

2000

# Lloyd A. Fry Company v. : Brief of Respondent

Utah Supreme Court

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**BRIGHAM YOUNG UNIVERSITY,  
J. Reuben Clark Law School**

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of

LLOYD A. FRY COMPANY,

Appellant.

Case No. 13980

## BRIEF OF RESPONDENT

Appeal from the Decision and Orders  
of the Utah Air Conservation Commit-  
tee, Utah State Division of Health

**FILED**  
JUL 28 1975

**Clerk, Supreme Court, Utah**

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In the Matter of )  
LLOYD A. FRY COMPANY, ) Case No. 13980  
Appellant. )

This is an appeal from a decision of the Utah Air Conservation Committee finding that emissions from the Lloyd A. Fry Roofing Company plant, in Woods Cross, Utah, were in violation of Section 3.2, Code of Air Conservation Regulations.

The Utah Air Conservation Committee asks this court to review the matter and affirm the order of Dr. Grant S. Winn, Decision and Orders entered by the Utah Air Conservation Committee, and Memorandum Decision of the Third Judicial District Court. Respondent further asks this court to sustain the finding and conclusions of the Utah Air Conservation Committee, which were based upon substantial evidence.

Dr. Grant S. Winn, Executive Secretary of the Utah Air Conservation Committee, sent notices to the manager of the Lloyd A. Fry Roofing Company, located at Woods Cross, Utah, prior to September 4, 1973. These notices indicated that the emissions from the stacks

at the plant were in direct violation of Section 3.2.1 of the Code of Air Conservation Regulations for Visible Emissions. The visible emission's regulations clearly define the term "contaminant" and then set the necessary emission limitations so as to insure that the air we breathe will not become injurious to human health or welfare, animal or plant life, or property, nor would it unreasonably interfere with the enjoyment of life or use of property.

Section 3.2.1 of the Code of Air Conservation Regulations is clear, reasonable and provides fair and adequate warning to any violator. Section 3.2.1 states as follows:

3.2.1. Single sources of emission from existing installations except incinerators and internal combustion engines shall be of a shade or density no darker than a No. 2 Ringelmann Chart (40% black) or an equivalent opacity.

On the 16th day of January, 1974, Dr. Grant S. Winn issued an order to the Lloyd A. Fry Roofing Company that his Woods Cross facility was in violation of Section 3.2 of the Visible Emissions Regulations. The Lloyd A. Fry Company operates an asphalt spray process upon felt material in the production of asphalt shingles used in roofing. Dr. Winn indicated in his order that the Fry Company was causing single source emissions from its west stack and east stack as a result of the asphalt spray process upon the felt material. The findings of Dr. Winn indicated that the emissions were not the result of the operation of incinerators or internal combustion engines.

Certain members of the staff of the Utah Air Conservation Committee and the Davis County Health Department made inspections of the

Lloyd A. Fry Company facility at Woods Cross on the following dates with these results:

<u>DATE</u>	<u>OPACITY</u>	
	<u>West Stack</u>	<u>East Stack</u>
9/6/73 (highest and lowest of 12 readings)	45%-60%	
9/27/73 (highest and lowest of 7 readings)		35%-55%
10/3/73 (single reading)	55%	
10/4/73 (average of readings over 45-minute period)	45%-50%	
10/9/73 (five-minute reading - highest and lowest point)	40%-60%	40%-60%
11/9/73 (single reading)	45%	50%

These staff members are trained to read the opacity of emissions from a stationary source and must qualify as observers for visually determining the opacity of emissions. These individuals receive training and certification and learn procedures to be used in the field for the determination of plume opacity. 40 C.F.R. (Code of Federal Regulations) 60 sets forth the standard of performance for stationary sources. The appendix to these standards describes the method of making a visual determination of the opacity of emissions from the stationary sources. The procedure in making the opacity observations with regard to the steam plumes states the following:

2.3 Observations. Opacity observations shall be made at the point of greatest opacity in that portion of the plume where condensed water vapor is not present. The observer shall not look continuously at the plume, but instead shall observe the plume momentarily at 15-second intervals.

2.3.1 Attached steam plumes. When condensed water vapor is present within the plume as it emerges from the emission outlet, opacity observations shall be made beyond the point in the plume at which condensed water vapor is no longer visible. The observer shall record the approximate distance from the emission outlet to the point in the plume at which the observations are made.

2.3.2 Detached steam plumes. When water vapor in the plume condenses and becomes visible at a distinct distance from the emission outlet, the opacity of emissions should be evaluated at the emission outlet prior to the condensation of water vapor and the formation of the steam plume. 40 C.F.R. 60.

The qualified observers are trained to read the plume at the point of greatest opacity beyond the breakpoint where the steam dissipates, or in that portion of the plume where condensed water vapor is absent. The readings were taken by these certified smoke readers beyond the point at which condensed water vapor is no longer visible. This procedure was employed because the Fry plumes were attached plumes rather than detached plumes as set forth above in the procedure. These provisions were added by the Environmental Protection Agency to make it clear that the opacity of contaminated water in steam plumes is to be read at the point where water does not exist in condensed form. The two specific instructions are (1) where the case for opacity can be observed prior to the formation of the condensed water plume, and the other (2) for the case where opacity is to be observed after the condensed water plume has dissipated.

The opacity of white plumes is measured in terms of percentage, while the opacity of black plumes is measured in terms of numbers

from a Ringelmann Chart. Each number from 1 to 5 on the Ringelmann Chart represents an increase of 20% opacity from zero. The equivalent opacity of a Ringelmann Chart No. 2 is 40%. The single sources of emission from the Lloyd A. Fry Roofing Company were of a shade or density darker than No. 2, Ringelmann Chart (40% black), or equivalent opacity, on the dates above mentioned. Such readings disclose a violation of Section 3.2.1, Visible Emissions Regulations, Code of Air Conservation Regulations. The breakpoint of a wet plume (one containing visible, uncombined water) is the point where the uncombined water disappears from the plume. The readings taken by the state and county observers were made beyond this breakpoint. The particulate matter in a wet plume can be accurately read beyond the breakpoint and the plume at that point is free of visible, uncombined water. The readings taken from the east and west stacks of the Lloyd A. Fry Company were of particulate matter, and the emissions were read beyond the breakpoint. The excessive emission readings from the Lloyd A. Fry Roofing Company process were of air contaminants within the meaning of Section 1.1.3, Code of Air Conservation Regulations and were neither the result of an unavoidable breakdown of equipment or procedures nor the result of a procedure necessary to the operation of a process described in Section 3.2.6(b), Visible Emissions Regulations, Code of Air Conservation Regulations.

Dr. Grant S. Winn issued his order of January 16, 1974, that the Lloyd A. Fry Roofing Company submit to his office within 30 days of the receipt of that order a request for variance, accom-



panied with a compliance schedule or cease operation of the facility. This order, under authority of Section 26-24-11, Utah Code Annotated (1953, as amended) was to become final, unless within 20 days of its receipt a written request for a hearing before the Utah Air Conservation Committee was made by the Lloyd A. Fry Company as provided in Section 26-24-11, Utah Code Annotated (1953, as amended). Fry requested a hearing before the Air Conservation Committee to answer charges, which commenced on April 4, 1974, before a Subcommittee of the Utah Air Conservation Committee. The hearing was recessed on April 5, 1974, and reconvened on May 15, 1974, on which date the hearing was concluded. The Subcommittee affirmed Dr. Winn's order dated January 16, 1974.

Lloyd A. Fry Roofing Company then filed a Motion of Review of the Decision of the Subcommittee, which Decision was reviewed by the Utah Air Conservation Committee on December 19, 1974. The Utah Air Conservation Committee affirmed the Decision of the Subcommittee of Hearing Examiners in accordance with Section 26-24-11, Utah Code Annotated (1953, as amended). Fry appealed the Decision of the Committee to the Third Judicial District Court in defiance of Section 26-24-12, Utah Code Annotated (1953, as amended). The office of Attorney General filed a Motion to Dismiss the Appeal of Fry in light of the statute which permits judicial review before the Utah Supreme Court, rather than a district court. This statute provides:

(1) Except as specifically provided in this section and in section 26-24-11(5)(e), all final orders or determinations of the committee or the executive secretary are subject to judicial review in the Supreme Court of Utah. . ."

Fry's appeal was dismissed by the Third Judicial District Court on January 31, 1975. Fry then filed a Notice of Appeal with the Utah Supreme Court on February 4, 1975.

#### STATEMENT OF THE LAW

The Air Conservation Act was enacted by the Utah State Legislature in 1967 (Laws of 1967, Chapter 47, Paragraph 1). This act created within the Division of Health, the Air Conservation Council, now known as the Air Conservation Committee, and empowered it to act in the control, abatement and prevention of air pollution. The Federal Clean Air Act (42 U.S.C. 1857 et. seq.) was amended by Public Law 91-604, dated December 31, 1970, entitled "Clean Air Amendments of 1970." Section 108 of that Act required the administrator to publish a list of air pollutants, which, in his judgment, have an adverse effect on public health and welfare and the presence of which in the ambient air resulted from numerous or diverse mobile or stationary sources. It further provided that the administrator, after consultation with appropriate advisory committees and federal departments and agencies, issue to the states and appropriate air pollution control agencies information on air pollution control techniques, and such information was to include data relating to the technology and costs of emission control. Section 109 of the federal act required the administrator to promulgate regulations setting forth a national primary ambient standard for each air pollutant. A primary ambient air quality standard is one which the attainment and maintenance in the

judgment of the administrator, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence such air pollutant in the ambient air. Section 107 of the Federal Act states that each state is to have the primary responsibility for assuring air quality within the entire geographic area comprising the state, by submitting an implementation plan for such state, which must specify the manner in which national primary and secondary ambient air quality standards are to be met, achieved and

- maintained within each air quality control region of the State.

Section 110 of the Act required each state, after public hearing, to adopt and submit to the administrator a plan providing for the implementation, maintenance and enforcement of each primary standard and each secondary standard. The administrator was thereafter required to approve or disapprove the plan so submitted and set out criteria of eight requirements that each plan must fulfill before it could be approved. One of these criteria necessary was that the plan must include emission limitations (see Section 110(a)(2)(B) of said Clean Air Act Amendment). Thereafter, the Utah Legislature, in 1971, made two significant changes in the Air Conservation Act (Laws 1971, Chapter 54, Paragraphs 1 and 2). Section 26-24-1.5 was added to the Air Conservation Act. This provision sets forth a declaration of public policy and states the purpose of the act. Section 26-24-1.5(1) reads as follows:

It is hereby declared to be the public policy of this state and the purpose of this act to achieve and maintain such levels of air quality as will protect human health and

safety, and to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the economic and social development of the state, and facilitate the enjoyment of the natural attractions of this state.

Subparagraph (3) reads in part as follows:

To these ends it is the purpose of this act to provide a framework within which air quality may be protected and consideration given to the public interest at all levels of planning and development within the state.

Subparagraph (2) was then added to 26-24-10, which reads as follows:

The committee may establish such emission control requirements by rule, regulation or standard as in its judgment may be necessary to prevent, abate, or control air pollution. These requirements may be for the state as a whole or may vary from area to area, as may be appropriate, to facilitate accomplishment of the purposes of this act, and in order to take account of varying local conditions. In adopting these emission control requirements, the committee shall conduct public hearings in the same manner and under such terms and conditions and with the same notice as required in Subsection (1) of this section.

The Air Conservation Committee thereafter developed a plan for control of particulate matter. Within the plan, and to meet the requirement of emission control, was the Air Conservation Regulation 3.2. This plan was submitted to the administrator and approved by him, and is now enforceable by both the state and federal authorities.

#### STATEMENT OF FACTS

The provisions of the Utah Air Conservation Act and the regulations adopted pursuant thereto are valid and provide adequate constitutional safeguards to determine whether or not a violation

has occurred. The standards set forth in the Utah Air Conservation Act, Section 1.1.3 and Section 3.2 of the Visible Emission Regulations, Code of Air Conservation Regulations, are clear, reasonable and provide fair and adequate warnings to any violator thereof. These regulations provide a clear and accurate definition of "contaminant" sufficient for a determination to be made by administrative procedure as to whether the "contaminant" does or does not become injurious to human health or welfare, animal or plant life, or property, or would unreasonably interfere with the enjoyment of life or use of property." The definition of "contaminant" specifically excludes steam and water vapor.

Each individual smoke reader testified that their opacity readings were taken beyond the "breakpoint" where the water vapor has dissipated and the dry contaminant continues skyward (Tr. Vol. I, pp. 95-97). A trained smoke reader can clearly determine the "breakpoint" of a wet plume when the water vapor evaporates (Tr. Vol. I, pp. 18-20, 73, 76-77, 95-97, 100-101, 120, 154, 185, 218-219; Vol. II, pp. 39, 178). Certified smoke readers receive field experience in addition to the smoke school to qualify to read wet plumes.

The visual readings of the smoke reader at the smoke school are compared to precise readings monitored by an electric eye in order to calibrate his eyeball for making objective visual readings and to eliminate as much subjectivity as possible (Tr. Vol. I, pp. 13-26, 30-34).

Guidelines are set forth by the regulations of the Environmental Protection Agency for reading wet plumes. The trained smoke reader learns to calibrate his eyeballs and take appropriate readings beyond the breakpoint. The members of the staff who made the opacity readings on visible emissions received adequate field training to read smoke plumes containing water vapor (Tr. Vol. I, pp. 18, 24-25, 30-31, 73-74, 95, 100-101, 156-157, 217-218; Vol. II, pp. 39, 178, 183-189, 197-200).

The appellant failed to show any discrepancy between "white" and "black" plumes. It has been shown that the smoke reader must calibrate his eyeballs to read the spacities of both black and white smoke in order to obtain certification (Tr. Vol. I, pp. 15-17, 40-42).

Smoke readers are trained at the smoke school and through field experience to read dry and wet plumes. They are given certain guidelines about where to stand and under what conditions they are to read the plumes. The ideal conditions prescribed are not always possible, and therefore, the smoke reader must exercise his judgment in taking readings under the best conditions available under the existing circumstances.

Some states have adopted regulations which take into account the fact that visible emissions readings may be taken under other than ideal conditions. For example, the Iowa rules adopted in Chapter 11, entitled "Qualification in Visual Determination of the Opacity of Emissions" in Section 11.1(2) under procedures reads, in part, as

follows:

"For stationary sources, the qualified observer stands at a distance from the base of the stack necessary to obtain a clear view of the appropriate portion of the plume, with the sun to his back but not more than 45° to either side. . . ."

Iowa rules outline the qualifications for the observer in 11.1(1), which states, in part, as follows:

"To qualify as an observer in reading visible emissions, a candidate must complete a smoke reading course conducted by the department or an equivalent course. The smoke generator used to qualify the observers must be equipped with a calibrated smoke indicator or light transmission meter located on the source stack if the smoke generator is to determine the actual opacity of the emissions."

When a smoke reader takes his readings, the nature of the material and the type of process being employed by an industry have nothing to do with the accuracy of his reading. The trained smoke reader makes an eyeball calibrated reading of the opacity of the plume which can be appropriately measured, regardless of the process, of the chemical and material employed. He is measuring the amount of dry particulate which is the by-product of the process, and such amount can be accurately measured in terms of its opacity in the plume released from the industry's stacks. The nature of the process and the materials used have no correlation with visible emissions readings and evaluations. In taking his readings, the smoke reader is not required to establish continuous violations.

The fact that he can measure a violation upon a single reading is sufficient to establish his burden of proof that a plant or industry is emitting dry particulate in such a quantity as to cause a plume opacity beyond the permitted level of the visible emissions regulations.

The readings taken by the smoke readers of the Fry Plant were after steam or water vapor dissipations. From the lip of the stack to the breakpoint, and even before the particulate reaches the lip of the stack, there is a dissolution factor which allows for dispersion of some of the particulate prior to the breakpoint. This dissolution factor gave for the Fry Plant an inherent advantage, in that the readings were taken beyond the breakpoint. (Tr. Vol. I, pp. 19, 20 and 28).

The readings taken were accurate, in that the training and experience taught the smoke readers to take into account atmospheric conditions, including wind velocity, ambient temperature, atmospheric pressure, humidity, cloud cover and position of the sun (Tr. Vol. I, pp. 13-26, 31-33, 74, 80-83, 117-121, 153-160, 217-221).

The smoke readers presented testimony that bears directly on the issue of wet plume breakpoints, that is, where the steam or water vapor condenses and falls away, and where the dry contaminant continues skyward. Each observer pointed out that there was a definite breakpoint and that it was easy to distinguish and read. For example, Mr. Bradford testified that they "(learned) to evaluate at the point there is that break between steam and particulate matter in the plume." (Vol. I, pp. 120) Mr. Rickers also testified, stating

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the determination of where particulate separates from the water cloud was a fairly simple one. (Vol. I, p. 95) The points of evaluation by the "smoke readers" were made in accordance with their training and certification at right angles to the plume at proper distances with the sun to their backs. (Tr. Vol. I, pp. 81-82, 119-120, 149, 153-156, 217-221).

Visual tests are accurate and may be considered as competent evidence upon which an order can be made (Tr. Vol. I, pp. 18-27; Vol. II, p. 178). There has been a showing of relative consistency in the readings of smoke readers with minimal subjective error (Tr. Vol. I, pp. 13-26).

The appellant has failed to show that more sophisticated and accurate instruments provide for a better and more objective evaluation of alleged air contaminants than the visual tests by trained and qualified smoke readers. The smoke generator used to train a smoke reader has an electric eye to obtain exact measurements of opacity to compare with the visual readings of the smoke reader in order to calibrate his eyeball (Tr. Vol. I, pp. 21-41). No equivalent is available for evaluating or monitoring wet plumes (Tr. Vol. I, p. 47).

Adequate records of the opacity readings were made by each smoke reader in writing with memoranda to Dr. Grant S. Winn for the business files of the Air Quality Section, Bureau of Environmental Health. Each smoke reader contacted the office of the Lloyd A. Fry Roofing Company prior to the taking of his readings. After the

readings were taken by the smoke readers, they contacted the office of the Lloyd A. Fry Roofing Company to show Mr. Dan Springer and other officials the readings which were taken (Tr. Vol. I, pp. 60-64, 102-104, 1-5, 110-113, 116, 134, 136-138, 143, 149-152, 163-180, 192-194, 196-198, 201, 214, and p. 216; see Exhibits 4, 5, 9, 10, 11, 12 and 14.

The notes of the smoke readers were made available at the hearing, in addition to the memoranda, and both the notes and the memoranda were properly admitted and made a part of the record.

The Air Quality Section held a meeting with the officials and legal counsel of the Lloyd A. Fry Roofing Company and inspected the plant in Woods Cross on September 5, 1973 (Tr. Vol. I, pp. 61-64, 111, 112). Richard L. Harvey, Davis County Health Department, sent a letter to Lloyd A. Fry Roofing Company on October 10, 1973, with regard to violations of Visible Emissions Regulations (Tr. Vol. I, pp. 151-152). Dr. Grant S. Winn, Executive Secretary, Utah Air Conservation Committee, issued his order dated January 16, 1974, notifying Mr. Donald D. Foster of the Lloyd A. Fry Roofing Company of the dates and the results of the opacity readings.

The transcript of the hearing shows no evidence presented by the Lloyd A. Fry Roofing Company that the wet plumes from their company differ from other wet plumes. Smoke readers were trained to read wet plumes in order to qualify to make readings of the plumes

from the Lloyd A. Fry Roofing Company (Tr. Vol. I, p. 18, 24-25, 30-31, 73-74, 95, 100, 101, 156-157, 217-218; Vol. II, p. 39, 178, 173-179, 183-189, 197-200).

Dr. Grant S. Winn, Chief of the Air Quality Section, Utah State Division of Health, was the first of many to testify as to the readability of "wet" plumes. Dr. Winn possessed the most impressive qualifications of any witness (Vol. I, p. 8) and has had extensive experience in teaching, government, and industry. His testimony concerning wet plume readings was that:

"an experienced observer would have no difficulty in determining where the water could dissipate and the other particulate or other more particulate matter continues and an evaluation is made." (Vol. I, p. 20)

Again, referring to the breakpoint, he said:

"a very definite break (occurs) when that steam plume dissipates. Very definite." (Vol. I, p. 30)

It is interesting that two witnesses for the Lloyd A. Fry Company, Dr. Dale Parker and Mr. Donald Foster, testified concerning "wet" plume reading, yet neither were qualified smoke readers and neither had any previous experience in reading for opacity in visible emissions in plumes similar to those of the Fry process. Mr. Chaffin, the only qualified smoke reader presented by the defense, made his readings at the Fry plant on May 14, 1974, between noon and 1:00 p.m. At that time of day and year in this latitude, the sun would have

been in his eyes, clearly in violation of standard EPA procedure, and caused an inaccurate reading.

Appellant argues that the breakpoint of a wet plume, where the uncombined water visibly separates from the particulate matter is impossible to determine, yet expert witnesses certified as smoke readers testified under oath that "an experienced observer would have no difficulty in determining where or whether the water cloud dissipates and other particulate or other more particulate matter continues." (Tr. Vol. I, p. 20, 120, 154, 202, 218). A witness for the appellant agreed that the breakpoint can be read and one testified that he had often observed such a line of the Fry plume.

Dr. Dale Parker, in his testimony, stated the following:

"I think that in my observations passing the plant I have seen the breakpoint occasionally. But, it isn't there all the time, so I have to conceive that point that it is possible for that moisture to break at times."  
(Tr. Vol. II, p. 52)

Dr. Parker went on further to testify as to a clear line of demarcation for the break point. The transcript of the hearing indicates the following testimony:

QUESTION (Mr. Hanson): And, you have just mentioned to one of the committee members that occasionally you can have a clear demarcation, have you ever seen that?

ANSWER (Dr. Parker): I have seen it in a lot of different stacks. You can see it in many or in a lot of different plumes around the valley. You can see it very definitely. I have seen a situation

in the Fry plant where I could consider that to be a good break-point. It isn't close to the stack. It's generally out a way."

Dr. Dale Parker testified for the Lloyd A. Fry Company, yet his testimony clearly states that he has not been trained as a smoke reader and has not been certified to read wet plumes (Tr. Vol. I, pp. 247-248, 252). Dr. Parker never indicated in his experience at the Dugway Proving Grounds established no correlation with any processes similar to that of the Lloyd A. Fry Roofing Company (Tr. Vol. I, pp. 248-250) (He specifically stated that the plumes with which he worked at Dugway were other than steam plumes).

The Air Conservation Committee had called Mr. Luedtke to testify. He gave his expert opinion based on facts and information supplied to him by the Lloyd A. Fry Roofing Company. Mr. Luedtke has a Bachelor's Degree in Chemical Engineering from Oregon State University and a Master's Degree in Chemistry with Mechanical Engineering as a Minor from Washington State University. He currently holds a Certificate in Industrial Relations from UCLA and is a Registered Professional Mechanical Engineer and a Registered Metallurgical Engineer in the State of California (Tr. Vol. II, p.167). Mr. Luedtke testified as to his experience with asphalt saturators, and that he had either run source tests or read smoke emissions and processed numerous applications for numerous plants in Los Angeles area (Tr. Vol. II, p. 169). He further testified to his experience with processes identical to the Fry Plant at Woods Cross (Tr. Vol. II,

pp. 170-171). To determine the amount of dry particulate and the amount of water vapor which exits the stack of the Fry Company, Mr. Luedtke was supplied with the necessary plant information and data to make his computations (Tr. Vol. II, pp. 172-177, 183-185). Mr. Luedtke entered testimony to the effect that the opacity from steam plumes at the Fry Company can be read (Tr. Vol. II, pp. 193-194). He testified that he had personally read many plumes with the same operation as the Fry Roofing Company, where the opacity was well in excess of the Ringelmann No. 2 (Tr. Vol. II, p. 196). On cross-examination Mr. Luedtke testified as to the identical process between Fry Roofing Company in Woods Cross and the celotex plant in Los Angeles, California (Tr. Vol. II, pp. 201-203). From the calculations and the psychometric chart, Mr. Luedtke came to the conclusion that significant amounts of dry particulate were coming from the Fry stacks, in addition to the amount of water vapor which was dissipated. His testimony affirmed the position that smoke readers can make a determination of dry particulate by reading beyond the breakpoint (Tr. Vol. II, pp. 174-178, 183-187).

The data furnished to Carl D. Luedtke was supplied by Mr. Mostyn and Mr. Donald Foster of the Lloyd A. Fry Roofing Company. (Tr. Vol. II, pp. 173-174) Mr. Luedtke's calculations were based upon ideal atmospheric conditions and he testified to scientific and experimental evidence which was framed within the reasonable probability, based upon sufficient preliminary facts, to make an expert

opinion (Tr. Vol. II, pp. 171-180). Mr. Luedtke compared his observations and calculations at the Lloyd A. Fry Company with similar asphalt roofing plants to arrive at his conclusions. He made reasonable inferences from his personal observations and communications with the officials of Lloyd A. Fry Roofing Company (Tr. Vol. II, pp. 193-203; Bol. I, pp. 223-225; Dr. Parker's testimony of similar processes at Dugway Proving Grounds).

On September 5, 1973, Alvin Rickers, Brent Bradford and Lynn Price of the Air Quality Section were invited to visit the Fry Plant where they observed the operation of the plant. They observed the emissions from the process when the felt sheet was passing through the asphalt saturators, and also observed such emissions from the stacks when the felt sheet was "broken" or when the felt was not passing through the asphalt saturators. They compared the opacity of the emissions with the water vapor forced out of the felt and into the stack and the emissions when the felt was broken without moisture from the felt as part of the emissions. The result was an opacity reading of 35-40% with the felt broken and no water vapor being read with the emissions (Tr. Vol. I, pp. 65, 66, 87, 243-244, 259, 263). This sets forth the fact that the water vapor did not interfere with the taking of an opacity reading of the emissions and refutes the Fry position that the readings were of water vapor with its alleged masking effect on emissions.

It also is interesting to notice that Donald Foster, who was called by the Fry Company, is in no position to make a determination

as to the opacity of the plume, since he is not a qualified smoke reader and has not had experience with visible emissions readings. Mr. Foster never took any readings of the opacity of the Fry plumes. He argued that the Fry Company was in compliance with the EPA Weight Emission Regulations; however, Fry is not charged under those regulations. No evidence was presented by the Fry Company to refute the visible emissions regulations of the Air Quality Section.

On October 18, 1973, Mr. Donald Foster testified before the Utah Air Conservation Committee, where he stated that the Woods Cross plant is identical with all the other Fry Plants throughout the United States, which includes 24 other plants at different locations. The plume from the Fry Roofing Company at Woods Cross does not differ from plumes of other particulate and steam sources as far as the visual evaluation is concerned. It can be determined where the steam ceases to be a part of the plume and the evaluations, all made beyond this point, include opacity caused by particulates alone.

The testimony of Mr. Foster, with regard to uncombined water, made sense. He testified as follows:

"Oil and water does not mix. We have uncombined water in our plume. We have a physical mixture, yes, going up the stack, but at some point out here, all of the water evaporates. The gas as it is driven off or the plume as it is driven off as a gas condenses. It may be a particulate at that time, but it's clear out here at some point well beyond the lip of the stack from 30 to 100 feet, at least." (Tr. Vol. II, p. 158).



Mr. Foster further testified that no uncombined water was observable in the plume at the Fry Roofing Company. If this is the case, then the entire plume would have to be composed of particulate matter. This would place Fry Roofing Company all the more clearly in direct violation of the Visible Emissions Regulations.

It is interesting to note that all of the states in the United States have visible emissions regulations. It is further interesting to note the Idaho regulations for the control of smoke and visible emissions. Section 4 of the "Regulation for Control of Smoke and Other Visible Emissions" for the state of Idaho reads as follows:

"The density or opacity of an air contaminant shall be measured at the point of its emission, if observable, and if not, shall be measured at an observable point on the plume nearest the point of emission. When water particulate contributes to the opacity of a visible emission, the measurement shall be made immediately beyond the point where the water particulate dissipates and no longer contributes to the opacity."

Thos emission regulation obviously sets forth the principle of a dissipation or breakpoint in wet plumes. The State of South Carolina adopted Regulation No. 2.6, entitled "Air Pollution Control Standards--Standard No. I--Smoke Emission." Section I of this regulation deals with existing sources, and Section II deals with new sources. Section I(B) reads as follows:

"Smoke, exclusive of condensed water vapor, from fuel burning shall not obscure an observer's view to

a degree as great as or greater than does smoke designated as No. 1 on the Ringelmann Chart."

Once again, the South Carolina statute makes a clear distinction that a smoke reader can observe a defined breakpoint, exclusive of condensed water vapor, at which he can make a visible emission reading. The State of Texas adopted a visible emissions regulation under Rule 103 of the Texas "Regulation I Control of Air Pollution from Smoke, Visible Emissions and Particulate Matter." Rule 103.7 reads as follows:

"Contributions from uncombined water shall not be included in determining compliance with Rule 103. The burden of proof which establishes the applicability of Rule 103.7 shall be upon the person seeking to come within its provisions."

You will notice from the Texas regulation that uncombined water can be separated from the dry particulate in making a visible emission reading. It is the burden of proof of the person charged to come forward to establish that he is in compliance with the regulation.

Finally, Mr. Raymond L. Chaffin was also called to testify by the Fry Company, yet he denied his own expertise in reading wet plumes. Mr. Chaffin indicated that he could only read dry plumes (Tr. Vol. II, p. 71). He indicated that he had not been trained at the EPA school; therefore, he was in no position to make a determination that Fry was in compliance with Section 312 of the Visible

Emissions Regulations (Tr. Vol. II, p. 73). Mr. Chaffin's readings at the Fry plant were made, as mentioned before, when the sun was in his eyes, in direct violation of the standard procedure prescribed by the Environmental Protection Agency (Tr. Vol. II, p. 86,92). This would have made any readings he had taken inaccurate, because the sun was in his eyes and not at the appropriate angle for taking his readings. Mr. Chaffin further testified that the steam coming from the stack condenses immediately to water and that the plume is composed entirely of steam (Tr. Vol. II, pp. 102-103). This would indicate that no plume could, in fact, exist. If a plume were to be observed beyond the condensation point out of the stacks of the Fry plant, their plumes would have to be composed of dry particulate to satisfy the explanation given by Mr. Chaffin.

POINT I

THE UTAH AIR CONSERVATION COMMITTEE HAS MET ITS BURDEN IN PROVING THAT THE LLOYD A. FRY ROOFING COMPANY HAS VIOLATED SECTION 3.2 OF THE VISIBLE EMISSIONS REGULATIONS.

The decision of the Utah Air Conservation Committee was based upon a finding of substantial evidence introduced at the hearing. It found that contaminant was discharged into the atmosphere, and that such contaminant was either of a shade as dark or darker than a Ringelmann No. 2 or that it obstructed the vision of smoke readers at least as much as would the smoke that was as dark as a Ringelmann No. 2.

In People v. Plywood Manufacturers of California, 137 Cal. App. 2d Supp. 859, 291 P.2d 587 (1955), the court held that the burden of proof in prosecution of a violation was upon the state. The elements of proof were held to be as follows:

"(1) that it was a contaminant that was discharged into the atmosphere, and (2) that the contaminant was either (a) of a shade as dark or darker than Ringelmann No. 2, or (b) that it obstructed the vision at least as much as would smoke that was as dark as Ringelmann No. 2." Id., at 594.

In this case, the Superior Court of California held that the "anti-smog" statute was not invalid because of objections urged against it. It also decided that the word "opacity" in the statute meant "want of transparency."

The Utah Air Conservation Committee is not required to establish a continuous violation, but rather that violations were observed on the different days listed by the various smoke readers. In People v.

International Steel Corporation, 102 Cal. App. 2d Supp. 935, 226 P.2d 587 (1951), the court held the above-mentioned standard was sufficiently definite to satisfy the due process of law.

Furthermore, in Plywood Manufacturing, supra, the court saw no difficulty arising from the fact that a plume of smoke may appear less dark than Ringelmann No. 2 from one position, but darker from another viewpoint. They held that if the contaminant has the substance that, fairly viewed from any position, gives it a shade as dark or darker than Ringelmann No. 2, it is condemned, no matter how light in color it may look to someone situated at another vantage point. Supra, at 591.

Each individual state has the responsibility of implementing certain air quality standards described in the National Environmental Protection Act, 42 U.S.C. §1847 c-2(a). In compliance with this federal directive, the Utah State Implementation Plan set forth certain emission limitations. In accordance with E.P.A. procedures, the smoke readers made objective readings and complied with the requirements of due process. Each and every reader found numerous violations of the Lloyd A. Fry Roofing Company on the date in question and testified as to their procedure in taking these readings. They were taken under the best conditions which were available on the dates in question.

Each reader testified that at the time the readings were taken, they had no difficulty in ascertaining where the breakpoint was, and that their readings were made of the contaminant which continued when the plume was free of uncombined water.

In State v. Lloyd A. Fry Roofing Company, 9 Ore. App. 189, 495 P. 2d 751 (1972), remanded on other grounds, \_\_\_ Ore. \_\_\_, 502 P. 2d 253 (1972), opinion reinstated in full, \_\_\_ Ore. App. \_\_\_, 502 P. 2d 1162 (1972), the Lloyd A. Fry Roofing Company was indicted on four counts of air pollution in violation of the rules of the local air pollution agency. The court held that the evidence concerning the defendant's alleged violations was correctly assessed, and applicable statutes and regulations were properly interpreted. The court further held that the state's evidence in the form of testimony and records of the smoke readers, certified as such just prior to making the readings in question, was admissible, and such evidence was sufficient to sustain the convictions. The court held that the two witnesses held sufficient qualifications to determine obscuration of background caused by emissions from defendant's plant. The decision further stated the law does not require that in order to qualify as an expert, the witness be better qualified than anyone else, but only that he has sufficient expertise to make it probable that he will aid the jury in its search for truth. The trial court's determination as to whether a witness is competent will not be upset, except upon a clear abuse of discretion.

In the case at bar, there has been no showing of any clear abuse of discretion, the same as in the Oregon case above cited. The Oregon case showed that there was no clear abuse of discretion in admitting evidence of smoke readings made by two agency employees who had undergone two days' training and had been certified just shortly before making the readings, even though the plume at the defendant's

plant was a "wet" plume. The readers had only been given practical training in reading "dry" plumes, receiving only instruction on the reading of "wet" ones. In the instant case, the Utah readers had been thoroughly trained, certified, and had years of experience in reading both types of plumes. No cases have indicated the amount of experience, training or education which is required to establish the competency of the witnesses.

In the instant case, no testimony was given about the variables which may affect a smoke reading, nor was there testimony offered to refute the results of the smoke reader's findings. The Utah smoke readers were subjected to many variables during their smoke school training, and received detailed instruction on wet plumes.

Basic or essential findings upon which administrative orders rest must be clearly and completely shown in findings based on substantial evidence, Cities Service Gas Company v. State Corporation Commission, 201 Kan. 223, 440 P.2d 660 (1968). The finding of the Utah Air Conservation Committee was based upon substantial evidence as set forth at the hearing. The Committee was authorized to issue such orders as may be necessary to effectuate the purposes of the Air Conservation Act and to enforce the same by all appropriate administrative and judicial proceedings. See, Section 26-24-5. This was an administrative hearing which resulted in a final order being issued by the committee to the appellant to either seek a variance as outlined in the act or cease and desist. This action was based

upon a finding of substantial evidence.

The question of whether or not there was presented to an administrative agency in a quasi-judicial proceeding sufficient evidence of a violation of rules and regulations pertaining to air pollution as would warrant the issuance by the agency of an order to cease and desist or otherwise abate the violative practices is the real question. The decision of an administrative tribunal must be supported by evidence of probative value, and if such evidence is apparent to a review in court, the court will not substitute its own judicial determination on the facts. See 2 Am. Jur. 2d, Administrative Law, Section 393. As proof of the violation itself, it has been held that a preponderance of the evidence, and not proof beyond a reasonable doubt, is all that is required. See North American Coal Corporation v. Air Pollution Commission, 2 Pa. Cnwlth. 469, 279 A.2d 365 (1971). Where an administrative agency is concerned with technical matters, the court will give weight to its presumed expertise in reviewing decisions, and stating as applicable the rule that the court will not overturn an administrative decision if it appears to be supported by substantial evidence on the record. Evidence consisting of testimony by several witnesses who live near the defendant manufacturing plant that fumes and smoke coming from the plant had caused them poor health and discomfort, along with the testimony of an expert witness who was the enforcement officer for the commission as to certain observations and tests made upon several occasions



at the manufacturing plant was held sufficient in Department of Health v. Owens-Corning Fiberglas Corporation, 100 N.J. Super. 366, 242 A.2d 21 (1968), Affirmed, 53 N.J. 248, 250 A.2d 11 (1970).

The court, in North American Coal, supra, stated that when visual tests are used to determine the amount of emission, great pains should be taken to make sure that the tests are made accurately and fairly and that sufficient proof to sustain the opinions of the experts is presented. This court took the position that the comparative degree of proof by which a case must be determined in an administrative hearing is the same as in a civil judicial proceeding; that is, a preponderance of the evidence, and notwithstanding that the defendant was charged with a violation of the commission's regulations, proof beyond a reasonable doubt would not be required. It also concluded that visual tests do constitute admissible evidence sufficient to warrant the granting of an abatement order.

In Ford v. Environmental Protection Agency, 9 Ill. App. 3d 711, 292 N.E.2d 540 (1973), the appellate court held that penalty powers given the Pollution Control Board of the State of Illinois were incidental to its duties of administering the Environmental Control Act and did not constitute a prohibited grant of judicial power. In this decision the appellate court held that an administrative officer or agency may penalize, without offending the constitution, when the penal function is incidental to the duty of administering the law. The Illinois Environmental Control Act provisions authorize the imposition of penalties by the Pollution Control Board and do not

deprive the penalized party of its constitutional right to a jury trial (see argument V). It is essential to note that the Illinois statute on violations and penalties is similar to the section in the Utah Code. In the proceedings for the enforcement of the Environmental Control Act, the court held that the board need only establish a prima facie case of violation and does not have an additional burden of introducing proof relative to each of the factors contained in the statutes setting forth what the board shall consider in making its orders and determinations. Where the board has made a prima facie case of violation of the Environmental Control Act, the alleged violator has the burden of going forward to establish the reasonableness of the emissions, discharges or deposits. The court went on to state that it was not necessary for the commission or board to make particular findings as to every evidentiary fact or claim, and it was sufficient that findings were made which were adequate to support the order of the board, and that such findings had substantial foundation in evidence. It is interesting to note that the burden of proof of the reasonableness of the emissions, discharges or deposits rests with the defendant; or in this case, Lloyd A. Fry Roofing Company.

In the case of Lloyd A. Fry Roofing Company v. Pollution Control Board, 20 Ill. App.3d 301, 314 N.E.2d 350 (1974), the Appellate Court of Illinois held that the charges in the administrative proceeding need not be drawn with the same refinement as

pleadings in a court of law, but the charges must be sufficiently clear and specific to allow preparation of a defense. The court further held that the compliance with the regulations of the Pollution Control Board is a prima facie defense to charges of violating the act, but is not a complete defense. The Lloyd A. Fry Roofing Company made no attempt, in the instant case, to establish compliance with the regulations of the State. The appellate court, in the Illinois decision, found that the Lloyd A. Fry Company had caused air pollution as defined by the act and had emitted particulates into the air in amounts exceeding the limits set forth in the rules and regulations governing control of air pollution. The Pollution Control Board of Illinois made its determination after due consideration of written and oral statements, testimony and arguments submitted at hearing. The court held that its position is to examine the findings of the administrative agency to determine if they are supported by sufficient competent evidence. The Utah Air Conservation Committee submits that this is the duty of the Utah Supreme Court, to review the findings of the Committee to make a determination if they are supported by sufficient and competent evidence.

The Utah Air Conservation Committee is not required to show that injury to an individual or members of the public has occurred. The purpose of the Visible Emissions Regulations adopted by the Utah Air Conservation Committee is to assure that the Federal Ambient Air Standards are not violated in order to assure that human health

is protected. The burden of the committee is merely to show that a public right has been invaded, namely, the right to breathe clean air. The public right threatened with this kind of an invasion must be substantial. The case of City of Chicago, et. al. v. Gunning System, 214 Ill. 628, 73 N.E. 1035 (1905) declared as unreasonable an ordinance which controlled the use of billboards.

The court, in the form of dictum, stated:

"The one essential and universal limitation upon the exercise of the police power is, however, that the regulation shall be reasonably necessary and reasonably exercised." Id., at 1040.

The court also stated as follows:

"In determining first whether this act is a constitutional exercise of the police power, we are cognizant that the criteria of a proper exercise of the police power, that inherent and plenary power of the legislature to protect public health, safety and general welfare, ... is whether the statute is reasonably designed to remedy the evils which the legislature has determined exist."

The court emphasized the theory that the public possesses a trust in natural resources. Whenever the environment is degraded, a public right (public trust) has been invaded.

Section 26-24-2(3), Utah Code Annotated (1953, as amended), states the definition of "air pollution" to be a condition in the ambient air where air contaminants in such quantities and duration and under certain conditions and circumstances tend to be injurious to human health or welfare. The Utah Air Conservation Committee has set forth certain visible emissions regulations to insure the public that contaminant levels will not get to a point where they will

be injurious to human health or welfare. The smoke readers observed

the opacity of the smoke plumes of Lloyd A. Fry Roofing Company to be emitting contaminants to a level beyond the emission limitations. These readings, in and of themselves, set forth a prima facie case that the emissions from the Lloyd A. Fry plant are at a level which tend to be injurious to human health or welfare.

## POINT II

THE FINDINGS, CONCLUSIONS AND DECISIONS OF THE UTAH AIR CONSERVATION COMMITTEE ARE BASED UPON SUBSTANTIAL AND FACTUAL EVIDENCE WHICH PROVIDED THE LLOYD A. FRY ROOFING COMPANY WITH ADEQUATE PROCEDURAL SAFEGUARDS REQUIRED BY THE DUE PROCESS OF LAW.

The Utah Air Conservation Committee made its determination after due consideration of written and oral statements, testimony and arguments submitted at the hearing. The administrative procedure allowed the hearing officers to make a determination and appraise the evidence. In State v. Lloyd A. Fry Roofing Company, supra, the Court of Appeals of Oregon held that the air pollution authority's intent to define the term "opacity" as the reduction of transmitted light and obscuration of background, including the concept of "equivalent opacity," meaning white smoke which obscures more than 40% of the background is equivalent to smoke as dark or darker in shade as that designated in No. 2 on the Ringelmann Chart (used to measure black or gray smoke), and such rules, were not so vague and arbitrary as to violate constitutional standards controlling the validity of

such legislation. There was no clear abuse of discretion in admitting evidence of smoke readings made by the two agency employees recently certified as smoke readers, even though the plume at the Fry plant was a "wet" plume and the reader's instruction had not been practical, but theoretical. The decision clearly held that there is no need for experience in reading wet plumes in order to make one's determination as to the opacity of dry particulate out of such plumes.

The appellants allege in their brief that there was no showing that the operation at the Oregon plant was the same as that of the Woods Cross plant, in reference to the above-cited case. The fact is that the Lloyd A. Fry Company has 24 plants in the United States, all of which are identical in process and operation with the Woods Cross plant. Mr. Donald Foster testified to this at the Utah Air Conservation Committee meeting on October 18, 1973.

In this same Oregon decision, the Lloyd A. Fry Roofing Company challenged the Columbia-Williamette Air Pollution Authority in that their regulations were vague and arbitrary, so as to violate the constitutional standards controlling the validity of such legislation. The court interpreted the concept of equivalent opacity to be constitutional. The Lloyd A. Fry Company made the argument that equivalent opacity measures one factor only, of a definition which requires that two factors be considered. These factors were the transmission of light and the background visibility.

The court interpreted the definition of opacity to mean both: the

reduction of light and obscuration of background. The court further held that this was the agency's clear intent and upheld the equivalent opacity to be constitutional.

Another concern that the appellant in the instant case has expressed is the alleged subjectivity of the procedure involved. Each of the state's smoke readers has been trained, certified, and retrained in smoke schools offered by the state. Each had qualified under strict federal standards (40 C.F.R. 60) and had passed the tests for certification. Each smoke reader has further received field training to become specialized and skilled in reading "wet" plumes, as well as dry.

The fact that a difference in readings has occurred does not destroy the validity of each individual reading. Appellant equates individuality with subjectivity. This is fallacious reasoning. Of course, each official or smoke reader, being an individual would have unique background, experience, and perception. That is why the consistency of the observed violations on many different occasions by five different men is so remarkable. It testifies affirmatively about the smoke school training and the vast experience of these men.

A building inspector may detect a warp in a wall, roof, or a foundation which an ordinary person would not have seen; yet it may be potentially harmful to those occupying the building, or a meat inspector may notice a slight discoloration in a cut of beef that would render it harmful to human life, yet he is just one of many

inspectors. Does this mean that his visual perceptions are suspect or that new and expensive equipment is required? No.

There was nothing even remotely haphazard or unskilled about the manner in which the evaluations by the state's observers were made. Evidence was presented as to the experience of each one and it was never challenged. The readings were done in a reasonable and fair fashion. Each observer testified that he took into account the numerous variables that could have altered the accuracy of his record.

The readings of the various smoke readers indicated that they read the plume at right angles and with the sun at their backs as much as would permit for best conditions to make the readings. The transcript of the hearing indicated that Richard Harvey read the plume at right angles (Tr. Vol. I, p.153) and that William Terburg also read the plume at right angles (Tr. Vol. I, pp.120, 149). George Chlarson appears to have been the most capable individual at reading smoke as a result of his qualifications at the smoke school. He read 25 consecutive readings without error (Tr. Vol. I, pp. 72-73). In the testimony of William Terburg, there was no showing that the sun was not to his back, and, in fact, he testified that the sun probably had no effect on his reading. Al Rickers, who is a qualified meteorologist, testified as to his extensive experience in taking 150 to 175 readings of smoke plumes (Tr. Vol I., p. 56) Mr. Rickers further testified that the student who qualifies at the smoke school have a reading variation which runs about 7% or less from the exact meter readings (Tr. Vol. I, p. 55).

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Each reader in this case was certified and complied with procedure by presenting an appropriate Fry Company official with notice of violation, and each properly recorded, in memorandum form, the details of the observations for future reference.

No evidence was presented by the appellant to show that this regular procedure was ineffective or that the observers required re-calibration of their eyeballs at the time of their readings. The current procedure is reliable and eminently satisfactory.

It should be evident that the smoke plumes which the inspectors observed are not, and are not required to be, evidence in this case. Rather, the evidence which was available to the state here and in all cases with respect to visible emission violations would consist of the inspector's trained observations and his field report whereon he recorded all the elements necessary for an accurate opacity reading.

In the City of Portland v. Lloyd A. Fry Roofing Company, 3 Ore. App. 352, 472 P.2d 826 (1970) the defendant then, as does the appellant now, claimed subjectivity in enforcement; that the "guilt or innocence of defendant (was) dependent upon the whims and vagaries of opinion testimony produced by officers of the enforcing agencies." Supra, at 828. The court found this contention invalid, unpersuasive, and firmly rejected it.

The court, in Lloyd A. Fry Roofing Company v. Pollution Control Board, supra, held that the Environmental Protection Act of

Illinois was not unconstitutionally vague and indefinite for failure to scientifically delineate all types of contaminants and pollution. Rather, it held that the authority and power bestowed on the Pollution Control Board to make rules and adjudicate cases are in keeping with the spirit of the act, for practical application and operation of the act, and that the act did not confer unlimited jurisdictional discretion, and judicial power upon the Board, inasmuch as discretion and power is clearly limited by statutory requirement that the Board determine standards. The court went on to say that the Environmental Protection Act of Illinois was not applied in a capricious or arbitrary manner on the theory that the actions for violations of the act could be brought against persons, even though they may be in compliance with regulations and even though the Act states that compliance with regulations is a prima facie defense to an action, in view of the provision of the act that violations of it occur whenever a person causes or tends to cause air pollution "or" violates the rules and regulations adopted by the Pollution Control Board.

With regard to the issues of evidence, the Court held that failure to observe the technical rules of evidence was not sufficient reason to set aside an administrative agency's decision unless the error materially affected the rights of the party and resulted in substantial injustice to him. The court stated that the admission of incompetent evidence before the Pollution Control Board is not reversible error if there is substantial evidence to sustain the decision. On the other hand, the court held that the Pollution Control Board's finding of air pollution by the manufac-

turer of the asphalt roofing in violation of the Environmental Protection Act was supported by substantial, competent evidence showing unreasonable interference with life and property. In the case at bar, the Utah Air Conservation Committee took into consideration all the facts and circumstances from the hearing upon the reasonableness of the emissions and found that the Lloyd A. Fry Company had failed to demonstrate any compliance with the Visible Emissions Regulations and that they further caused the emission of contaminants to the extent to be beyond the emissions limitations set forth by the Utah Air Conservation Committee.

The appellant brings forward the case of Bortz Coal Company v. Air Pollution Commission, 2 Pa. Cmwlth. 441, 279 A.2d 388 (1971). Actually, the Bortz decision is highly favorable to the State. The court rejected contentions that the pollution statute constituted an unlawful delegation of legislative authority and that the enforcement of the rules and regulations was a confiscation of property without the due process of law. It found that the evidence was not sufficient to uphold an abatement order. The facts, however, quickly demonstrate the difference between the Bortz case and the one before this court. Of the four witnesses in the Bortz decision, two were housewives who complained of dirt and soot, and only one was an air pollution expert. There was no indication in the record that he was qualified as a smoke reader. He had made observations from which he not only asserted an opacity violation,

but also claimed the coke ovens in question emitted more than 45 pounds of particulate matter per hour from each oven. The smoke emitted was black; therefore, a Ringelmann Chart could have been useful, while in the instant case, the observers were reading white plumes. The chart would not have added anything to the accuracy in any scientific manner, since the readers were determining an equivalent opacity, on the Fry stacks. The Bortz abatement order was based on the casual observation of one employee. The order of the Utah Air Conservation Committee was based not only upon the careful observations of trained and recertified smoke readers, but expert testimony as to their abilities and capabilities.

Appellants further cited the case of Portland Cement v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973). The Portland Cement decision relied on by appellant Fry Roofing Company to question the visible observation method can easily be distinguished. The court was addressing itself to a proposed Environmental Protection Agency 10% opacity standard for new stationary sources of particulate matter, while in the instant case the concern before this court is a violation by an existing stationary source of a more liberal amount or standard of 40% for existing sources. The court also seemed to express the belief that the present opacity standard of at least 20% (for new sources) was quite reliable and only expressed concern for reasonable accuracy at minimal levels at or below 10%. This same argument applies to the additional decision cited by appellant in Essex Chemical v. Ruckelshaus, 486 F.2d 427 (D.C. Cir. 1973).

### POINT III

THE UTAH AIR CONSERVATION ACT PROVIDES FOR ADEQUATE PROCEDURAL SAFEGUARDS TO MEET THE REQUIREMENTS OF THE DUE PROCESS OF LAW.

Smoke control regulations, whether directly prohibiting the emission of smoke or regulating the supply and use of smoke-producing fuel, have ordinarily been held valid as a proper exercise of the police power. The typical smoke regulation is regarded as reasonable and does not violate due process or constitutional provisions against discriminatory legislation or, applied to interstate or foreign commerce, the Commerce Clause of the Federal Constitution. The terms used in smoke control regulations, such as "dense smoke" or a reference to the Ringelmann Chart as published by the United States Bureau of Mines (defining degrees of darkness) are not so indefinite as to render the regulation invalid.

Regulations for the control of the emission of smoke or the use of smoke-creating fuel, have ordinarily been held valid, or at least, not invalid on their face. The general rule is that the question of the reasonableness of an act otherwise within constitutional bounds is for the legislature exclusively, and that in ordinary cases the courts have no revisory power concerning it nor any power to substitute their own opinion for the judgment of the legislature. The courts inquire whether a statute is arbitrary or capricious, that is, whether it is reasonably necessary and appropriate for the accomplishment of the legitimate objects falling within the scope of the police power of the state, then the validity

of the exercise of such power is valid. Statutes, ordinances, and administrative rules and regulations (issued under the authority of appropriate statutes), dealing with the control of smoke or other air pollution, have ordinarily been held reasonable, or at least, not unreasonable on their face. State ex rel. Hainsworth v. Shannon, 130 Mo. App. 90, 108 S.W. 1097 (1908); Rochester v. Macauley-Fien Milling Company, 199 N.Y. 207, 92 N.E. 641 (1910); People v. Tadge, 203 Misc. 949, 121 N.Y.S.2d 147 (1953); Commonwealth ex rel. Allegheny County v. Toth, 189 Pa. Super. 552, 152 A.2d 284 (1959).

Smoke control regulations have ordinarily been held not to violate the due process clauses of the Federal and State Constitutions. This is so, even though such a regulation disturbs the full enjoyment of a personal right without providing compensation therefor. Ballentine v. Nester, 350 Mo. 58, 164 S.W.2d 378 (1942); State v. Chicago, M. & St. Pr. Co., 114 Minn. 122, 130 N.W. 545 (1911). It is a general principle of statutory law that a statute must be definite to be valid. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of the due process of law. Regulations for the control of smoke and other forms of air pollution have been upheld against the attack that their language was so vague and indefinite as to deprive the regulations of their validity. People v. International Steel Corporation, supra; People v. Plywood Manufacturers of California, supra. In the case of People v. Plywood Manufacturers of California, the Superior Court held that the "anti-

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smog" statute was constitutionally valid and satisfied the demands of due process because the legislature, in drafting the statute, took the sound premise that smoke that was as dark or darker than Ringelmann No. 2 obstructed the view to an identifiable degree that would serve as a standard for the statute.

In People v. International Steel Corporation, supra, the court held that the statute for the control of air pollution, which prohibits the discharge into the atmosphere from any single source of emission, within certain time limits, of smoke "as dark or darker in shade as that designated in No. 2 on the Ringelmann Chart, as published by the U.S. Bureau of Mines," was held not subject to the objection that it was fatally uncertain because it set forth no ascertainable standard of guilt. A definition of density or darkness of smoke by reference to the Ringelmann Chart published by the U.S. Bureau of Mines is not subject to the objection that it is invalid on the ground of vagueness. The court in both cases rejected the contention that the statute was unconstitutional because the ordinary person, having no special training, would not be able to tell whether his smoke is as dark as Ringelmann No. 2 or whether its opacity equals that of smoke that matches Ringelmann No. 2. The court pointed out that while a statute is invalid if its terms leave that which it attempts to control shrouded in uncertainty, a statute which declares an act identified with certainty to be unlawful, is not rendered unconstitutional because the act, as a fact, may not be readily identifiable by the common man as that forbidden by the statute. The court started with the rule that the existence

of the facts supporting the legislative judgment is to be presumed and the burden of overcoming the presumption of constitutionality is cast upon the assailant. Board of Health v. New York Central Railroad Company, 4 N.J. 293, 72 A.2d 511 (1950).

Regulations of smoke and other forms of air pollution have ordinarily been held not to violate the constitutional provisions guaranteeing the equal protection of the laws or restricting special legislation nor to be otherwise discriminatory so as to be invalid. People v. International Steel Corporation, supra. A smoke control regulation is not discriminatory so as to be invalid where it applies to all coming within its terms. A smoke control statute is not discriminatory because under it one who discharges an air contaminant only slightly below the prescribed limit of color capacity is exempt from the prohibition, even though if he continues his operation long enough he will discharge more contaminant into the air than one who continues for only a short time beyond the three-minute minimum permitted in the statute. People v. International Steel Corporation, supra.

The discretion exercised by a legislature within its power is not subject to judicial control unless it involves a violation of some right protected by the constitution, a fundamental right. In this respect, courts have pointed out that a statute for the control of air pollution is a proper exercise of the police power with the discretion of the administrative body enforcing it, and that an act of the legislature is not to be declared void by the court unless the



violation of the constitution leaves no room for reasonable doubt. St. Louis v. Edward Heitzberg Packing and Provision Company, 141 Mo. 375, 42 S.W. 954 (1897); Atlantic City v. France, 75 N.J.L. 910, 70 A. 163 (1908). The courts have shifted the burden to the defendant to prove the unreasonableness of an ordinance or regulation. Presumption is in favor of the validity of such rule or regulation, and the defendant has the burden to establish it as unreasonable. The defendant has a further burden to show the impossibility of his compliance with such ordinance. People v. Tadge, supra; Cincinnati v. Miller, 11 Ohio Dec. Reprint 788, 29 W.L. Bull. 364 (1893); Oswald v. Christy, 112 N.Y.S.2d 913 (1952 Supp.)

A statute in the State of California, referring to "excessive smoke" was held not so indefinite, uncertain and vague that it failed to inform an average, intelligent person what acts or omissions are prohibited, or to fix any standard of guilt, since the requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas of common usage. The visible emissions regulations are much clearer than the definition of "excessive smoke" used in the California statute, and yet the "excessive smoke" statute was held to be constitutional and within the parameters of due process of law. Myriads of cases have upheld the validity of the use of the Ringelmann Chart in ascertaining the opacity of a smoke plume. A county pollution control ordinance was not held unconstitutional where there was a definite relationship between public health and welfare being protected under the ordinance regulating pollutant discharges into the atmosphere, and where

standards setting forth maximum allowable emission of smoke and particulate matter, including the use of the Ringelmann Chart, were easily ascertainable from the language of the Code. Miami v. Coral Gables, 230 2nd So.7 (Fla. App. 1969). In a Michigan decision, the ambiguity in the definition of "smoke" in the city air pollution control ordinance would not bar its application where the defendant's smoke emissions were found to be darker than permissible, comparing them with the Ringelmann Chart density No. 2. People v. Detroit Edison Company, 16 Mich. App. 423, 168 N.W. 2d 320 (1969); Bortz Coal Company v. Air Pollution Commission, supra. Lloyd A. Fry Company v. Department of Health, 179 Colo. 223, 499 P.2d 1176 (1972) held that the smoke control regulations of the State of Colorado do not violate the due process of law. The court upheld the validity of the regulations against an attack that the language is so vague and indefinite as to rob the regulations of their validity. In City of Portland v. Lloyd A. Fry Roofing Company, supra, the city ordinance using the Ringelmann Chart as the standard in controlling air contamination was constitutional. It established a standard of guilt ascertainable to persons of common intelligence, contained standards likely or calculated to produce uniform application, and did not make guilt or innocence of the defendant dependent upon whims and vagaries of opinion testimony produced by officers of the enforcing agency. In the same case, the definition of opacity by the air pollution authority, in terms of the reduction of transmitted light and obscuration of background,

merely stated the same concept in two ways, as previously mentioned. In the above-cited cases, the equivalent opacity method did not require the use of the Ringelmann Chart in the field, because the chart was designed for black smoke and the observer at the smoke school is also trained to read the equivalent opacity of white smoke. Reading equivalent opacity without the aid of the Ringelmann Chart is a valid method of reading smoke plumes. State v. Lloyd A. Fry Roofing Company, supra, at 753-754.

Finally, in the decision of Department of Health v. Owens-Corning Fiberglas Corporation, supra, the New Jersey Air Pollution Control Act was held to be not invalid, in that it lacked specificity in failing to inform the defendant with particularity as to the nature of the offending activity where such activity was "air pollution" which was properly defined in the act.

It is interesting to take notice that all states have visible emission statutes similar to those of the State of Utah, and none of these statutes has ever been declared unconstitutional. The violation of Section 3.2.1 of the Visible Emissions Regulations does not create an "irrebuttable presumption," rather a rebuttable one is presented. The rebuttable presumption is that the degree of opacity in the Fry plumes, when darker than Ringelmann No. 2 (40% opacity) is proof that "air pollution" exists. Section 3.2.6(d) allows for the exception of uncombined water. This allows the aggrieved party great latitude to present evidence that water vapor formed a portion of the observed plume, as in this case. The appellant, however, has failed to establish this burden of proof. Fry

Company has neglected to present even a single case to support its bold assertion of unconstitutionality. Since every state in the country has visible emission statutes, the dearth of case law favoring the Fry position speaks resoundingly against it.

#### POINT IV

THE UTAH AIR CONSERVATION ACT IS A LAWFUL DELEGATION OF LEGISLATIVE AND JUDICIAL POWER TO THE UTAH AIR CONSERVATION COMMITTEE FOR THE PURPOSE OF CARRYING OUT ITS ADMINISTRATIVE FUNCTION.

Since administrative agencies are purely creatures of legislation, without inherent or common-law powers, the general rule applied to statutes granting powers to them is that only those powers are granted which are conferred either expressly or by necessary implication. State v. Goss, 79 Utah 599, 111 P.2d 340 (1932). Statutes authorizing the State Board of Health to make rules limited to matters respecting duties imposed upon the board with respect to particular subjects or situations are held valid. Id. Where administrative powers are granted for the purpose of effectuating broad regulatory programs which are deemed to be essential to the public welfare, interpretive attention may concentrate on remedial character of the legislation to produce a liberal interpretation that enables the full benefits of the program to be realized. This approach has been taken consistently with respect to the statutes granting powers to boards of health. 3 Southerland, Statutory Construction, 4th Ed. §65.03. The public and social purposes served by health legislation greatly exceeds the inconvenience and hardship imposed upon the individual and therefore, the former is

given greater emphasis in the problems of interpretation. The courts are inclined to give health statutes liberal interpretation despite the fact that such statutes may be penal in nature and frequently may impose criminal penalties.

Every presumption will be indulged in favor of constitutionality, and every reasonable doubt resolved in favor of validity. State v. Packer Corporation, 77 U. 500, 297 P.2d 1013 (1931). When legislative action is within the scope of the police power, fairly debatable questions as to reasonableness, wisdom and propriety are not for the courts, but for the legislature. Standard Oil Company v. Marysvale, 279 U.S. 582, 49 S.Ct. 430, 73 L.Ed. 856 (1928). The Utah Supreme Court, in the case of Goodrich v. Public Service Commission, 114 U. 296, 198 P.2d 975 (1948), declared it was cognizant of the duties and prerogatives conferred upon the Division of Health by the statutes referred to in UCA, § 26-15-1 to 26-15-5 (1953, as amended), in that in fulfilling those responsibilities, the Division of Health should be allowed considerable latitude of discretion.

The state legislatures may provide for the execution of their policies through administrative agencies by conferring specific duties and powers. The Utah Supreme Court in two cases held as follows:

"It (legislature) may, however, provide for the execution through administrative agencies of its legislative policy and may confer upon such administrative officers certain powers and the duty of determining the question of the existence of certain facts upon which the effect or execution of its legislative policy may be dependent. Rowell v. State Board of Agriculture, 98 U. 353, 99 P.2d 1 (1940); see also, McGreu v. Industrial Commission, 96 U. 203, 85 P.2d 608 (1938); Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1937).

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A legislature may properly authorize an administrative officer to

determine questions of fact. Any discretion left to the administrative officer is left to the application of the rules of reason to facts proven or found. The Utah Supreme Court has held that a statute will not be held void for uncertainty if any sort of sensible, practical effect may be given it. Norville v. State Tax Commission, 98 U. 170, 97 P.2d 937 (1940); State v. Packer Corporation, 77 U. 500, 297 P. 1013 (1931); State v. Packer Corporation, 78 U. 177, 2 P.2d 114 (1931); Packer Corporation v. State, 285 U.S. 105, 52 S.Ct. 273, 76 L.Ed. 643 (1931). In Revna v. Trade Commission, 113 U. 155, 192 P.2d 563 (1948), the Utah Supreme Court held as follows:

"We recognize, of course, that the legislature may properly delegate to some administrative body the duty of ascertaining the facts upon which the provisions of a law are to function, and also, that one of the methods of initiating activity on the part of the administrative body may be by petition of the citizens concerned. Such procedure is not in and of itself defective as an improper delegation of legislative authority. The question of an improper delegation of legislative authority is embedded in the extent of the power granted to the administrative body ....Id., at 576.

The law referred to in this case was enacted as a health and safety measure in the interest of the public, and that should govern its functioning.

The Utah Air Conservation Act sets forth public policy and purposes very clearly. It contains guidelines and standards to direct the Utah Air Conservation Committee in fulfilling its purposes. Section 26-24-1.5(1) provides the legislature's declara-

tion of public policy:

"To achieve and maintain such levels of air quality as will protect human health and safety, and to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of people. . ."

It is clear that this declaration of public policy acts as a guideline, in and of itself, for the decisions of the air conservation committee.

The Utah Air Conservation Committee is also charged with:

"Air pollution prevention, abatement, and control; to provide...distribution of responsibility among state and local units of government... to provide a framework within which air quality levels may be protected and consideration given to the public interest at all levels of planning and development within the state." Section 26-24-1.5(3), Utah Code Annotated, (1971, as amended).

The declared purpose of the Act is to "secure and maintain appropriate levels of air quality. Utah Code Annotated, Section 26-24-1.5(2), (1971, as amended).

The Act provides definitions within which the committee's decisions are bounded. For example, the guidelines provided by the definition of "air contaminant", 26-24-2(1), demonstrates that the administrative jurisdiction and discretion of the committee is limited to specific situations involving "particulate matter, or any gas, vapor, suspended solids, or combination thereof, excluding steam and water vapors."

Another standard by which the committee must abide is the restriction inherent in the definition of "air pollution" at UCA Section 26-24-2(3) (1953, as amended):

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"Air pollution" means the presence of any

of one or more air contaminants in such quantities and duration and under such conditions and circumstances as is or tends to be injurious to human health or welfare, animal or plant life, or property, or would unreasonably interfere with the enjoyment of life or use of property as determined by the standards, rules, and regulations adopted by the Air Conservation Committee."

Recognizing that further definition and scientific knowledge were beyond its capabilities, the legislature enacted UCA Section 26-24-10(2), (1971) as amended, which empowered the air conservation committee to:

"establish such emission control requirements, by rule, regulation or standard, as in its judgment may be necessary to prevent, abate, or control air pollution."

By adopting such controlling phraseology, the legislature limits the rules and regulations adopted by the Air Conservation Committee to those which are necessary. This guideline was referred to in the Lloyd A. Fry Roofing Company v. State Department of Health, supra, at 1180, where the court concluded:

"In cases dealing with other areas of legitimate legislative activity where precision was determined to be impossible . . . such broad standards as "reasonable" or "necessary" have been found sufficient as standards, although incapable of precise definition."

It is apparent, therefore, that this section, 26-24-10(2), provides sufficient guidelines and standards as to be within the bounds of proper legislative delegation of authority.

Additionally, the committee, in adopting standards of air quality, must conduct public hearings. It is clear from this requirement that the legislature has provided for due process in



the adoption of air quality standards. UCA §26-24-10(1) (1971) as amended.

A final example of legislative control of the Air Conservation Committee is the requirement in § 26-24-5, subsection 18, that any rules, regulations or standards adopted by the Air Conservation Committee must be in conformity and consistent with provisions of federal law. With the adoption of federal emission controls in 1971, the state legislature found it necessary to delegate the complex, highly scientific matters of emission controls to a body capable of implementing federal demands. This same subsection also gives the Board of Health broad powers of control over the Air Conservation Committee, allowing the board the right to:

"amend or modify any action of the committee or its executive secretary if the board deems such amendment or modification necessary for the protection of public health."

The state legislature has the power, and responsibility, to delegate to an administrative agency a reasonable measure of authority to accomplish the purpose for which the agency was created. It has long been accepted that the legislature may delegate a "reasonable measure" of its authority which is necessary to accomplish the constitutional purposes it desires. Kesler and Sons Construction Company v. Utah State Division of Health, 30 U.2d 90, 513 P.2d 1019 (1973); see also People ex rel. Curren v. Shaumar, 392 Ill. 17, 63 N.E.2d 744 (1945). The delegation of authority from the legislature to an administrative agency is necessary, particularly in view of the modern multitudinous details of scientific necessity. Federal Insurance Corporation v. Merrill, 322 U.S. 380, 68 S.Ct.

1, 92 L.Ed. 10 (1943). This especially true in areas requiring depth and specialization. While there may be a question of "degree" of powers delegated, there is no doubt that the legislature may delegate to an administrative agency the exercise of a limited portion of its legislative power with respect to some specific subject matter. N.J. Pel Co.v. Communications Workers of America, 5 N.J. 354, 75 A.2d 721 (1950); Herrin v. Arnold, 183 Okla. 392, 82 P.2d 977 (1938).

A state legislature may also provide for the execution, through administrative agencies, of its legislative policy, and may confer upon such administrative officers certain powers and the duty of determining the question of existence of certain facts upon which the effect or execution of its legislative policy may be dependent. Clayton v. Bennett, 5 U.2d 152, 298 P.2d 531 (1956).

The Utah Air Conservation Act was enacted by the Utah Legislature in 1967. This act provided for the creation in the State Division of Health of the Utah Air Conservation Council, now known as the Utah Air Conservation Committee for the State of Utah, and empowered it to act in the control and prevention of air pollution. In the eight years since its adoption, it has never been challenged as unconstitutional until now. In the instant case, the appellant fails to carry a burden of proof which automatically attaches in any case where a legislative act is involved. A legislative enactment is presumptively valid, and one who challenges it bears an

extremely heavy burden to establish its unconstitutionality beyond a reasonable doubt. Lloyd A. Fry Roofing Company v. State, 179 Colo. 223, 499 P.2d 1176 (1972); Department of Health v. Owens-Corning Fiberglas Corporation, supra; State v. Lloyd A. Fry Roofing Company, supra. To bear the extremely heavy burden of proving the unconstitutionality of the statute, one would expect relevant jurisdictional case law, or at the minimum, a citation or two from the common law of other jurisdictions. While all 50 states have legislative enactments very similar to the Utah Air Conservation Act and similar visible emission regulations, the appellant has failed to show where even one of these 50 acts and regulations has been successfully challenged.

As an example of one of the enabling statutes in a sister state, Respondent cites Section 5(b) of the Illinois Environmental Protection Act. It reads as follows:

"The Board (Pollution Control Board) shall determine, define, and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of this act."

This is a very broad jurisdictional statement for the board to act in defining rules and regulations with regard to air pollution. This act has been upheld, despite successive attacks to challenge its constitutionality.

Furthermore, the delegation of quasi-legislative powers to administrative agencies is normally sustained as valid, and the standards which must accompany such a grant of legislative power

Need not necessarily be set forth in expressed terms if they might reasonably be inferred from the statutory scheme as a whole. The Court, in People v. Bevevino, 202 Misc. 723, 112 N.Y.S.2d 647, (1952), which involved a prosecution for the violation of the regulation limiting the density of smoke to be released into the atmosphere, held that the delegation of the New York City Council to the Bureau of Smoke Control of the power to adopt and amend rules and regulations relating to emission controls in open air of smoke and soot, as well as fly ash products of combustion was not unconstitutional and was a proper delegation of legislative authority. Defendant claimed that the very fact that it was the agency and not the city council which created the offense under which he was prosecuted indicated that the legislature had unlawfully delegated to the agency the general power to determine what shall constitute an offense or a violation of the law. Rejecting this contention, the court pointed out that the legislature may delegate to an administrative agency the power to make reasonable rules and regulations with the force and effect of law, and that in so doing, it is proper for the legislature to declare the violation of these rules to be a crime and provide the punishment for their violation. In the case of Bortz Coal Company v. Air Pollution Commission, 2 Pa. Cmlth. 441, 279 A.2d 388 (1971), the court held that the enforcement of the rules and regulations promulgated by the Air Pollution Commission did not constitute a confiscation of property without due process. By merely pointing out that no matter how seemingly complete the scheme or pri-

vate ownership may be under our system of government, all property must be held in subordination to the right of its reasonable regulation by the government to preserve the health, safety and morals of the people. In Houston Compressed Steel Corporation v. State, 456 S.W.2d 768 (Tex.Civ. App.1970), the Texas Clean Air Act was attacked as an unlawful delegation to an administrative agency, in that it gave such agency the power to adopt and regulate and control the level of emissions of their contaminants into the air. The court took the position that the science of air pollution control is new and inexact, and that such legislative standards are difficult to devise, and that if such standards are to be effected, they must be broad; for if they are too precise, they will provide an easy escape for those who wish to circumvent the law. While thereby impliedly admitting the broadness of the definition of air pollution in the Texas law, the court was of the opinion that the definition was clear and easily capable of understanding. See also, State v. Arizona Mine Supply Company, 107 Ariz. 199, 484 P.2d 619 (1971).

It has been alleged that the regulation is both vague and indefinite. This contention was not persuasive in similar cases. In Lloyd A. Fry Roofing Company v. Pollution Control Board, supra, the statute was found to be valid and did not constitute an unlawful delegation of legislative power. The petitioner, Fry, had alleged an "abdication" of legislative responsibility. The court, however, found this to be unpersuasive. The State of Utah contends that any more specific guidelines than those already established, would infringe upon the flexibility and adaptability of the Utah Air Con-

servation Act. In the case of Lloyd A. Fry Roofing Company v. State Department of Health, supra, at 1179, the court stated as follows:

"The modern tendency is to permit liberal grants of discretion to administrative agencies in order to facilitate the administration of laws dealing with involved economic and governmental conditions. In other words, the necessities of modern legislation dealing with complex economic and social problems have lead to judicial approval of broad standards for administrative action, especially in regulatory enactments under the police power.

The court also indicated that the 1969 law to which the Fry Company advocated a return, as amended in 1970, was too precise -- "impractical, if not impossible to administer." Id., at 1179.

The delegation of "quasi-legislative" powers to administrative agencies, authorizing them to make rules and regulations, within proper standards fixed by the legislature, are normally sustained as valid, and barring a total abdication of their legislative powers, there is no real constitutional prohibition against the delegation of a large measure of authority to an administrative agency for the administration of a statute enacted pursuant to a state's police power. The standards which must accompany such grant of legislative power need not necessarily be set forth in expressed terms if they might reasonably be inferred from the statutory scheme as a whole. State v. Arizona Mine Supply Company, supra, at 625. It is clear that the Act is not vague and that the visible emissions regulations accompanying the act are both definite and adequate, and that the delegation of quasi-legislative powers to the Utah Air

Conservation Committee is clearly constitutional.

We therefore urge that this court hold as did the High Court of Colorado, that:

"The standards established in the Air Pollution Control Act are not so broad as to result in an improper delegation of legislative authority, and the Fry Roofing Company has failed to meet its burden of overcoming the presumption of validity in this respect." Lloyd A. Fry Roofing Company v. State Department of Health, supra, at 1180.

#### POINT V

THE UTAH AIR CONSERVATION ACT IMPOSES CIVIL SANCTIONS AND THE IMPOSITION OF SUCH PENALTIES BY THE COMMITTEE DID NOT DEPRIVE THE LLOYD A. FRY ROOFING COMPANY OF ITS CONSTITUTIONAL RIGHT TO A JURY TRIAL

The Federal Constitution guarantees the right to jury trial in civil action in federal court, and nearly every state constitution contains a similar guarantee. See Utah Constitution, Art. I, §10. They do not extend, but preserve the right of jury trial as it existed in English history, either in 1791 when the Seventh Amendment was adopted, Dimick v. Scheidt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1943); Baltimore and C. Great Line v. Redman, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 (1934), or, in the case of the states at the date of the first state constitution. People v. One, 1941 Chevrolet Coupe, 37 Cal. 2d 283, 231 P.2d 832 (1951), in which the court held as follows:

"The constitutional right to jury trial . . . is the right as it existed at common law at the time the state constitution was adopted . . . and what that right is is a purely historical question, a fact which is to be ascertained like any other social, political

or legal fact . . . It is necessary, therefore, to ascertain what was the rule of the English common law upon this subject in 1850."

The foregoing quotation emphasizes the point that the right to a jury trial as preserved by the federal and state constitutions has substantially the same meaning, extent, and application as it had at common law, and the provisions related to this right are to be interpreted and construed in the light of the common law, at the time of their adoption.

In all other cases, the legislature may provide for a hearing or trial without a jury, as they have done in hearings before administrative agencies. An early statute setting up a special tribunal to hear claims against a municipal corporation was held constitutionally valid under the Seventh Amendment, as a proceeding "not in the nature of a suit at common law." Guthrie National Bank v. City of Guthrie, 173 U.S. 528, 19 S.Ct. 513, 43 L.Ed. 796 (1898). Under constitutional provisions, the right of trial by jury is preserved inviolate only as the classes of cases in which that right was enjoyed before the adoption of the constitution. In all other cases, the legislature may provide for a hearing or a trial without a jury. The 7th Amend. didn't create a right to a jury trial but merely preserved rights then existing at common law. General Tire and Rubber Company v. Watkins, 331 F.2d 191 (4th Circuit), cert. den. 377 U.S. 952. The purpose and effect of Article III, Section 2 of the United States Constitution, providing that at the trial of all crimes excepting cases of impeachment shall be by jury, is not to enlarge the common law right to a jury trial but to preserve unimpaired



trial by jury in all cases in which it had been recognized by the common law and in all cases of like nature. Ex parte Querin, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (1942).

Every state legislature has passes some form of clean air provisions, and created an administrative agency to promulgate rules and enforce its sanctions. Violators are always allowed a form of judicial review which begins with a hearing before the agency and concludes with an appeal to the state or United States Supreme Court. The Illinois Environmental Protection Act is quite similar to that of Utah in this respect. The clean air provisions, as far as judicial review, in the State of Illinois, are:

Any party to a board hearing, any person who filed a complaint on which a hearing was denied, any person who has been denied a variance or permit under this act, and any party adversely affected by a final order or determination of the board may obtain judicial review, by filing a petition for a review within 35 days after the entry of the order or other final action complained of, pursuant to the provisions of the Administrative Review Act, approved May 8, 1945, as amended, and the rules adopted pursuant thereto, except that review shall be afforded directly in the appellate court for the district in which the cause of action arose and not in the circuit court. Review of any rule or regulation promulgated by the board shall not be limited by this section but may also be had as provided in Section 29 of this act.

The Utah Code is similar in its provisions to those of the Illinois Code. It is clear that administrative hearings before qualified members of the agency are an adequate safeguard for the protection of civil rights. Section 26-24-12, Utah Code Annotated (1953, as amended) allows for a review of any final order of the committee in the Utah State Supreme Court. The appropriate sections of the code are Section 26-24-11(3)(b) which states.

Hearings may be held before the committee or any hearing examiner of the committee or any committee member as hearing examiner when this member has been especially appointed by the committee to hold such hearing. The committee may appoint one or more hearing examiners, and the committee or any hearing examiner shall have power and authority to call, preside and conduct hearings, including the power to issue subpoenas to compel witnesses and the production of pertinent, relevant evidence on behalf of all parties. A full and complete record will be kept of all proceedings before the committee or hearing examiner, and all testimony shall be taken down by a reporter employed by the committee. Upon the conclusion of a hearing, a hearing examiner or committee, as the case may be, shall make findings of fact which shall include all evidential or ultimate facts necessary to support this order. Findings of fact and orders of copies of all of them shall be furnished to each of the parties in interest, the original of which shall be part of the records of the case. The order of the hearing examiner or committee shall be the final order of the committee unless a petition for a review is filed as provided in subsection 3(c) of this section.

Subsection 3(c) of this section states:

Any person or persons aggrieved by an order entered by a hearing examiner or by the committee may file a motion for a review of the order. Upon the filing of such motion to review his order, the hearing examiner may:

(i) Reopen the case and enter a supplemental order after holding such further hearing and receiving such further evidence as he may deem necessary; or

(ii) Amend or modify his prior order by supplemental order; or

(iii) Refer the entire case to the committee.

The hearing examiner makes the supplemental order, it shall be final, unless a motion to review the same shall be filed with the committee.

Section 26-24-12 states:

Except as specifically provided in this section and in Section 26-24-11(5) (e), all final orders or

determinations of the committee or the executive secretary are subject to judicial review in the Supreme Court of Utah. Such a review may be secured by any person adversely affected by the such person filing a petition in the Supreme Court at any time after this final order or determination but not later than 30 days after the date of any final enforcement order or determination which specifically requires affirmative action on the part of such person if this person made an appearance at the hearing held before the committee as to which the final order or determination was made or is not served with notice of such hearing, if notice was required by provisions of this act. The petition shall be served upon the executive secretary and shall state grounds upon which review is sought. As to matters directly appealable to the Supreme Court, upon review, the court may affirm, modify or set aside the final order, but only upon the following grounds:

(a) that the committee or the executive secretary acted without or in excess of its powers.

(b) that the findings of fact and conclusions of the committee are not supported by substantial evidence.

The committee and every party to the action or proceeding before the committee shall have the right to appear in the review proceeding.

The Utah Code provisions have allowed for adequate due process of law. Persons adversely affected are allowed a hearing, the right to a rehearing, and a final review of the order in the Utah Supreme Court. Due process of law does not require a jury trial. As mentioned earlier, the right to a jury trial shall remain inviolate, but only in cases where it was maintained at common law. The Illinois Constitution is similar to the Utah State Constitution with regard to the right of trial by jury, as well. Article I, Section 13, of the Illinois State Constitution states: "The right of trial by jury as heretofore enjoyed shall remain inviolate."

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Article I, Section 10, of the Utah State Constitution, states, in part as follows:

"In capital cases the right of trial by jury shall remain inviolate . . . "

Where there is a determination of facts by experts in an administrative hearing, with the right of appellate review of the decision, the right to a trial by jury has not been abridged. At common law, no administrative hearing procedures were known, and the state and federal constitutions merely preserved the right to jury trial. They did not enlarge them. When a determination of facts is made by a panel of experts, more able to sift through the complex scientific and technical evidence, there is a lessening of the probability of error.

A challenge to the Illinois Environmental Protection Act was made in the case of Ford v. Environmental Protection Agency, 9 Ill. App. 3d 711, 292 N.E.2d 540 (1973). Several issues, basic to the instant case, were involved. Called upon to determine whether the Act provided for criminal or civil sanctions, the court concluded:

" . . . It is to be construed as evidencing that a civil sanction was intended. No mention of crime or criminal prosecution is made in the Act . . . Id. at 542.

The Utah statutes evidence as well a civil sanction rather than a criminal sanction or prosecution in the Utah Air Conservation Act. The petitioner, in Ford v. Environmental Protection Agency, supra, claimed that his constitutional right to a jury trial was being deprived. The court, ruling this contention to be meritless,

explained:

Section 13 of Article I of the Constitution of 1970 provides: 'The right of trial by jury as heretofore enjoyed shall remain inviolate.' . . . /E/xcept for changes in punctuation /it/ is identical with the . . . 1870 Constitution of Illinois. No change in construction was, therefore, intended. It has been consistently held that such constitutional language was designed simply to secure the right of trial by jury in all tribunals, as it had heretofore been enjoyed; but it was not intended to confer the right in any class of cases where it had not previously existed; and that it was not intended to guarantee trial by jury in special statutory proceedings unknown at common law. Ford v. E.P.A., supra, at 545.

The same conclusion was reached in Cobin v. Pollution Control Board, 16 Ill. App.3d 958, 307 N.E.2d 191 (1974). In Lloyd A. Fry Roofing Company v. Pollution Control Board, supra, the court stated:

Petitioner's contention that the act deprives it of its constitutional right to a trial by jury is also without merit. . . . /t/he Act provides for the creation of an administrative agency to enforce the Act. The constitutional guarantee of right to trial by jury was never intended to apply to administrative proceedings which were unknown at common law, and therefore, petitioner cannot argue that his right has been abridged. Id., at 357-358.

In the case of Lloyd a Fry Roofing Company v. State of Texas, 516 S.W.2d 430 (Tex. Civ. App. 1974), the state brought an action for injunctive relief and statutory penalties for alleged violations of the Clean Air Act by the manufacturing of asphalt roofing shingles. In this case the court held that the primary jurisdiction must first be exercised by an administrative body before a court can obtain jurisdiction. This supports the position that the doctrine of primary jurisdiction is before an administrative agency and not before a trial by jury. It is clear that adequate pro-

cedural safeguards exist to protect basic rights. The Utah Code provisions have allowed for adequate due process of law and do not require a right to jury trial. Persons adversely affected are allowed notice, a hearing, the right to a rehearing and final review by the Utah Supreme Court. Respondent contends that the penalties provided in the Utah Air Conservation Act provide for civil penalties. A hearing is provided before an administrative agency, and no actual adjudication in a court of law occurs. Primary jurisdiction is conducted by the administrative agency, and enforcement lies with the determination of such administrative agency. No criminal sanctions are imposed by a court of law in accordance with the penalty provisions of the Utah Air Conservation Act. No penalties are listed in the penal code, and the procedures described are clearly administrative in nature. This is an administrative hearing and due process protections under the state and federal constitutions do not require that the government's case for civil penalty be proved beyond a reasonable doubt. State and federal court rulings hold that a proceeding, such as the one at bar, is civil in nature, even though the effect is to punish an offense. The courts have concluded that in this type of proceeding the correct standard of proof is a preponderance of the evidence and not proof beyond a reasonable doubt. As already shown, there is judicial agreement that the defendant in such a proceeding does not have a right to a jury trial, is not entitled to the presumption of innocence, and that the action is conducted according to the rules of civil procedure.

In a leading case, the United States v. Regan, 232 U.S. 37, 34 S.Ct. 213, 58 L.Ed. 494 (1914), the Supreme Court reviewed a long line of federal cases dealing with the issue of whether an action to collect a penalty was civil or criminal in nature and then stated:

It is a necessary conclusion from these cases (1) That as respects a pecuniary penalty for the commission of a public offense, Congress competently may authorize . . . enforcement of such penalty by either a criminal prosecution or a civil action; . . . and (3) That, if not directed otherwise, such an action is to be conducted and determined according to the same rules and with the same incidents as are other civil actions.

As to the quantum of evidence required to recover the penalty, the court decided:

. . . while in a strictly criminal prosecution the jury may not return a verdict against the defendant unless the evidence establishes his guilt beyond a reasonable doubt, in a civil action, it is the duty of the jury to resolve the issues of fact according to a reasonable preponderance of the evidence, and this although they may involve a penalized or criminal act. Id., at 49.

A major theory in the cases with regard to jury trial are that since there were no administrative hearing procedures known at common law, the state and federal constitutions merely preserve the rights that existed at their adoption, but do not enlarge upon them. A second significant theory is that when a determination of facts is made by a panel of experts, more able to sift through the complex scientific and technical evidence of air pollution cases, there is a lessening of a probability of error. Besides, administrative



agencies do not impose criminal penalties. Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1937), wherein the court stated as follows:

Civil procedure is incompatible with the accepted rules and constitutional guarantees governing the trial of criminal prosecution. Id., at 402.

In Cox v. United States, 332 U.S. 442, 68 S.Ct. 115, 92 L.Ed. 59 (1947), the court held as follows:

The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to a jury trial does not include the right to have a jury pass on the validity of an administrative order . . . When the judge determines that there was a basis in fact to support classification, the issue need not and should not be submitted to the jury. Id., at 444.

Committing the factfinding function to an administrative agency does not, in itself, constitute a denial of due process of law. There is substantial authority that a requirement of due process in a constitutional provision does not require a trial by jury. Hawkins v. Bleakly, 243 U.S. 210, 37 S.Ct. 255, 61 L.Ed. 678 (1916); and that such a due process clause does not imply that all trials in state courts affecting personal or property rights must be by a jury trial. Hardware Dealers Manufacturing v. Glidden Co., 284 U.S. 151, 52 S.Ct. 69, 76 L.Ed. 214 (1931); Wagner Electric Manufacturing Company v. Linden, 267 U.S. 226, 43 S.Ct. 589, 67 L.Ed. 961 (1922). In investigating adjudicatory functions in an administrative agency, the constitutional right to a jury trial may not be violated. Lipke v.

Laderar, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061 (1921); Joint



Anti-Fascist Refugee Community v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1950). Neither the state nor the constitution guarantee or preserve the right of trial by jury, except in those cases where it existed when the constitution was adopted. Constitutional guarantees do not apply to a statutory proceeding nor in the nature of a suit at common law. The constitutional guarantee does not apply to special and summary proceedings created by statute subsequent to the adoption of the constitution, where they are not in the nature of suits at common law and are dissimilar to such suits. Determination effects in such proceedings may be left to administrative agencies. NLRB v. Jones and Laughlin Steel Corporation, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1936); Crowell v. Benson, 285 U.S. 22, 5 S.Ct. 285, 76 L.Ed. 595 (1931).

#### POINT VI

THE ADMINISTRATIVE SEARCHES CONDUCTED BY THE CERTIFIED SMOKE READERS TO TAKE THEIR VISIBLE EMISSIONS READINGS WERE REASONABLE AND WITHIN THE SCOPE OF THE "OPEN FIELDS" DOCTRINE

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The constitutional guarantee against unreasonable searches and

seizures marks the right of privacy as one of the unique values of the constitution. Whether a particular "search" or "seizure" is unreasonable depends upon two traditional factors. First, does the person exhibit an "actual expectation of privacy?" Second, is that exhibited expectation "one that society is prepared to recognize as reasonable." Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The facts of the instant case unequivocally demonstrate that the appellant exhibited no expectation of privacy, and that even if appellant did exhibit such an expectation, it would not be one that society would deem reasonable.

First, the emissions from Fry's two stacks were clearly visible to persons in the area (Tr., Vol.I, p.252). Second, when the Division of Health and County inspectors visited the plant vicinity to make the readings, they notified the Fry company prior to the making of their readings and were never asked to leave the premises. There is no indication that the appellant maintained an objection to periodic inspections, and, in fact, assisted with a demonstration on September 5, 1973. Finally, the evidence shows that the smoke readers made the Fry company aware of their readings and even showed them the results of those readings after their readings had been taken. The smoke readers made their readings either off the plant premises or on the plant premises, generally open to the public. The considerations of visibility, public access, and no showing of intrusion all demonstrate that the appellant neither exhibited nor had any

actual expectation of privacy and was not entitled to any protections of the Fourth Amendment. See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1738, 18 L.Ed.2d 943 (1966). Moreover, the courts support the proposition that even if Fry Company could show that it had a subjective expectation of privacy, it would not have been one that society would deem reasonable.

Even if the smoke reader's observations of the highly visible emissions can be termed a search, in that the observers occasionally stood on company land, it was not unreasonable, since such action clearly falls within the "open fields" exception to the Fourth Amendment. In Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1923), where the defendant's own illegal actions of concealing moonshine whiskey were observed by revenue agents concealed on his land, the court held that the "special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers and effects" is not extended to the open fields. Supra, at 59. See also United States v. Capps, 435 F.2d 637, at 640 (9th Cir. 1970).

In the most recent decision concerning this aspect of the Fourth Amendment, the Supreme Court of the United States held the "open fields" exception applicable to administrative inspections with regard to air pollution. In Air Pollution Variance Board v. Western Alfalfa Corporation, 416 U.S. 861, 94 S.Ct. 1966, 40 L.Ed.2d 607 (1974), an inspector of the Colorado Health Department conducted visible emissions readings of smoke emitted from respondent's stacks,

without first obtaining a warrant or the owner's consent. After a hearing by the Variance Board and a review by the district court, the Colorado Court of Appeals held that pollution tests of this nature violated the Fourth Amendment's prohibition against unreasonable searches. The Supreme Court of Colorado denied certiorari, but it was granted by the United States Supreme Court. In reversing the Colorado decision, the United States Supreme Court held unanimously that (1) the inspector's observation from company-owned land did not constitute an unreasonable search, since he had not entered the plant or offices, but merely cited plumes of smoke, visible to anyone who was near the plant; there had been no showing that the public was excluded from the property, and (2) the inspector's action in conducting visual smoke opacity readings, whether he operated on or outside the premises, was within the "open fields" exception of the Fourth Amendment.

In summary, it is clear that the instant case falls within the bounds of Western Alfalfa, and that the administrative searches conducted by the state and county-employed inspectors were reasonable and within the scope of the "open fields" doctrine. The accurate smoke readings were done according to the rules and regulations within the exception. No expectation of privacy on the defendant's land was intended, and the readings were taken where the public was allowed to frequent. The nature of the violations are clearly in violation of public health laws and surely outweigh the allegation of a right of privacy. The Fourth Amendment does not grant an absolute right. It also does not allow a protection of such rights as alleged

by appellant. Notice was received by Fry Company officials both before the readings were taken and by notice of violation mailed subsequently, reporting violations.

#### CONCLUSION


The Utah Air Conservation Committee clearly met its burden of establishing that the Lloyd A. Fry Roofing Company violated Section 3.2 of the Visible Emissions Regulations. The findings, conclusions and decision of the committee are based on substantial and factual evidence as indicated in the transcript of the hearing. The Utah Air Conservation Act has provided clear and reasonable legislative guidelines to the Utah Air Conservation Committee to carry out its administrative functions within the protections of the due process of law; The Utah State Implementation Plan for Air Quality clearly sets forth the emission limitations which were approved by the Environmental Protection Agency to insure that federal ambient air standards could be attained in accordance with the Clean Air Act of 1970 and its accompanying amendments. The state submits that the Utah Air Conservation Act imposes sanctions in accordance with administrative determinations and that the Lloyd A. Fry Roofing Company was not denied any constitutional right to a jury trial. The committee further alleges that the administrative searches conducted by smoke readers were objective in nature and conducted by properly trained and certified smoke readers to make visible emissions readings which were reasonable and within the scope of the "open fields"


doctrine.

The Utah Air Conservation Committee requests that this court should affirm the order of Dr. Grant S. Winn, decision and orders entered by the Utah Air Conservation Committee and memorandum decision of the Third Judicial District Court. Respondent submits that this Court must sustain the findings and conclusions of the Utah Air Conservation Committee upon the basis that substantial and factual evidence was presented at the hearing, showing that the committee and executive secretary acted within the powers granted to them by the legislature. Substantial evidence was presented to support the findings and decisions.

Respectfully submitted,

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DELIVERY CERTIFICATE

DELIVERED a copy of the foregoing Brief of Respondent this  
25<sup>th</sup> day of July, 1975, to Rex J. Hanson,  
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Barbara J. Wallace