

2000

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

Utah Supreme Court

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Rex J. Hanson; Attorney for Appellant.

William C. Quigley; Attorneys for Respondent.

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IN THE SUPREME COURT OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

In the Matter of )

LLOYD A. FRY COMPANY, )

Appellant. )

Case No.

13980

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BRIEF OF APPELLANT

---

Appeal from the Decision and Orders  
of the Utah Air Conservation Committee,  
Utah State Division of Health

---

REX J. HANSON  
702 Kearns Building  
Salt Lake City, Utah 84101

ATTORNEY FOR APPELLANT

WILLIAM C. QUIGLEY  
236 State Capitol  
Salt Lake City, Utah 84114

ATTORNEY FOR RESPONDENT

FILED  
MAY 12 1975

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236 State Capitol  
Salt Lake City, Utah 84114

ATTORNEY FOR RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

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BRIEF OF APPELLANT

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STATEMENT OF THE CASE

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

RELIEF ON APPEAL

Lloyd A. Fry Roofing Company seeks a complete judicial hearing and review of this matter and reversal of a Decision and Orders entered by the Utah Air Conservation Committee.

PROCEDURAL HISTORY

Prior to September 4, 1973, the Manager of the Lloyd A. Fry Roofing Company (Fry) located at Woods Cross, Utah, received notice from Dr. Grant S. Winn, Executive Secretary of the Utah Air

Conservation Committee that the emissions from the stacks at the plant were in violation of Section 3.2.1 of the Code of Air Conservation Regulations which provides:

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 September 4, 1973, an informal meeting was held between Fry officials, Winn, and other Air Conservation personnel, during which Fry contended that the emissions were composed mostly of uncombined water vapor, which is not a contaminant. Air Conservation personnel agreed to attend a demonstration at the Fry plant on September 5, 1973, which Fry asserted would show that the emissions from the stacks at the plant were 97% water vapor.

On October 18, 1973, Fry officials attended a meeting with the Utah Air Conservation Committee during which Fry officials again stated that the emissions from the plant were not in violation and that enforcement personnel, in reading the emissions (plumes from the stacks) were not differentiating between uncombined water vapor and asphalt fumes.

In a letter dated January 16, 1974, Fry was informed by Winn that the Woods Cross facility was in violation of Section 3.2 of the Visible Emissions Regulations on September 6, 1973; September



27, 1973; October 3, 1973; October 4, 1973; October 9, 1973; and November 9, 1973, and Fry was ordered to submit to the Air Conservation office a request for a variance accompanied with a compliance schedule or cease operation of the plant. Pursuant to 26-24-11, Utah Code Annotated, 1953, Fry requested a hearing before the Air Conservation Committee to answer the charges, which commenced on April 4, 1974, before a sub-examining committee represented by William C. Quigley as counsel and John Spencer Snow as legal advisor. Rex J. Hanson represented Fry. On April 5, 1974, the hearing was recessed, reconvened on May 15, 1974, and concluded on that date. The Hearing Committee affirmed the Order of the Executive Secretary dated January 16, 1974.

Fry then filed a Motion for Review of the Hearing Committee's Decision, which was reviewed by the Utah Air Conservation Committee on December 19, 1974, which affirmed the Decision of the Hearing Examiners. Representatives of Fry did not attend and were not invited to attend this meeting.

On January 15, 1975, Fry appealed the Decision of the Air Conservation Committee to the Third Judicial District Court, which appeal, pursuant to a Motion filed by the Attorney General, was dismissed by the Court on January 31, 1975, upon the ground that the Air Conservation Committee's Order was reviewable only by the Supreme Court of Utah.

Fry then filed a Notice of Appeal with the Utah Supreme Court on February 4, 1975.

#### STATEMENT OF FACTS

1.

#### THE LAW

In 1967, the 37th Utah Legislature enacted Senate Bill 36, The Air Conservation Act. Subsequently, the Act has been amended, in 1969, 1971 and 1973. The substance of the Air Conservation Act is now contained in Utah Code Annotated, Title 26, Chapter 24.

Pursuant to Section 26-24-1.5, the Utah Legislature declared the public policy and the purpose of the Air Conservation Act to be: "(a) The achievement and maintenance of such levels of air quality as will protect human health and safety; (b) the prevention of injury to plant and animal life and property to the greatest degree possible; (c) the fostering of comfort and convenience of the people; (d) the promotion of economic and social development of the State of Utah; and (e) the facilitation of enjoyment of the natural attractions of the State of Utah."

Section 26-24-2 sets out the definitions of "air contamination", "air contaminant source", "air pollution", and additional definitions having direct application to the creation of the Air

Conservation Committee or to the Board of Health. Section 26-24-2 reads as follows:

26-24-2. Definitions. - As used in this act:

(1) "Air contaminant" means any particulate matter of any gas, vapor, suspended solid, or any combination thereof, excluding steam and water vapors.

(2) "Air Contaminant source" means any and all sources of emissions of air contaminants whether privately or publicly owned or operated.

(3) "Air pollution" means the presence in the ambient air of one or more air contaminants in such quantities and duration and under 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.

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Under Subsection 1, air contaminant is defined as any particulate matter or any gas, vapor, suspended solid, or any combination thereof, excluding steam and water vapors. (emphasis added)

Section 26-24-3 states that the Division of Health shall have the responsibility for the administration of the Air Conservation Act. This Section, when read in conjunction with Section 26-15-5, sets forth the powers and the duties of the Board of Health with respect to the establishment of rules, regulations and standards.

The Utah Air Conservation Committee was created and established pursuant to the authority set forth in Section 26-24-3.1.

In this Section, the Legislature stated that there was to be created

within the Division of Health an air conservation counsel which has since been amended to read: "The Air Conservation Committee." This Committee has been delegated the authority to set forth air quality standards and to determine the maximum amount of contaminants that may be emitted by any particular source under the law.

The general makeup of the Committee, its purposes and duties are set forth in Section 26-24-4 through 8. However, these powers and duties, dealing with the control of air pollution, must be read in conjunction with Section 26-24-2(3) which states:

(3) "Air pollution" means the presence in the ambient air of one or more air contaminants in such quantities and duration and under 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. (emphasis added)

In addition, 26-24-5(1) grants the Air Conservation Committee the power to make rules regarding the control abatement and prevention of air pollution from all sources and again, in Subsection (2), the Committee was given the power to establish air quality standards on a regional basis. Furthermore, Subsection (4) grants the Committee the power to hold hearings related to any aspect of or matter in the administration of the Air Conservation Act. Subsection (5) grants the Committee the power to issue such orders as may be necessary

to effectuate the purposes of the Air Conservation Act and to enforce these orders by all appropriate administrative and judicial proceedings and to cause the institution of judicial proceedings to secure compliance with the Act. Subsection (12) states that the Committee shall determine "by means of field studies and sampling the degree of contamination and air pollution in all parts of the State." It is apparent that the Committee is required not only to conduct field studies, but also must conduct the sampling evaluation to determine possible violators of the Act. The transcript is void of any evidence whatsoever regarding samples that were taken or of any field studies given to "smoke readers" to accomplish this objective.

The procedure that must be followed by the Committee in adopting standards of quality for ambient air, the notice that must be given and the hearing requirements are set forth in Section 26-24-10. In Subsection (2) the Air Conservation Committee is given broad power "to establish such emissions control requirements, by rule, regulation or standard as in its judgment may be necessary to prevent, abate or control air pollution."

The Utah State Board of Health has adopted a Code of Air Conservation Regulations pursuant to authority of Section 26-24-5 and 26-14-5. Section 3.2, Visible Emissions, of the Code of Air Conservation Regulations reads:

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

Section 3.2.6(d) of the Code, Exceptions, states, "An emission failing to meet the standard because of the effect of uncombined water shall not be in violation."

Section 1.1.26 of the Code defines:

Ringelmann Chart means the Chart published by the U. S. Bureau of Mines (Information Circular 7718) which illustrates graduated shades of grey to black for use in determining the light obscuring capability of particulate matter.

Section 1.1.31 of the Code defines:

Equivalent opacity means the relationship of opaqueness or percent obscuration of light to the Ringelmann Chart for shades other than black and is approximately equal to the following:

<u>Equivalent Opacity (%)</u>	<u>Ringelmann No.</u>
20 . . . . .	1
40 . . . . .	2
60 . . . . .	3
80 . . . . .	4
100 . . . . .	5

However, this, again, must be read in conjunction with Section 26-24-2(3) which defines air pollution.

No guidelines are set out as to the manner in which an inspector should make an evaluation or "reading" of the plume to determine whether the emission is in violation of Section 3.2.1 of

the Code prohibiting a shade or density no darker than a No. 2 Ringelmann Chart (40% black) or an equivalent opacity; i.e., what distance the inspector must be from the stack, the diameter of the stack, the angle from which the observation is made, the number and time sequence of observations, and the circumstances under which the observation is made, such as the time of the evaluation, position of the sun, weather conditions, wind, humidity, or the background of the plume. The evaluation process depends solely on the subjective judgment of the inspector at the time the smoke reading occurs (Tr., Vol. I, pp. 49, 50, 51).

The saturant and coating asphalt is purchased from Trumbull Asphalt Company of Woods Cross (Tr., Vol. II, p. 58). The asphalt, before it is used in the Fry manufacturing process, is "full blown," which means it has been distilled to the extent that a high degree of the volatile oils have been driven off before it is sold to Fry (Tr., Vol. II, p. 59). A much higher temperature is used in the blowing process than the temperature of the asphalt when it is used by Fry to saturate the felt in its manufacturing process (Tr., Vol. II, pp. 61, 62). In the "blowing process" the asphalt is oxidized just under its flash point of 500, 550 or 600 degrees, which is hotter than the flashpoint of the asphalt in the Fry plant, which is 450 degrees. The melt point of the asphalt after it is "full blown," ranges from 120 to 140 degrees (Tr., Vol. II, p. 120).

The specifications Fry receives from Trumbull state the heat loss by the American Society of Testing Materials (ASTM, D-6) which determines the loss on heating of fumes. Fry's specification requires that the test be run at temperatures of 465 degrees. At this point, the heat loss measurement (loss of fumes) equals .67 degrees heat loss by weight over a period of 8 hours, a heat loss 0.08375 percent occurs during each hour which is the air contaminant or particulate emitted by the Fry process (Tr., Vol. II, pp. 117, 118, Ex. 17).

The manufacturing process at the Fry plant in the production of roofing materials involves a roll of asphalt used at the beginning of a single production line from which the felt is wound off in loops on a series of rollers into a pre-saturation area where asphalt heated to a range from 430 to 450 degrees impacts against one side of the felt, which is composed of 6 to 9 percent moisture content. When the asphalt contacts the side of the felt sheet, moisture is driven off the opposite side in the form of steam. Thereafter, the sheet of felt continues to move in loops around the rollers into a dip tank where the felt is further saturated and coated with asphalt on both sides (Tr., Vol. I, pp. 227, 228). It was uncontroverted that the effect of impacting asphalt on one side of the felt sheet during the pre-saturating process was to drive out the moisture content in the form of water vapor from the felt. After the moisture is driven from the felt, it is caught in overhead metal



hoods and becomes the major part of the emissions from the plant (Tr., Vol. I, p. 229). The amount of particulate or asphalt emitted during the process is approximately 5 percent of the total emission or in a ratio of water vapor to asphalt of 20 to 1 (Tr., Vol. I, pp. 229, 230). There is no combustion involved in the Fry manufacturing process. The emissions from the pre-saturator and saturator are caught in the hoods and with the aid of a fan are emitted from two stacks, the greatest density and volume being emitted from the west stack because there is hardly any vapor left in the felt sheet after it passes through the spraying and dipping operations. Most of the water vapor is emitted from the west stack (Tr., Vol. I, pp. 243, 244; Vol. II, pp. 134, 135; Ex. 15E).

## 2.

### THE FACTS

On September 5, 1973, at the invitation of Fry, Alvin Rickers, Assistant Chief of Air Quality, Brent Bradford, and Lynn Price, visited the Woods Cross plant where they observed the emissions from the stacks during the normal operation of the plant. While there they examined the emissions when the felt sheet was proceeding through the asphalt saturators and also observed the emissions from the stacks when the felt sheet was "broken" or when the felt sheet was not passing through the asphalt saturators, the purpose

being to compare 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, permitting no moisture from the felt to become part of the emissions. (Opacity is the amount of limitation or inhibition which prevents an observer from seeing objects through a plume; 40 percent opacity means 40 percent of your vision through the smoke plume is obscured (Tr., Vol. I, pp. 21, 22)). Photographs were taken of the emissions from the plant during normal operation and during the operation when the felt was "broken" which show conclusively that the smoke plume during normal operation is composed almost entirely of water vapor (Ex. 15, 15A, 15C, 15D and 15E). Readings of the plume were taken by Alvin Rickers who informed the Fry people the emissions from the plant during normal operation were not in violation (Tr., Vol. I, p. 64).

In a letter (Ex. 1), Fry was charged with violations on six different dates on which readings or evaluations were made by personnel from the Utah Air Conservation Committee or from the Davis County Department of Health. All of these men were graduates of a smoke school conducted by the Air Conservation Committee.

The course given at the smoke school consisted of the use of a smoke generator powered by an oil burning furnace which was so arranged that an air, water or oil mixture could be varied to produce incomplete combustion, the result being a black or a white

plume. The generator stack had attached to it an electric eye which measured the opacity of the plume regardless of the color. The students were taught by first showing them a plume of smoke and telling them the percent of opacity over a period of time. Then the student had the opportunity of reviewing the procedure on a basis of comparison from what they had been told initially (Tr., Vol. I, pp. 15, 16). The school lasted for approximately three days (Tr., Vol. I, p. 20). However, there was no method utilized at the school and the students were not trained to read a smoke plume which was partially composed of water vapor, called a "wet plume" (Tr., Vol. I, p. 23). There are many variations in the opacity estimates given by the students and the training must be repeated often. Sometimes, it took the whole course of three days, or continual repetition to get some student's "eyeballs calibrated" so they could make estimates that met the requirements (Tr., Vol. I, p. 24). As stated, there was no training available for the reading of a wet plume other than experience in the field where the smoke reader attempted to evaluate the opacity of the plume after the moisture had evaporated out of it (Vol. I, pp. 48, 49). The determination of when the water vapor has evaporated out of the plume depends upon the judgment of the reader (Vol. I, pp. 50, 51). The distance the plume travels before the water vapor is

dissipated depends upon the weather conditions, the amount of humidity in the air, and a "number of other things" (Tr., Vol. I, pp. 73, 74). There is no other process in the State of Utah where felt is saturated with asphalt as occurs in the Fry plant (Tr., Vol. I, p. 75), and none of the smoke readers who read the emissions from the Fry plant as being in violation; that is, of a density darker than a No. 2 Ringelmann Chart (40% black) or an equivalent opacity, had any prior training in reading or evaluating plumes with the same or similar composition of water vapor as that contained in the Fry plumes. No tests had ever been made to determine the subjective variations on reading which would exist between the different smoke readers (Tr., Vol. I, p. 31). There are various factors, such as humidity, temperature, time of day, position of the sun, and background beyond the plume, which must be considered in making a proper evaluation of the density of a plume (Tr., Vol. I, pp. 32, 33). It is generally more difficult for students to get their eyes calibrated to reading white smoke than it is for the student to read black smoke (Tr., Vol. I, p. 36). The evaluations are made by smoke readers in the field without any monitoring devices (Tr., Vol. I, p. 43). Any water vapor in the plume creates greater opacity and would make the plume more difficult to evaluate (Tr., Vol. I, p. 43). Therefore, the determination of opacity is made upon the smoke reader's subjective observation and judgment (Tr., Vol. I, p.49).

The first date on which an alleged violation occurred was September 6, 1973, whereupon an inspector found the west stack of the Fry plant to have an emission of between 45 percent to 60 percent opacity; no reading was made of the east stack (Prosecution Ex. No. 1). The 45 percent to 60 percent opacity range allegedly represents the highest and lowest of 12 readings made on that date (Record, Findings of Fact and Conclusions of Law and Decision, dated October 17, 1974). However, the transcript is void of any evidence to support this charge or any evidence that Fry was in violation of the Utah Code of Air Conservation Regulations, Section 3.2. Alvin Rickers, Winn's assistant, testified that as much as 7 percent variation could exist between the readings of different individuals (Tr., Vol. I, p. 55). If so, and allowing for error of 5 percent, if this inspector read the opacity at 40 percent, such was not a violation.

The second date on which an alleged violation occurred was September 27, 1973, wherein George R. Chlarson, an employee of the Utah State Division of Health, Air Quality Section, read the east stack of the Fry plant to have an emission of between 35 percent to 55 percent opacity. Apparently, there was no reading made of the emission from the west stack that date. However, the 35 to 55 percent opacity alleged represented the highest and lowest of seven readings made that day (Prosecution Ex. 1, 10; Record, Findings of

Fact, Conclusions of Law and Decision dated October 17, 1974). The original evaluation made by Chlarson was outside the premises of the Fry plant some 200 feet from the stack (Tr., Vol. I, p. 138). Subsequently, these findings were presented to a Mr. Springer, the Office Manager of the Fry plant (Tr., Vol. I, p. 138). The evaluation of Chlarson began at 11:00 and lasted about 1 hour and 55 minutes. However, the testimony is uncontroverted that when the moisture is driven from the felt by the impact of the hot asphalt, the moisture is caught in an over-head hood which is emitted from the west stack. It is impossible for the east stack to have a more dense emission than the west stack (Tr., Vol. II, p. 134), which certainly effects the credibility of Chlarson's observation or reading.

The third day an alleged violation occurred was October 3, 1973. On that date Richard L. Harvey, an Administrator of the Environmental Health Services for the Davis County Health Department made one observation and found emissions from the west stack of the Fry plant to have an opacity of 55 percent and an emission from the east stack had an opacity of 30 percent (Tr., Vol. I, p. 148, 155; Prosecution Ex. 1, 11; Record, Findings of Fact, Conclusions of Law, and Decision dated October 17, 1974). The reading occurred at approximately 12:44 p.m. on the County right-of-way which is 1500 South at Woods Cross, Utah (Tr., Vol. I, pp. 147-149).

At this time the reading was taken approximately 200 to 300 feet from the stack (Tr., Vol. I, p. 153). The plume had traveled approximately 45 to 50 feet from the lip of the stack before the reading was made (Tr., Vol. I, p. 154). However, Harvey's notes and memorandum state no estimate of distance with respect to when dissipation of water vapor occurred from the plume and the distance from which the plume was from the stack when the reading was taken (Prosecution Ex. No. 11, 12). Harvey made only one observation which lasted for approximately 30 seconds (Tr., Vol. I, pp. 155, 157). Furthermore, the sun was approximately overhead at this time in a southeasterly direction, and was not at his back (Tr., Vol. I, pp. 155-158).

The fourth date on which an alleged violation occurred was October 4, 1973. At that time Brent C. Bradford, an Environmental Health Specialist for the Utah State Division of Health, Air Quality Section, visited the Fry plant for the purpose of making an evaluation of the emissions from that plant (Tr., Vol. I, pp. 108, 114). Bradford had been at the Fry plant on September 5, 1973, at the invitation of the Fry people (Tr., Vol. I, p. 108). On October 4, 1974, Bradford entered the Fry property without their permission and there made an evaluation of the emission from the plant (Tr., Vol. I, p. 114). The evaluation occurred at approximately 10:05 a.m. approximately 200 feet from the stack. However, at the smoke

school they were taught that evaluations should occur at a distance from the stack of approximately  $2\frac{1}{2}$  times the length of the stack (Tr., Vol. I, p. 117). The standard procedure in reading a smoke plume is to have the sun at the smoke reader's back (Tr., Vol. I, p. 119). The evaluation by Bradford lasted approximately 45 minutes and at that time he found emissions from the west stack averaging between 40 percent to 50 percent (Prosecution Ex. 9). However, the charges set forth in the Executive Secretary's letter of January 16, 1974, allege opacity of the west stack emission at 40 percent and the east stack at 55 percent (Prosecution Ex. 1). Furthermore, there is no record of any emission from the east stack as being in violation of the regulations. Bradford's analysis dealt only with the west stack (Prosecution Ex. 9). The transcript is void of any evidence with respect to a violation of the east stack on October 4, 1973. When Bradford made the evaluation of the plume emitting from the Fry plant, it contained water vapor. The only training that Bradford had had in the reading of a plume containing water vapor was in an asphalt mulch plant somewhere in the State of Utah (Tr., Vol. I, pp. 120, 121). Furthermore, Bradford stated that the length of time one observed an emission was not discussed at the smoke reading school, nor was it covered in any of their studies (Tr., Vol. I, p. 130). During the reading taken by Bradford, he was approximately 100 to 125 feet from the stack. His evaluation was that the opacity



in the emission immediately above the lip of the stack was approximately 80 to 90 percent, but that where the water vapor dissipated from the plume, opacity ranged from 40 to 50 percent (Prosecution Ex. 9). However, this varies with his estimate which was given during the hearing where he stated that the opacity ranged between 40 and 55 percent (Tr., Vol. I, p. 128). Bradford concluded that in making his evaluation of the plume he did not follow guidelines taught at the smoke school. His testimony is as follows:

Q. And, I think you are trained in smoke school to make these evaluations about two and a half times the length of the stack?

A. That's the school book solution, yes.

Q. Is that a valid guideline, in your opinion?

A. As a guideline, yes. But, only as a guideline. Obviously, you can't always get the two and a half times the stack distance away from it.

Q. If you follow the guidelines there, there is more probability that your evaluation would be accurate, would it not?

A. I don't know that I am prepared to answer that.

Q. Isn't that why you were given those guidelines in your training, to get the most accurate evaluation possible?

A. Again, I would assume so. I don't know that I would be prepared to answer that as far as being able to determine what would be the best. That's what the school book answers, that's all I can say.

-ixor  
Berburg Q. Well, you would agree that the guidelines have some value or you wouldn't be taught them, would you?

noijh A. Well, I would agree that someone takes an absolute value. I don't know--again, I don't know that I am in a position to judge that (Tr., Vol. I, pp. 117, 118).

The fifth date on which a violation allegedly occurred was October 9, 1973 (Prosecution Ex. 1). On that date William H. Terburg, an Environmental Health Specialist with the Davis County Health Department visited the Fry plant for the purpose of evaluating the effluent from their stacks (Tr., Vol. I, pp. 212-214). On that date Terburg made one reading which lasted approximately 5 minutes and found both stacks with emissions of between 40 to 60 percent opacity at a point 20 feet above the stacks (Prosecution Ex. 13, 14). The evaluation occurred at approximately 11:20 a.m. at approximately 150 feet west of the stack on 15th South (Tr., Vol. I, p. 215). Terburg stated that at 20 feet above the stack the plume was void of any water vapor (Tr., Vol. I, p. 218). At that time, there was a slight breeze which changed during the evaluation (Tr., Vol. I, pp. 218-221). However, there is no indication as to what his reading actually represented or whether it was just an estimate or a range that existed in the opacity of the plume. Furthermore, there was no indication of the highest and lowest point that existed on that date (Record, Findings of Fact and Conclusions of Law and Decision dated October 17, 1974). The

emission from neither stack was in violation if the reading was 40 percent; his testimony that the density of emissions from the east and west stack was equal is incredible considering the uncontroverted evidence that emission from the west stack contains most of the water vapor and is always more dense than the emission from the east stack.

The sixth date on which Fry was charged with violation was November 9, 1973, whereupon Alvin E. Rickers and Casper Nelson, made a visit to the Fry plant. Alvin Rickers is employed by the Utah State Division of Health as Assistant Chief of the Air Quality Section. Rickers assists in teaching at the smoke school in the area of meteorology. The instruction is given at the school that the reading should be made from 6 to 12 inches above the stack. The reason, of course, for doing it at that point is that the electric eye is reading the opacity at the top of the stack and evidently dissipation occurs at a rapid rate (Tr., Vol. I, p. 55). Rickers stated that opacity is the decrease in transmittance of light. His training in determining the "break point" in a plume where the water vapor evaporated or dissipated from the plume consisted of a one-time observance of a plume from Kennecott Copper Corporation, which does not have the same process as Fry (Tr., Vol. I, p. 74). On November 9, 1973, Rickers made four readings over a period of 12 minutes at 3-minute intervals. In three out of the

four readings the east stack was found to have a 50 percent opacity, the fourth reading was of 45 percent opacity. The west stack was found to have a 40 percent opacity on two readings and a 45 percent opacity reading on two readings (Prosecution Ex. 4 (card)). However, the charges made for that date reflected 45 percent opacity on the west stack and 50 percent opacity on the east stack (Prosecution Ex. 1). Furthermore, the Findings of Fact of October 17, 1974, show a single reading occurring on November 9, 1973. An apparent discrepancy exists in the Prosecution's evidence (See Prosecution Ex. 9; Record, Findings of Fact and Conclusions of Law and Decision dated October 17, 1974). In addition, Rickers' evaluation was that there was 90 percent opacity at the lip of the east stack and 80 percent opacity at the lip of the west stack. However, after dissipation, the opacity in the east stack was 50 percent and the opacity of the emission from the west stack was 45 percent. This is clearly inconsistent with the record.

Dr. Dale Parker who has a PhD Degree in Environmental Biology from the University of Utah was called by Fry as a defense witness. Although not certified by the smoke school, Dr. Parker had worked 21 years at Dugway and had extensive experience with wet clouds or plumes (Tr., Vol. I, pp. 224, 225). In his testimony he described the entire Fry process and explained that the average temperature of the asphalt when it impacts the felt is 430 degrees

to 450 degrees. The felt sheet is composed of 6 to 9 percent moisture content, which is driven off on the felt side opposite from point of impact with the asphalt in the form of steam. From that point the steam goes through a cooling process as it is emitted from the stacks. He estimated the amount of particulate or asphalt in the plume is less than five percent. No combustion takes place in the process. The ratio is 20 to 1 of water to asphalt (Tr., Vol. I, pp. 227-230). In his opinion the emissions from the Fry plant could not be in violation of the 40 percent opacity test during normal operation (Tr., Vol. I, p. 254). In his opinion the testimony of the smoke readers was based strictly on their ability to read opacity of a plume and not on their ability to differentiate between a wet plume and a dry plume (Tr., Vol. I, p. 256).

Raymond L. Chaffin, a defense witness, testified that he was Chief Chemist for the Environmental Test Group of Core Laboratories. He has been a certified smoke reader since May of 1971 (Tr., Vol. II, pp. 66, 67). He had observed the plume emitted from the Fry plant and was unable to observe any line of demarcation where the moisture came out of the emission or plume (Tr., Vol. II, pp. 69, 70). In the smoke schools the students are not given any training in reading a wet plume and any evaluation of the opacity of a wet plume is only a guess. In his opinion, the reading of a wet plume is completely subjective (Tr., Vol. II, pp. 71, 72).

Donald D. Foster, a Chemical Engineer and Director of the Environmental Control for Fry, testified that Fry is in compliance with the EPA Weight Emission Regulations as they relate to the State of Utah and the Wasatch Front (Tr., Vol. II, p. 121). On the dates of the alleged violations, he had computed from company records the percentage of water vapor in the plume as compared to asphalt fumes. The percentage ranged from 97 percent to 98 percent (Tr., Vol. II, pp. 139, 140). He had observed plumes from the Fry Woods Cross plant 40 or 50 times, and had never observed a sharp break or definite break in the plume, "It seemed to sort of drift off and dissipate." (Tr., Vol. II, p. 142). There is no distillation of the asphalt in the Fry process (Tr., Vol. II, p. 145). The difference between the Fry process and the process in asphalt mulch plants is that in the latter there is combustion (Tr., Vol. II, pp. 150, 151). Equivalent opacity is another term for the Ringelmann Chart. It is important in accurately reading a plume of any type to take readings in a sequence or series of intervals of time, because of variations in the speed of manufacturing process, changes in air temperature and wind direction (Tr., Vol. II, pp. 151, 152, 153). The emissions from the Fry plant on the dates of the alleged violation were not in violation of Section 3.2 of the Air Conservation Code (Tr., Vol. II, pp. 160, 161).

The Air Conservation Committee called Carl D. Luedtke, an EPA Consultant as a rebuttal witness. He has a Bachelor's Degree in Chemical Engineering and a Master's Degree in Chemistry, and had qualified as a smoke reader (Tr., Vol. II, pp. 166, 167). His experience with asphalt saturators was in the Los Angeles area, none of which were Fry plants; they were equipped with emission control devices, but used a similar process to that of Fry (Tr., Vol. II, pp. 169, 170). He had never read the Fry plume (Tr., Vol. II, p. 194). He had observed the Fry plume on one occasion while on an inspection tour of the facility as an EPA consultant (Tr., Vol. II, p. 194). In his opinion, based upon assumptions that the dip-tanks in a Celotex plant in California were similar in dimension to those of the Fry plant, the "break felt" test was not reliable to show the percentage of water vapor in the plume (Tr., Vol. II, p. 183). However, Foster testified that the assumptions made by Luedtke were incorrect in that the Fry tanks were smaller, the asphalt cools after saturating the felt, distillation does not take place, and only minimal fumes come off the asphalt (Tr., Vol. II, pp. 210-217). Luedtke was also of the opinion that taking the average of consecutive readings at intervals was not a more accurate way of determining opacity, despite his admission that there would be a variance in subjective readings made by the same individual. (Tr., Vol. II, pp. 207, 208). Luedtke

also testified that there was no connection between particulate matter and opacity (Tr., Vol. II, p. 187), which is contra to the well accepted fact that the smaller the pieces of particulate therein, the more dense is the plume.

There was no evidence from any source that the emission from the Fry plant "is or tends to be injurious to human health or welfare, animal or plant life or property."

#### ARGUMENT

##### POINT I

THE AIR CONSERVATION COMMITTEE HAS THE BURDEN  
OF PROVING ALL ELEMENTS OF THE ALLEGED VIOLATION,  
INCLUDING THE ABSENCE OF VISIBLE WATER VAPOR

The State of Utah, through its administrative agency, the Air Conservation Committee, is the party seeking relief in this action. Obviously, it has the burden of proving all elements of its case.

The letter from Dr. Grant Winn to Fry dated January 16, 1974, charges Fry with violations of Utah's Visible Emissions Regulations, Section 3.2, Code of Air Conservation Regulations. Apparently, the Subsection of 3.2 claimed to have been violated is:

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



Section 3.2.6 states:

d. An emission failing to meet the standard because of the effect of uncombined water shall not be in violation.

which conforms to 26-24-2, which excludes water vapor as a contaminant.

The violation alleged against Fry is criminal in nature, and the State has the burden of proving each and every element of the offense beyond a reasonable doubt. It is an essential element of the State's case to prove that on the dates charged, the Fry plume either contained no visible water vapor at all, or that such visible water vapor was taken into account and excluded when the opacity reading was made. Again, equivalent opacity in excess of the Ringelmann Chart is not a violation if the opacity (inhibition of transfer of light through plume) is caused by water vapor. This requires the State to prove a negative proposition which does not in any way shift the burden of proof to the defendant. The general rule is stated in 1 Jones on Evidence, § 5:8:

As stated in an earlier section a part of the plaintiff's burden may lie in the necessity of proving a negative assertion as an element of his claim. This is true not only as to the plaintiff but also as to other parties to this action, and it may be said that whoever asserts a claim or defense that is negative in form or depends upon a negative proposition has the burden of establishing the truth of the assertion. This is only another way of saying that

he who affirms must prove; and in cases involving negative propositions the courts seem not to have regarded the form of the issue as material.

In reading the transcript, one gets the unmistakable impression that it was Fry rather than the Committee which had the burden of proof. Because of continuous communication between the Hearing Examiners, the State and Federal EPA personnel during recess outside of the presence of defense counsel, it was necessary to make an objection, which was sustained by the Legal Advisor (Tr., Vol. I, p. 127).

## POINT II

### THE STATE HAS NOT MET THE BURDEN OF PROVING ALL ELEMENTS OF THE ALLEGED VIOLATION

The evidence is uncontroverted that in making the "readings" which were the basis for the charges that the Fry plume violated the Visible Emissions Regulations, the observers relied only on their subjective judgment; no scientific aids or equipment were used. In fact, a Ringelmann Chart was not used because the Fry plume was white in color, which required the observer to evaluate the plume on the basis of equivalent opacity; that is, to compare in his mind the shade of density of the Fry plume with what he remembered as being No. 2 density on the Ringelmann Chart. A traffic policeman may be able to distinguish between an automobile traveling at

a speed of 20 miles per hour and one going twice as fast. He may not need a speedometer or radar to make this evaluation, yet no one would suggest that a 20 mile-per-hour speed limit should be enforced solely by the policeman's visual judgment. It is common knowledge that we all view things differently and two people with 20-20 eyesight may still have a totally different perception of the same physical object, especially with respect to such intangibles as color, shade, tone, intensity, etc. If one ever attempted to purchase a shade of paint to match another shade (seen only a few minutes earlier) the difficulty in correctly matching the desired shade would be apparent.

The description of the smoke school curriculum set forth at length in the Statement of Facts will not be repeated here. Suffice it to say, the State would close down this plant based upon the subjective testimony of graduates of a 3-day course, whose training consisted of observing the degree of opacity of a plume of smoke, absent any water vapor under controlled conditions. In attempting to evaluate the Fry emissions the "smoke reader" would observe the Fry plume under varying weather conditions and then try to compare the plume with an image from memory learned at an earlier time during his school training. The school did not, and could not, give any training on evaluating the opacity of a wet plume. The training for analyzing wet plumes consisted of the observer, accompanied by an "experienced observer," making one or two observations

of a wet plume in the field, emitted from a process vastly different from the Fry manufacturing process. The Fry process does not involve combustion as does the process used in asphalt mulch plants which contain much more particulate and would tend to cause moisture to separate or dissipate from the plume more readily. The difficulty in reading the Fry plume is enhanced by the requirement that opacity be evaluated after the water vapor has dissipated from the cloud, which would be subject to varying wind conditions, humidity and light conditions. The testimony was clear that the temperature of the emission as it leaves the stack is higher than that of the ambient air. Obviously, the plume would be subject to a cooling action beginning on the edges which would cause a gradual condensation of vapor from the plume starting on the outside and proceeding in a gradual manner towards the center as the plume expanded geometrically in moving away from the lip of the stack (Tr., Vol. I, p. 226).

There was evidence that it is desirable to "re-calibrate the eyeballs" of a smoke reader every six months, because the training does wear off. However, there was no evidence offered as to how fast it wears off, whether gradually or in sudden increments or whether the degree to which it wears off varies with individuals. Furthermore, there was no evidence of the visual acuity of any of the observers who made the readings on which the charges were based. Exhibit 3, a study made by the U.S. Department of Health, Education

and Welfare, in 1967, contains studies on page 28 which show the wide variation which 6 allegedly trained plume observers can derive in observing a plume whose opacity is measured by scientific instrumentation. Indeed, it should be noted here that the smoke school training course used a photo electric eye to measure the accuracy of the students' readings. In Portland Cement v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973) the court severely questioned the ability of a visual observer to read plume opacity and indeed, sent back for further consideration a 10% opacity standard promulgated by the EPA. The court pointed out that the fact that visual observation may be "a cheaper and faster method of determining compliance," but that fact would not suffice to uphold a method of enforcement which was otherwise illegal. See general discussion at 486 F.2d pp. 400-401. See also, Essex Chemical v. Ruckelshaus, 486 F.2d 427 (D.C. Cir. 1973) at p. 432.

In Bortz Coal Company v. Air Pollution Commission, 279 A.2d 388 (Pennsylvania), the company was charged with permitting smoke to emanate from its stack which was darker than #2 of the Ringelmann Smoke Chart. This charge was based on the visual observation of a State employee. In overturning the finding of the Air Pollution Commission, the Court ruled:

Visual test and observations are not adequate evidence of a violation where recognized scientific tests are available. (279A.2d at 398).

We anticipate that the Respondent will rely on State vs. Lloyd A. Fry Roofing Company, 495 P.2d 750 (Ore. App. 1972) for affirmance of the Air Conservation Committee's decision. There was no showing that the operation of the Oregon plant was the same as the Woods Cross plant. The evidence in that case was uncontroverted that the plume from the Oregon plant was a wet plume; i.e., the emission from the stack included water droplets. The Court held the decision of the lower court involved a jury question; that because of the nature of the training given smoke readers as to wet plumes, the admissibility of their testimony presented a close question, but since they testified the defendant's plume obscured 80 percent or more of the background (more than twice the 40 percent required to constitute a violation) and since there was no showing that the amount of visible water in defendant's plume could have had a substantial impact on the readings, the Court resolved the close question of admissibility in favor of the State.

In the case at Bar there was a substantial showing as to the amount of water vapor in the emission, and in no instance was a reading made as high as 80 percent. Furthermore, the evaluations of the Fry plume were made in a haphazard manner in which the inspectors used no uniform guidelines.

The witness, Chlarson, made seven readings on September 27, 1973, on the east stack, of which three were in violation, the

highest being 55 percent. Nothing more than a "wisp at times" was observed from the west stack. The testimony was uncontroverted that the heaviest emission comes from the west stack.

The witness, Harvey, made one thirty-second observation on October 3; admitted he did not follow guidelines recommended at the smoke school (Tr., Vol. I, p. 155, Ex. 11).

The witness, Bradford, on October 4, 1973, commenced his evaluation at 10:00 a.m., the first observation being outside the company property about 200 feet from the stacks, and completed his observations on company property. In addition, his entrance on company property was without permission. The wind was minimal; he did not estimate wind velocity, nor could he tell exactly the direction of the wind (Tr., Vol. I, pp. 117-120). His observation lasted fifty minutes. Normally, he would take readings every five minutes. He was unable to give the minutes and seconds of how long he looked at the plume during each observation. He had made prior evaluations from asphalt mulch plants (Tr., Vol. I, pp. 120-130). He wrote the results of his observations on a business card and gave it to Springer, Fry's Office Manager. In a summary contained in a letter to Winn, he said the emissions from the west stack averaged 40 to 50 percent (Ex. 9); 40 percent was not in violation and the additional 50 percent could easily be accounted for by subjective variation. The letter of January 16, 1974, listing the dates on which Fry was

charged with violations showed the west stack at 40 percent, the east stack 50 percent, which was amended at the hearing to show the east stack was not in violation.

The witness, William Terburg, testified to a reading of the Fry plume on October 9, 1973. He made one continuous observation for five minutes from 11:25 until 11:30 a.m. His evaluation of the emission from both stacks was 40 percent to 60 percent (Ex. 13). He did not know whether the sun, which at that time would not have been to his back, had any effect on the accuracy of his evaluation (Tr., Vol. I, p. 220).

The witness, Alvin E. Rickers, on November 9, 1973, at 11:25 to 11:33 a.m., took two readings of each of the stacks, which he wrote on a business card which he gave to Springer, the Fry Office Manager. He read the emissions from the east stack higher than those of the west stack despite the uncontroverted evidence that the heaviest emission exits from the west stack. In this, his testimony is not consistent with the majority of the other smoke readers. The business card says nothing about the circumstances or weather conditions under which the evaluations were made. In a memorandum of that date to Winn, he gave more detailed information, other than the number of readings which was not mentioned in the memorandum.



The lack of uniformity and variance between the evaluations made by the foregoing witnesses certainly casts reasonable doubt on whether the emissions from the Fry plant were in violation of the "40 percent equivalent opacity" regulation.

Considering the penalties provided by the Statute as punishment for violations of the Code of Air Conservation Regulations, due process would certainly require that Fry be notified in advance of the emission evaluations so that arrangements could be made to obtain evidence to rebut the charges. In any event, the notice of violation should apprise Fry of the circumstances existing when the evaluations were made.

From the foregoing, it is apparent that the charges of the Air Conservation Committee are not supported by substantial evidence. Substantial evidence is defined in Bortz Coal Co. v. Air Pollution Commission, supra., as follows:

"substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and more is required than a mere scintilla of evidence or suspicion of the existence of the fact to be accomplished.

### POINT III

THE DECISION OF THE AIR CONSERVATION COMMITTEE FINDING FRY IN VIOLATION OF SECTION 3.2.1 OF THE CODE OF AIR CONSERVATION REGULATIONS IS IN VIOLATION OF ARTICLE I, SECTION 7 OF THE UTAH CONSTITUTION AND AMENDMENT XIV, SECTION 1 OF THE UNITED STATES CONSTITUTION.

Section 26-24-2(3) of the Air Conservation Act defines pollution as follows:

(3) "Air pollution" means the presence of ambient air of one or more air contaminants in such quantities and duration and under 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.

There was no evidence that the emissions from the Fry plant caused or tended to cause any of the deleterious effects listed in the foregoing statute. Opacity does not equal pollution. A wet plume can be 100 percent opaque even though it contains no pollutants whatsoever. Anyone who has observed steam from boiling water knows this pure water vapor can be totally opaque.

The evidence adduced at this hearing shows that eyeball plume readings in the field cannot be made with reasonable precision and opacity and even if it could be measured precisely, is not an adequate measure of the amount of pollution the plume contains. The Committee's witnesses conceded that subjective variation between observers could reach 7 percent and possibly 10 percent. See also the results of the tests conducted in the study under the auspices of the U.S. Department of Health, Education and Welfare (ex. 3, p. 28) which shows the wide variation in the observations of six allegedly trained observers of a plume whose opacity was

measured by scientific instruments, variations in stack diameter, gas velocity, moisture content, weather and light conditions will cause plumes to have different opacities even though they contain the same weight of pollutants. Inspectors are not taught, and probably couldn't be taught, how to subjectively evaluate these variables.

The fact that water vapor is excluded in determining whether the emission violates opacity standards in confirmation of the fact that opacity caused by water vapor is not a violation. The committee's witnesses contend that they could evaluate the opacity of the plume at a point after the water vapor had dissipated from the plume. Considering multiple variables, there is no scientific foundation for the contention that the point where all of the water vapor has left the plume can be accurately determined, so that only the opacity attributable to the particulates can be evaluated.

"Due process" prohibits the use of opacity limits as a legal standard, because the opacity cannot be measured accurately and cannot be reliably correlated with pollution. Section 3.2.1 of the Code of Air Conservation Regulations should be held invalid as a violation of "due process" if reasonable men can differ on whether there was a violation. The probability of such differences between the evaluations of the Committee's witnesses in uncontroverted.

Section 3.2.1 does not conform to 26-24-2(3) of the Air Conservation Act, since the degree of opacity does not equal the degree of pollution and the statute is directed to the control of air pollution. Therefore, Section 3.2.1 should be held invalid. Violation of Section 3.2.1 creates a conclusive presumption that a degree of opacity of a shade or density darker than No. 2 Ringelmann Chart (40% black) or an equivalent opacity, is irrebuttable proof of the degree of air pollution. Similar legislation has been held invalid by the U.S. Supreme Court in the recent case of Vlandis v. Kline, 412 U.S. 441 (1973). In that case "a state statute established different tuition rates for resident and non-resident students and adopted the student's legal address at the time of application as the sole criterion for determining his residency throughout the entire period of attendance. Students who had applied from out of state but had acquired all of the attributes of bona fide residency brought suit. Sustaining an injunction against enforcement of the statute, the court said:

In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees at its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination. Rather,

standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bond fide resident entitled to the in-state rates.

See also, U.S.D.A. v. Murray, 413 U.S. 508 (1973), and Cleveland Bd. of Education v. LaFleur, 414 U.S. 632 (1974).

#### POINT IV

#### THE AIR CONSERVATION ACT IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AND JUDICIAL POWER

Section 26-24-10(1) of the Act requires the Air Conservation Committee to conduct public hearings in adopting the standards of quality for ambient air. Subsection (2) of this Act states:

(2) The committee may establish such emission control requirements by rule, regulation or standards 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 the same terms and conditions and with the same notice as required in subsection (1) of this section.

Even though the Committee is required to conduct public hearings, the Statute does not say that the Committee is required to consider, take into account, or in any way be governed by information obtained at the hearings. In fact, it may disregard any such information.

The Committee may adopt whatever regulations it feels are necessary

to prevent, abate or control air pollution, with no restraint or guidance from the Legislature. It is the judge and jury of what regulations should be adopted to achieve air quality. As was said by Mr. Justice Cardozo in Schechter v. United States, 295 U.S. 495, 55 S.Ct. 837:

The delegated power \* \* \* is not canalized within banks that keep it from overflowing. It is unconfined and vagrant.

The Act does not set out any definite standards to guide the Air Conservation Committee other than its discretion as to what is good and proper for the safety and health of the public. Section 26-24-11(1)(b) requires the Executive Secretary shall be conference, conciliation and persuasion endeavor to eliminate the violation before written notice is served as provided in Subsection A. The extent, duration and scope of such efforts are to be determined within the sole discretion of the Executive Secretary. This appears to be an unconstitutional delegation of legislative power or even to a certain extent a delegation of judicial authority.

Section 26-24-13(1)(a) sets out penalties for violation of the Act:

(1)(a) Any person who violates any provision of this act, or any rule, regulation, order (other than an order requiring compliance with an implementation plan), or standard in force under this act, other than section 26-24-16, or who causes or permits to be caused air pollution as defined in section 26-24-2 of any air resource of the state,

shall be guilty of an offense and subject to a fine of not more than \$10,000 for each day of violation. Any person who knowingly violates any requirement of an applicable implementation plan adopted by the committee more than thirty days after having been notified in writing, by the executive secretary, that such person is violating such requirement, shall be guilty of an offense and subject to a fine of not to exceed \$25,000 for each day of violation in the case of a first offense, and not to exceed \$50,000 for each day of violation in the case of second and subsequent offenses. Any person who violates any order requiring such person to comply with the requirements of an implementation plan shall be guilty of an offense and subject to a fine of not to exceed \$25,000 for each day of violation in the case of a first offense, and not to exceed \$50,000 for each day of violation in the case of second and subsequent offenses.

Note that a person "guilty of an offense" is subject to the penalties listed. If this offense is criminal, which it appears to be, defendant is entitled to a jury trial in accordance with 77-1-8 U.C.A., 1953. At the commencement of the hearing before the Examining Committee, Appellant expressly stated that by participating in the hearing, Lloyd A. Fry Roofing Company was not waiving its right to a jury trial; that its purpose in appearing was to cooperate with the Committee and follow the Statute as it now exists, despite doubt concerning its constitutionality.

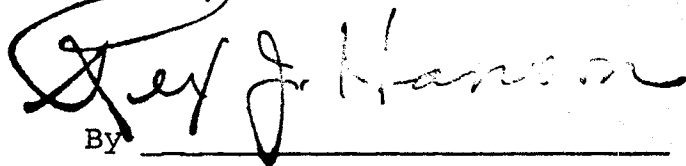
The Act is so vague, especially with reference to the procedures required and the type of action involved, that it fails to meet reasonable constitutional standards of exactness and specificity.

# CONCLUSION

No one can deny the laudable objective of the Clean Air Act, and the sincerity of the Air Conservation Committee in promulgating its regulations to achieve air quality; however, it is no less important that constitutional and legal safeguards of long established rights be not swept away in this "Ecology" age. On the record, we submit that this Court should reverse the decision of the Utah Air Conservation Committee and remand the matter for judgment in favor of Lloyd A. Fry Roofing Company.

Respectfully submitted,

HANSON, WADSWORTH & RUSSON

  
By \_\_\_\_\_



Mr. L. J. J. J. J.