *3-4.
61. *Id.* at *4.
62. *Id.* at *5.
mally advanced as the basis for the argument in question. Even more confounding is the complete absence of a proposed method by which to distinguish constitutional from subconstitutional regulatory confusion in cases where both bases are advanced. Despite the *Phibro* case's unpersuasive attempt to mediate the conflicting views of the two opinions in *Rollins*, the decision is nonetheless very significant as a strongly-worded, EPA-specific administrative precedent in favor of the regulatory confusion doctrine. *Phibro* demonstrated the willingness of an ALJ under the purview of EPA to recognize that agency's fallibility.

### III. THE GENERAL ELECTRIC CASE

Turning to the *General Electric Co. v. EPA* decision in which the line of regulatory confusion cases culminate, this Essay will briefly summarize the history of that case and then address the various significant doctrinal issues and tensions which are likely to emerge in future judicial treatments of the regulatory confusion principle.

#### A. THE ADMINISTRATIVE ADJUDICATION OF THE GENERAL ELECTRIC CASE

For several months in 1987, General Electric Company (GE) instituted a process to help its customers prepare for the disposal of their electrical equipment—generally transformers—which contained PCBs. After draining from the transformers the dielectric fluid, a mineral oil which often contained PCBs, GE would refill the transformers with a freon-based solvent to rinse the equipment of regulated quantities of PCBs. Once the transformers were properly cleaned, the solvent was drained off into distillation units. The distillation process separated PCBs out of the solvent solution in a recycling process, leaving behind three streams: one composed of cleaned transformers which were properly shipped to an approved landfill for disposal; one composed of concentrated PCBs which were properly shipped for disposal; and the other composed of a cleaned (i.e., less than 50 ppm of PCBs) solvent which was captured for reuse in the described rinsing process.

The relevant regulations provide that liquids containing greater than 50 ppm of PCBs be burned in an approved incinerator or a high-efficiency boiler or be deposited in a landfill specially permitted for hazardous chemical wastes. Any alternative means of disposal—defined by EPA as any means of avoiding incineration or disposal in a chemical waste

63. *Rollins*, 937 F.2d at 655. See also Strand, *supra* note 8, at 10,334 (discussing the distinction between regulatory confusion as an argument for mitigation of penalties or as an affirmative defense to violation).
65. Id.
66. Id.
67. Id.
68. 40 C.F.R. § 761.60(a) (1996).
landfill—must be preapproved by EPA via permit. EPA argued and both the ALJ and the Environmental Appeals Board (EAB) concluded that by distilling the PCBs out of the solvent liquids, GE was avoiding required incineration or landfilling of the entire PCB-contaminated solvent liquid. Indeed, reducing the quantity of liquids requiring destruction pursuant to the PCB regulations was GE's primary motivation in instituting the distillation process. Under these circumstances, there should seem to have been little doubt that GE faced potentially serious charges of noncompliance with the PCB regulations.

What might have seemed cut and dried became complicated, however, when GE pointed to the following: an additional regulatory provision authorizing reuse of solvent liquids in totally enclosed processes until they exceed 50 ppm of PCBs; the plain language of the regulation which only prohibits destruction of PCBs by unapproved methods; and EPA's own internal confusion as to whether the distillation process was authorized under the regulations. These contentions were to form the basis of a powerful argument of regulatory confusion that was ultimately adopted by the U.S. Court of Appeals for the D.C. Circuit in General Electric.

Despite appearances of regulatory confusion—especially appearances arising from evidence provided by GE that one EPA regional office specifically approved distillation without a permit—EPA Region IV issued a complaint against GE on May 12, 1989. EPA's complaint alleged unpermitted disposal of PCBs and proposed a penalty of $125,000. The ALJ concluded that while a disposal violation had occurred, a penalty of only $25,000 was warranted based on the limited environmental risk associated with the distillation method.

GE appealed this decision to the EAB, arguing that the regulations were so ambiguous, especially in light of conflicting agency guidance, that they prevented fair notice of what constituted compliance. In its analysis of the regulatory confusion argument and the application of penalties for unpermitted use of the distillation method, the EAB affirmed the ALJ, holding that the Rollins line of cases did not apply. According to the EAB, the regulation requiring proper disposal of PCB transformers and liquids was unambiguous. If a party wants to dispose of PCB transformers or liquids, there are two options prescribed by regulation. Additional options are available only by permit and, without such a permit,

69. Id. § 761.60(e).
71. Id. at 1331-33.
73. Id. at *14. The complaint also contained an allegation that the same process violated EPA's PCB use regulations. See id. at *10. This allegation, while accepted by the ALJ, was found by the EAB to be duplicative of the alleged disposal violation, and the ALJ's decision was reversed to that extent. See id. at *57. Consequently, this Essay does not discuss the alleged use violation.
74. Id. at *15.
"GE did not have the option of improvising on these procedures."75 Without a permit, GE could not treat otherwise regulated PCB liquids, thereby largely avoiding the disposal rules that applied to such liquids. The EAB left the ALJ's $25,000 penalty assessment for unpermitted distillation undisturbed. From this final agency decision, GE petitioned the U.S. Court of Appeals for the D.C. Circuit, relying primarily on the issue of regulatory confusion.

B. **General Electric in the D.C. Circuit**

On petition for review in the D.C. Circuit, the court restated the factual background of the PCB enforcement matter.76 Thereafter, the court turned to the two key remaining issues presented by the litigants: First, whether the agency's interpretation of its regulation was a permissible construction.77 Second, whether the imposition of penalties under EPA's interpretation violated due process under the circumstances.78

The first issue was resolved with relative brevity by the court in the government's favor. After discussing the *Chevron* principle that "an agency's interpretation of its own regulations" is due "a 'high level of deference,'"79 the court held that despite the arguable superiority of GE's interpretation permitting distillation, principles of deference dictated that EPA's interpretation would prevail.80

GE's second appeal issue, however, was decisive. The court explained:

Had EPA merely required GE to comply with its interpretation, this case would be over. But EPA also found a violation and imposed a fine. Even if EPA's regulatory interpretation is permissible, the company argues, the violation and fine cannot be sustained consistent with fundamental principles of due process because GE was never on notice of the agency interpretation it was fined for violating.81

On this basis, and despite the deference to EPA's regulatory construction, the D.C. Circuit voided the penalties EPA had assessed against GE, as well as all of the collateral consequences of the enforcement action.82

The court began its analysis of the due process-regulatory confusion argument by discussing the doctrinal roots of the "no punishment without

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75. Id. at *55.
77. Id. at 1327-28.
78. Id. at 1328-34.
79. Id. at 1327 (citing General Carbon Co. v. OSHRC, 860 F.2d 479, 483 (D.C. Cir. 1988)).
80. Id. at 1328.
81. Id.
82. Id. at 1334.

EPA thus may not hold GE responsible in any way—either financially or in future enforcement proceedings—for the actions charged in this case. Although we conclude that EPA's interpretation of the regulations is permissible, we grant the petition for review, vacate the agency's finding of liability, and remand for further proceedings consistent with this opinion.
notice" principle. "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," the court wrote. Turning to the more immediate line of regulatory confusion cases, the court cited Diamond Roofing, Gates & Fox, and Rollins, as well as several other applicable cases.

In discussing the regulatory confusion issue, the court boiled the doctrinal principle down to several iterations of a single standard: (1) available agency materials addressing the regulation in question must give the regulated party "fair warning of the conduct it prohibits or requires"; (2) the regulated party must be able to "reasonably understand that [its] contemplated conduct is proscribed"; (3) the "regulated party acting in good faith" must be "able to identify, with 'ascertainable certainty,' the standards with which the agency expects the party to conform"; and (4) the standards must be "reasonably comprehensible to people of good faith." In essence, fair and adequate notice of an interpretation appropriate to the circumstances is required. Applying the facts of the case to this standard, the court held:

Where, as here, the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not on 'notice' of the agency's ultimate interpretation of the regulations, and may not be punished.

In addressing the various predecessor cases and in applying this standard, the court mentioned a number of factors that, in the totality of circumstances, will lead a court to accept a regulatory confusion defense. Favorable factors for such a defense are found in situations where: (1) notice of proscribed conduct is inadequate on the face of the regulations and other public pronouncements of the agencies; (2) there are internal contradictions or inconsistencies in the regulations that undermine the certainty of the agency's interpretations; (3) there are no other pre-enforcement efforts or communications which would have put the regulated party on effective notice; (4) agency departments cannot agree on an interpretation of the regulations or the agency interpretation shifts over

83. Id. at 1328-29.
84. Id.
85. Id. (citing Martin v. OSHRC, 499 U.S. 144 (1991); Satellite Broadcasting Co. v. FCC, 824 F.2d 1 (D.C. Cir. 1987)).
86. General Elec. Co., 53 F.3d at 1328.
87. Id. at 1329.
88. Id.
89. Id. at 1330.
90. Id. at 1333-34.
91. Id. at 1329, 1333.
92. Id. at 1330.
93. Id. at 1329, 1333.
94. Id. at 1329, 1330, 1332.
time;\textsuperscript{95} (5) the regulated party's interpretation is more reasonable than
the agency's;\textsuperscript{96} (6) traditionally authorized actions or any of the courses
of action available to the regulated party would be punishable under the
agency's interpretations;\textsuperscript{97} (7) the agency admits a need to clarify the reg-
ulations by offering new regulatory proposals;\textsuperscript{98} or (8) there is uncertainty
about which regulatory provision controls.\textsuperscript{99}

In the \textit{General Electric} case, virtually every one of the above factors
converged to favor a finding of regulatory confusion. The regulations,
public pronouncements, and communications by the agency to GE were
ambiguous or conflicting, or both;\textsuperscript{100} other regulatory provisions sug-
gested GE's conduct was legal;\textsuperscript{101} at least one of EPA's Regional offices
took the position that GE's operation was within the scope of the regula-
tions;\textsuperscript{102} the agency's litigation posture on exactly what rule GE violated
shifted over time;\textsuperscript{103} GE's reading of the regulations was at least as obvi-
ous—if not more so—than the agency's;\textsuperscript{104} and EPA had proposed new,
"clarifying" regulations to replace the existing provisions.\textsuperscript{105} Under the
circumstances, the \textit{General Electric} court properly found that GE was not
on constitutionally sufficient notice that its conduct was proscribed by the
regulations in question.\textsuperscript{106} While EPA had the prospective authority to
require GE's compliance with its interpretation, penalties could not be
assessed against GE consistent with the "fair notice" principle of due
process.\textsuperscript{107}

IV. THE FUTURE OF REGULATORY CONFUSION:
DIVERGENT DOCTRINAL TRAJECTORIES

The \textit{General Electric} decision takes clear, strong positions on two cen-
tral doctrines in American jurisprudence: fair notice and agency defer-
ence. This Part will discuss the implications of \textit{General Electric} for those
doctrines and the implications of external turbulence in those doctrinal
fields for the long-term potency of \textit{General Electric}.

A. \textit{General Electric} and Competing Principles on Notice

There is a strong principle in American constitutional law holding that
to comport with due process, a regulated party must be on fair notice as

\begin{itemize}
\item \textsuperscript{95} \textit{Id.} at 1332.
\item \textsuperscript{96} \textit{Id.} at 1331.
\item \textsuperscript{97} \textit{Id.} at 1331, 1332.
\item \textsuperscript{98} \textit{Id.} at 1332.
\item \textsuperscript{99} \textit{Id.}
\item \textsuperscript{100} \textit{Id.}
\item \textsuperscript{101} \textit{Id.} at 1331.
\item \textsuperscript{102} \textit{Id.} at 1332.
\item \textsuperscript{103} \textit{Id.}
\item \textsuperscript{104} \textit{Id.} at 1334.
\item \textsuperscript{105} \textit{Id.} at 1331-32.
\item \textsuperscript{106} \textit{Id.} at 1334.
\item \textsuperscript{107} \textit{Id.}
\end{itemize}
to any conduct the government intends to proscribe.\textsuperscript{108} The \textit{General Electric} case seizes on this issue, citing to as many as ten prior decisions embracing this position in various civil, criminal, and administrative contexts.\textsuperscript{109} Underlying this position is one central tenet of American jurisprudence: Persons are not accountable for actions they could not have known were wrong.\textsuperscript{110} The insanity plea, the void-for-vagueness doctrine, the rule of lenity, disparate treatment of minor or diminished capacity defendants, and the doctrine of regulatory confusion each grow from this same root principle.

At the same time, this principle is substantially impaired by a diametrically opposed doctrine, the deeply ingrained notion that "ignorance of the law is no excuse."\textsuperscript{111} Indeed, the conflict between "fair notice" reasoning and "ignorance of the law" principles has been analyzed in great detail by many courts and scholars.\textsuperscript{112} Despite these careful analyses, no rule has emerged for consistently balancing the competing principles or clearly indicating where each applies.\textsuperscript{113} The resolution the courts appear to have reached is that where a rule of law is really confusing (as opposed to unclear or simply beyond the understanding of the particular defendant), relief from punishment may be afforded. The \textit{General Electric} precedent depends upon precisely this sort of rough balance; no principled "bright line" supports it over the counterargument that "ignorance of the law is no excuse."

Indeed, recently the courts have been producing with some regularity conflicting approaches to claims of ignorance of the law. In \textit{United States v. Weitzenhoff},\textsuperscript{114} for example, the Ninth Circuit held that a facility operator may be found guilty of criminal violations of the Clean Water Act even if the operator possessed a good faith belief that a water discharge


\textsuperscript{109}. \textit{General Elec. Co.}, 53 F.3d at 1328-32.

\textsuperscript{110}. See, e.g., \textit{Cheek}, 498 U.S. at 199-200; \textit{General Elec. Co.}, 53 F.3d at 1328.


\textsuperscript{114}. 35 F.3d 1275 (9th Cir. 1993), \textit{cert. denied}, 115 S. Ct. 939 (1995).
permit expressly authorized the operator's conduct. On the other hand, in *Ratzlaf v. United States*, the Supreme Court found—by a narrow 5-4 margin—that certain money laundering laws did not give constitutionally sufficient "fair warning" to the public and, therefore, that the rule of lenity prohibited construing those laws against the defendant. Conflict over the effect of a defendant's "ignorance of the law" is alive and well in the federal courts. This conflict—and any changes in doctrine that result therefrom—will either erode or shore up the due process-fair notice foundation of *General Electric*. On its own, *General Electric* will stand as a significant precedent in favor of the "fair notice" strand of these competing doctrinal visions.

B. *General Electric* and Competing Principles on Deference to Agency Interpretation

In addition to the struggle over fair notice, there is ongoing doctrinal tension in the courts over the proper scope of agency discretion. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.* laid out in strong form the principle that, where Congress is silent, an agency's statutory construction only needs to be reasonable to be credited by the courts. Under those circumstances, even if an opponent's interpretation of the law is superior, the agency's construction will be given effect. Numerous cases arising both before and since *Chevron* followed similar rules. The doctrine of deference to agency interpretations, receiving its seminal treatment in *Chevron*, has become a staple of modern administrative law.

On one view, *General Electric* is a strong case in that tradition. Despite acknowledging that EPA's construction of its regulation was "so far from a reasonable person's understanding of the regulations that they could not have fairly informed GE of the agency's perspective," the *General Electric* court upheld that interpretation as a "permissible" one. Few interpretations that are less obvious on the face of a set of regulations have been upheld by a major federal court as a "permissible" construction. In this sense, *General Electric* is a profoundly pro-discretion, pro-agency decision.

Almost simultaneously, however, the court largely stripped that volley of its effect. In a move somewhat reminiscent of Chief Justice Marshall's
ploy in *Marbury v. Madison*\textsuperscript{124}—the landmark case in which Marshall asserted overwhelming judicial authority to overrule unconstitutional laws under the cover of overruling a much narrower exercise of judicial power\textsuperscript{125}—the D.C. Circuit opened its decision by paying remarkably strong lip service to the *Chevron* principle of deference to agency interpretations. Quickly, however, the court rendered this portion of its opinion toothless. The court proceeded to suggest, at least implicitly, that, in cases of first impression, if an agency interpretation needs to lean on the principle of deference to successfully obtain a judicial endorsement, then the interpretation is questionable enough to provide constitutionally insufficient warning to the regulated community. The court on the one hand boldly asserted the continuing vitality of broad *Chevron* deference to agencies and then, to an as yet uncertain degree, rendered that doctrine virtually meaningless, at least in punitive contexts involving the first instance application of said construction. In that context, the "fair notice" exception arguably swallows the deference rule.

Outside the context of a vague rule being applied in a first instance, however, *General Electric* contains a remarkably broad assertion in favor of deference. It will stand for the proposition that an otherwise unreasonable agency construction of a statute or regulation is permissible and, presuming that the agency has published its interpretation in guidance or used it against other members of the regulated community, that such construction may be used as a basis for penalties. Notably, as a practical matter the protection from penalties provided by *General Electric* in cases where agency interpretations are rendered without proper notice arguably diminishes the harshness of deference to extremely novel agency interpretations. Consequently, the two-pronged approach of the *General Electric* decision—that is, (1) accepting the general presumption in favor of agency constructions; and (2) rejecting penalties under such constructions if they cannot be fairly expected—might be claimed to have cleared a path for standards for "permissible" interpretations lower than have been seen heretofore. Where the regulated community is shielded by *General Electric* from bizarre or unforeseeable agency interpretations by the regulatory confusion doctrine, it might be argued, the courts can be even more broadly deferential to agencies without harsh results. From this viewpoint, *General Electric* has the potential to invigorate the doctrine of deference to agency interpretations. Nevertheless, the scope of the deference doctrine is a matter of ongoing controversy in the courts, and the foundation of the *General Electric* opinion on deference may be susceptible to any changes in the deference doctrine.

\textsuperscript{124} 5 U.S. (1 Cranch) 137 (1803).

V. CONCLUSION

The *General Electric* case and the regulatory confusion doctrine as a whole likely will play a substantial role in many future regulatory enforcement matters. Environmental and other complex regulatory schemes are notoriously ambiguous. Agencies have different divisions and offices which often disagree. They operate under a history of different administrations with inconsistent philosophies. They also have a habit of offering unclear or even conflicting guidance in regulations, Federal Register preambles, and separate guidance documents. It will not be hard in many instances to find facial or philosophical inconsistencies in various policies. As a result, enforcement activities—particularly in subject matter areas to which enforcement is relatively new—will face a stiff challenge from assertions of regulatory confusion. The doctrine of regulatory confusion will be one of the principal topics of debate in regulatory enforcement proceedings, both in environmental and other regulatory contexts. *General Electric* presents the most articulate and well-reasoned judicial decision to date on that question and offers substantial food for thought on the deeper philosophical issues which underlie both the interpretation and application of laws and regulations and the concept of fair notice in a free society.

At the same time, *General Electric*’s assertion of a broad view of deference will give substantial comfort to agencies in contexts where (1) the agencies succeed in maintaining consistency in an interpretation; (2) the agencies properly publish their interpretation; or (3) the interpretation has arisen in prior enforcement proceedings. Thus, constructions of regulations that are unreasonable and have little support in the plain reading of the regulatory language apparently may be found permissible under *General Electric*.

*General Electric*’s careful treatment of the issues of deference and due process is sophisticated and significant. Still, *General Electric* is a case which, at its heart, is based on doctrinal positions on ignorance of the law and on deference that are far from settled. Indeed, the decision is built around two doctrines rife with internal tensions, each of which has the potential to rip the holding apart. Further, *General Electric* is such a strong case in favor of the regulatory confusion doctrine and in support of broad agency deference, and it was decided by such a well-respected court—especially on administrative law issues—that litigants on both sides of regulatory matters are certain to rely on it repeatedly. Through this repeated use, the destructive tensions in the fabric of *General Electric* will be reviewed in many contexts by court after court. As a result, the *General Electric* decision creates opportunities—through its precedential effect or through its possible overruling on either of the aforementioned doctrinal grounds—for dramatic precedential shifts in these doctrinal areas in the near future. *General Electric* undoubtedly will be a significant touchstone from which new views on these competing principles will evolve.