

1996

Magnesium Corporation of America v. Air Quality Board, Division of Air Quality, Department of Environmental Quality, State of Utah : Reply Brief

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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FILE NO. 960354-CA

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Petitioner,)

vs.)

AIR QUALITY BOARD and DIVISION)
OF AIR QUALITY, DEPARTMENT OF)
ENVIRONMENTAL QUALITY,)
STATE OF UTAH,)

Respondents.)

Case Nos. 960354-CA and
960433-CA

Priority No. 14

REPLY BRIEF OF PETITIONER, MAGNESIUM CORPORATION OF AMERICA

PETITION FOR REVIEW OF ORDER ISSUED BY THE UTAH AIR
QUALITY BOARD, DR. RICHARD E. KANNER, CHAIRMAN, PRESIDING

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REPLY BRIEF OF PETITIONER, MAGNESIUM CORPORATION OF AMERICA

INTRODUCTION

This case requires the court to determine whether the Approval Order suspended the enforcement protection of the Unavoidable Breakdown Rule. The question is one of law. It does not require any special agency expertise or the application of agency rules to facts. It simply requires the application of the general law that governs the construction of written instruments and the authority of an agency to ignore its own established regulations. The court is on familiar ground, because its task is to construe a written instrument.

The Unavoidable Breakdown Rule is a rule of general application that precludes enforcement for excess emissions from unavoidable breakdowns of pollution control

equipment. It applies to the pollution controls at MagCorp just as it does to the pollution controls at any other company in Utah.

MagCorp did not, as suggested by the Agency,¹ "resort to excluding emissions" by claiming the protection of the Unavoidable Breakdown Rule. (Respondents' Br. 23.) MagCorp experienced unavoidable breakdowns² and complied with its Approval Order and the Unavoidable Breakdown Rule. The Agency does not dispute that MagCorp timely filed the appropriate breakdown and excess emission reports and repaired the control equipment. In reliance on the Rule and the Approval Order, MagCorp reasonably assumed excess emissions from reported unavoidable breakdowns were not a violation. At no time prior to or in response to MagCorp's reports did the Agency advise MagCorp that it was not entitled to the enforcement protection of the Rule. As late as February 22, 1994, long after the breakdowns and seven months prior to issuance of the NOV, the Agency by letter (A1, R. 54-5), a copy of which is set forth in the Addendum, continued to lead MagCorp to believe that it was subject to the Unavoidable Breakdown Rule. It is the Agency, not MagCorp, that is "resorting" to after-the-fact, erroneous and strained interpretations of established orders and regulations.

¹ "Agency" collectively refers to the Respondents, Air Quality Board and Division of Air Quality.

² The breakdowns were unavoidable and otherwise met the definition in the Unavoidable Breakdown Rule. The Agency so stipulated (R. 38-40, 44-47, 381-2) and the Hearing Examiner so confirmed at the evidentiary hearing (R. 381-2).

SUMMARY OF ARGUMENTS

The appropriate standard of review is correction of error, because the Agency misapplied the general law governing construction of written instruments and failed to follow its own Unavoidable Breakdown Rule. Without reading the Approval Order as a whole, the Agency erroneously interpreted the "in no case" language in isolation as meaning "no exceptions" and precluding the enforcement protection of the Unavoidable Breakdown Rule. The Agency failed to harmonize the other provisions of the Approval Order, which are inconsistent with its interpretation, including Condition 24, which expressly requires MagCorp to comply with the Rule.

Even if reviewed under a standard of intermediate-deference, the Agency's myopic decision that the "in no case" language means "no exceptions" is unreasonable, arbitrary and capricious. It is contrary to other provisions of the Approval Order and the Unavoidable Breakdown Rule. It is also logically inconsistent with the Agency's holding that MagCorp could have and should have obtained a variance. There is absolutely no rational basis for devising or imposing an absolute emission limit that can reasonably replace the protection afforded by the Unavoidable Breakdown Rule. The Rule expressly applies to and accommodates operators, such as MagCorp, that are unable to curtail operations during an unavoidable breakdown. Having held the Approval Order unambiguous, the Agency cannot now resort to extrinsic testimony from witnesses who did not participate in the negotiation of the Approval Order and ignore the uncontradicted testimony to the contrary from those witnesses who did.

Even if held to be a permissible interpretation, the Agency's decision is not entitled to any deference and cannot be upheld, because the Agency did not communicate its interpretation and provide MagCorp fair warning of the conduct the Agency now seeks to prohibit. In any event, the NOV is time-barred by the one-year statute of limitations in Utah Code Ann. § 78-12-29(3) (1992 & Supp. 1996) as to any exceedance of the Melt/Reactor Limit that occurred prior to September 1993. The Agency had in its possession MagCorp's Quarterly Emission Reports from which it was on duty of inquiry and reasonably could have discovered the amount of chlorine emissions from the Melt/Reactor stack prior to that time.

ARGUMENT

I. THE AGENCY'S HOLDINGS ARE ERRONEOUS BECAUSE THE AGENCY MISAPPLIED GENERAL LAW GOVERNING DOCUMENT CONSTRUCTION AND FAILED TO FOLLOW ITS OWN REGULATION.

A. The Standard Of Review Is Correction Of Error.

Correction of error is the appropriate standard for reviewing an agency's application of general law. Morton Int'l, Inc. v. Auditing Div., 814 P.2d 581, 588 (Utah 1991); SEMECO Indus., Inc. v. State Tax Comm'n, 849 P.2d 1167, 1172 (Utah 1993) (Durham, J., dissenting). In this case, the Agency misapplied established rules of general law governing construction of a written instrument. The Approval Order is an administrative order, and like court orders, judgments, contracts, and other written instruments, it must be construed and interpreted according to the ordinary rules of document construction. See e.g., Park City Utah Corp. v. Ensign Co., 586 P.2d 446, 450 (Utah 1978) (judgments); In the Matter of the Estate of Leone; 860 P.2d 973, 975 (Utah Ct. App. 1993) (court orders); accord

Boswell v. Brazos Elec. Power CO-OP, Inc., 910 S.W. 2d 593, 599 (Tex. Ct. App. 1995) (administrative orders). Questions involving the interpretation and construction of written instruments are questions of general law, not agency law. See Morton, 814 P.2d at 585 and n.11. The appellate court is in an equal if not better position to apply established rules of construction and interpret the meaning of an administrative order or other written instrument. See Savage Indus., Inc. v. Tax Comm'n, 811 P.2d 664, 668 (Utah 1991); Morton, 814 P.2d at 587.

The Agency contends "[t]he interpretation of an approval order is . . . similar to application of an agency rule . . . [and] [t]herefore, review of the Board's action should be under the intermediate deference standard." (Respondents' Br. 20; see also id. at 25, n.10.) The Agency's contention is erroneous. Construing an administrative order is different from applying an agency rule to facts, because it involves application of the general law governing the construction of written instruments.

It is well-established that "absent a delegation of discretion, appellate courts should review with no deference all claims of interpretation or application of law." SEMECO Indus., Inc., 849 P.2d at 1172 (Durham, J., dissenting) (emphasis added); see also, Savage Indus., Inc., 811 P.2d at 668-70; Zissi v. State Tax Comm'n, 842 P.2d 848, 852-53 (Utah 1992). The Legislature has not granted the Agency discretion to apply the established rules of general law governing the construction of written instruments to interpret or construe the language that is at issue in the Approval Order. See e.g., Belnorth Petro. Corp. v. Tax Comm'n, 845 P.2d 266, 268 (Utah Ct. App. 1993) (no deference unless legislature has granted agency discretion to interpret statutory language at issue); see also Bhatia v.

Department of Employment Sec., 834 P.2d 574, 581 and n.3 (Utah Ct. App. 1992) (Bench, P.J., concurring). Therefore, the correction of error standard is the proper standard of review to apply. Savage Indus., Inc., 811 P.2d at 669-70.

Correction of error is also appropriate for reviewing agency action that is contrary to and departs from an established rule of that agency. See, Holland v. Career Serv. Review Bd., 856 P.2d 678, 683-84 (Utah 1993) (Bench, J., concurring). Here, the Agency is not applying its rule to the facts, but is departing from its rule, which requires a correction of error standard.³ Whether the Agency's decision is reviewed under Utah Code Ann. § 63-46b-16(4)(h)(ii) (1993 & Supp. 1996) (contrary to the Agency's own rule), as argued by Respondent (Respondents' Br. 17-8), or under subparagraphs (b) (beyond jurisdiction), (d) (misapplication of law), or (e) (unlawful procedure), the standard of review is correction of error. The Unavoidable Breakdown Rule was established by the Agency through formal rulemaking, and is of general application to all sources regulated by the Agency. See Utah Admin. R307-1-1 (1996) (air conservation rules apply throughout state). The Utah

³ The Agency relies on Union Pac. R.R. Co. v. Auditing Div., 842 P.2d 876, 879 (Utah 1992) for applying an intermediate-deference standard in reviewing whether an agency erred in applying its rules. As Judge Bench correctly recognized in Holland, however, the Union Pac. R.R. case only addressed the standard for reviewing an agency's application of a rule to the facts and did not involve a "claim that the agency had departed from its own rules." Holland, 856 P.2d at 684 (Bench, J., concurring) (emphasis added). The present case is clearly distinguishable because it directly presents a claim that the Agency departed from its Unavoidable Breakdown Rule. The Union Pac. R.R. case is further distinguishable because it involved the application of an agency rule to facts to determine whether the railroad qualified for a tax exemption. In contrast, the present case involves whether the Unavoidable Breakdown Rule applies to MagCorp, as it does to any other operator. There is no dispute that the breakdowns experienced by MagCorp were unavoidable or otherwise met the definition of the Rule. (R. 382.)

Administrative Rulemaking Act, Utah Code Ann. § 63-46a-1 to -16 (1993 & Supp. 1996), anticipates that once the Agency "adopts a rule it must abide by the rule, unless it exercises rulemaking authority to amend the rule." Holland, 856 P.2d at 684. Since the Agency may depart from its established rules only through formal rulemaking procedures, the appellate court "cannot logically defer to such departures, reasonable or not, when they occur by means of agency adjudications." Id. at 685.

B. The Approval Order Must Be Read as a Whole and All of Its Terms and Conditions Must Be Harmonized.

The Agency argues the "plain language" rule simply requires interpretation of the "language in question and only if there is some ambiguity is there a need to look further." (Respondents' Br. 20). This is not the law. The inquiry does not end with an isolated examination of the three or four words in question, but must necessarily extend to the entire document. See Amax Magnesium Corp. v. State Tax Comm'n, 796 P.2d 1256, 1258 (Utah 1990) (citing Peay v. Board of Ed. of Provo City Schools, 377 P.2d 490, 492 (Utah 1962); Archer v. Board of State Lands & Forestry, 907 P.2d 1142, 1145 (Utah 1995) (construction of agency rule requires considering rule as a whole). It is a fundamental, general rule of construction that a written instrument should be construed as a comprehensive whole, not in a piecemeal fashion. Utah Bankers Assoc. v. American First Credit Union, 912 P.2d 988, 993 (Utah 1996); Beaver County v. Utah State Tax Comm'n, 916 P.2d 344, 358 (Utah 1996); Jensen v. Intermountain Health Care, Inc., 679 P.2d 903, 906 (Utah 1984) ("Separate parts of an act should not be construed in isolation from the rest of the act."). All of its provisions

must be given effect. See Larrabee v. Royal Dairy Products Co., 614 P.2d 160, 163 (Utah 1980); Jones v. Hinkle, 611 P.2d 733, 735 (Utah 1980).

The Agency misapplied the law. It did not read the Approval Order as a whole but, instead, read the "in no case shall" language in isolation. It makes no attempt to harmonize its interpretation with other provisions of the Approval Order, including Condition 24, which expressly requires MagCorp to "comply" with the Unavoidable Breakdown Rule. It offers no explanation of how MagCorp can be required to comply with the Unavoidable Breakdown Rule but not receive its protection.

The Agency points to numerous statutes using the words "in no case shall." (Respondents' Br. 21 and n.6) These examples of purportedly absolute language are fraught with their own exceptions. For example, Section 78-12-12.1 of the Utah Code Annotated (1992), which governs adverse possession of real property, begins with the phrase "In no case shall," but ends with a proviso creating an exception to the requirement that the party claiming adverse possession pay all taxes levied and assessed on the property for a period of seven years. Obviously, the words "in no case shall" cannot mean absolutely no exceptions,

but must be read in light of the subsequent proviso.⁴ Other examples of exceptions in statutes using the "in no case shall" language can be found throughout the Utah Code.⁵

More closely on point, is the Agency's use of "in no case shall" in its own air quality regulations. Rule R307-14-3.A(1), which governs the transfer of gasoline to transport vehicles, provides: "Reasonably available control technology shall be required and **in no case shall** vapor emissions to the atmosphere exceed 0.640 pounds per 1,000 gallons transferred." (Emphasis added.) Paragraph 6 of that same regulation, however, creates an express exception providing that a "gasoline storage and transfer installation . . . need not comply with R307-14-3.A if it does not have a daily average throughput of more than 3,900 gallons .

"⁶ Utah Admin. R307-14-3.A(6) (1996).

C. The Approval Order Must be Construed in Light of Existing Law and the Unavoidable Breakdown Rule.

⁴ Other exceptions to this statute have also been recognized by the Courts. See e.g., Cooper v. Carter Oil Co., 316 P.2d 320, 322-4 (Utah 1957), holding that notwithstanding the "in no case shall" language of the adverse possession statute, the requirement of payment of taxes by the party claiming adverse possession may be satisfied by a third party acting on the claimant's behalf and the requirement of occupation for seven years "continuously" may be satisfied by grazing sheep only three weeks out of every year.

⁵ See e.g., Utah Code Ann. § 78-14-7.1 (1992), which limits damage awards in malpractice actions, and provides in part: "**In no case shall** the amount of damages awarded for such noneconomic loss exceed \$250,000. This limitation does not affect awards of punitive damages." (Emphasis added.)

⁶ Moreover, the general provisions of these regulations provide: "Any malfunctioning control device shall be repaired within 15 calendar days of when it was found by the owner operator to be malfunctioning, unless otherwise approved by the executive secretary." Utah Admin. R307-14-1.C. (1996). This clearly creates another exception to the "in no case" language of R307-14-3.A. by providing a grace period to repair malfunctioning control equipment.

The Agency also ignores the general rule of construction that existing law applies, unless it is unequivocally excluded in the document. See Beehive Medical Elec., Inc. v. Industrial Comm'n, 583 P.2d 53, 60 (Utah 1978). The "in no case" language, when read in conjunction with Condition 24 and the other provisions of the Approval Order, does not unequivocally state that the Unavoidable Breakdown Rule does not apply or that emissions from unavoidable breakdown are not excluded.

D. The Agency Cannot Suspend the Enforcement Protection of the Unavoidable Breakdown Rule Without Rulemaking.

By depriving MagCorp of the enforcement protection of the Unavoidable Breakdown Rule, the Agency failed to follow its own established regulation. The Agency has no authority to ignore or suspend an established regulation of general application without formal rulemaking proceedings to change its applicability to all operators. See State v. Utah Merit Sys. Council, 614 P.2d 1259, 1263 (Utah 1980); Holland, 856 P.2d at 684 (Bench, J., concurring); Utah Code Ann. § 63-46a-3(8), and -9(2) (1993 & Supp. 1996) (regarding rule amendments).⁷ The Agency's argument that the introductory language to Utah Admin. R307-1-4 (1996) allows it to override the protection of the Unavoidable Breakdown Rule is simply wrong. (Respondents' Br. 35.) The express language of that regulation provides that the Agency may require in an Approval Order, more stringent "controls" than those listed in the

⁷ The Cathode Limit contains language expressly stating that it includes emissions from unavoidable breakdown, however, as recognized by the Hearing Examiner (R. 670), there are no chlorine control devices on the Cathode Stack which could break down, as opposed to the Melt/Reactor Stack, which has a burner and scrubbers.

regulations. The Unavoidable Breakdown Rule is not a control. It is an exception to controls. Any control in an Approval Order would be subject to its provisions.

II. EVEN UNDER AN INTERMEDIATE-DEFERENCE STANDARD, THE AGENCY'S HOLDING THAT MAGCORP IS NOT ENTITLED TO THE PROTECTION OF THE UNAVOIDABLE BREAKDOWN RULE IS UNREASONABLE, ARBITRARY AND CAPRICIOUS

Even if reviewed under the intermediate-deference standard of reasonableness and rationality proposed by the Agency (Respondents' Br. 16-20.), the Agency's decision is unreasonable, arbitrary and capricious. The only reasonable interpretation is that "in no case," when read in light of the entire Approval Order and the regulations, simply modifies the 80% conversion requirement in the Melt/Reactor Limit and does not preclude the general application of either the Unavoidable Breakdown Rule or the variance procedure.

A. The Agency's Interpretation of the "In No Case" Language Is Logically Inconsistent with the Other Provisions of the Approval Order and Its Holding that MagCorp Should have Obtained a Variance.

The Agency's myopic interpretation of the "in no case" language is blatantly inconsistent with Condition 24, which requires MagCorp to comply with the Unavoidable Breakdown Rule, and inconsistent with the other provisions⁸ of the Approval Order. The

⁸ The "in no case" language in the Melt/Reactor Limit must also be read in light of both Condition 1.B.(3)(d) (B2, R. 107), which reserves authority to the Agency to reduce the Melt/Reactor Limit based on operating performance of the Chlorine Reduction Burner, and the language in Condition 1.C.(3) providing that the Cathode Stack Limit (B2, R. 107) is for "all emissions from the cathode stack, including emissions from unavoidable breakdowns." The former confirms that the Melt/Reactor Limit could be reduced and, therefore, could never have been intended to be absolute. The latter provision clearly illustrates how the Agency

Agency makes no effort to harmonize these provisions with its interpretation. The Agency's interpretation is also directly inconsistent with the Unavoidable Breakdown Rule, and is, therefore, arbitrary and capricious as a matter of law. See Merit Sys. Council, 614 P.2d at 1263; Holland, 856 P.2d at 684-85 (Bench, J., concurring).

The Agency's holding that "in no case" means absolutely "no exceptions" is logically inconsistent with its holding that MagCorp could have and should have obtained a variance. If a variance is available, then "in no case" cannot mean "no exceptions." The Agency cannot hide the logical inconsistency of its interpretation behind an intermediate-deference standard of review. It is simply unreasonable to construe "in no case" as meaning no exceptions, while holding at the same time that MagCorp should have sought a variance.

B. The Agency's Interpretation is Unreasonable, Because There is No Rational Method to Project the Amount of Emissions that Will Occur from Unavoidable Breakdowns.

The Agency freely acknowledges the unique nature and special design of the Chlorine Reduction Burner (Respondents' Br. 10-11), but argues, nonetheless, that it was reasonable to impose an absolute emission limit that somehow took into account all excess emissions from unavoidable breakdown. (Respondents' Br. 24-30.) The Agency, however, provides no rational basis or explanation of how an absolute emission limit can prospectively account for all excess emissions that would otherwise fall within the enforcement protection of the Unavoidable Breakdown Rule.

uses explicit language if, in fact, it intends to include emissions from unavoidable breakdowns in a limit.

The Agency's mathematical manipulation of annualizing the short-term limit⁹ to create a "margin"¹⁰ in relation to the annual limit is unreasonable on its face. There is simply no rational way the Agency could have developed an absolute numerical limitation that would take into account all of the unexpected events and circumstances that could give rise to an unavoidable breakdown, whether as a result of equipment failure, weather, earthquake, or other natural disaster. If, in fact, the Agency has the methodology or prescience to do so, it should adopt a regulation applying that method to all operators in the State of Utah.

The inherent inflexibility of an absolute emission limit is the very basis for the federal court decisions, cited by MagCorp, requiring unavoidable breakdown protection.¹¹ (Petitioner's Br. 20.) It is also the obvious reason behind the Agency's Unavoidable Breakdown Rule--to provide enforcement protection for excess emissions from unavoidable breakdowns, because they cannot be calculated ahead of time.

⁹ The Agency's reliance on the short-term limit is erroneous. The short-term limit had nothing to do with the annual limit or the meaning of the "in no case" language, but was enforceable only during stack-testing of the chlorine reduction burner. This was clearly stated in the Agency's 1994 inspection memorandum. (A8; R.88).

¹⁰ The Agency claims the difference between the 4,800 ton annual limit and the annual sum of the 400 lb./hr. short-term limit in the Melt/Reactor Limit allows an adequate "margin" of 3,048 tons for all emissions from unavoidable breakdown. This "margin" calculation was first announced by the Agency's counsel in her Pre-Hearing Brief. (R. 8.) There is no evidence in the record, however, that it was based on any rational methodology for prospectively calculating excess emissions from unavoidable breakdowns. MagCorp understood the 4,800 ton annual limit to include emissions from normal operations and from projected preventative maintenance, but not excess emissions from unavoidable breakdowns. (R. 553.)

¹¹ See e.g., Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 432-33 (D.C. Cir. 1973) (holding that clean air permit issued by EPA containing an emission limit that was "never to be exceeded" must still allow protection from unavoidable breakdowns) (emphasis added), cert. denied sub nom, Appalachian Power Co. v. E.P.A., 416 U.S. 969 (1974).

The Unavoidable Breakdown Rule is like a force majeure clause in a contract that excuses a party's inability to perform for the period of time the party's performance is delayed by events or circumstances beyond its control. Such clauses are necessary, because contracts cannot be drafted to account for every conceivable force majeure that will in fact occur. The Unavoidable Breakdown Rule performs the same function. It contains no numerical limitations and imposes no upper limit on the amount of excess emissions from unavoidable breakdowns, but, instead, provides a procedure to be followed during periods of unavoidable breakdown. If, as argued by the Agency, MagCorp's Melt/Reactor Limit was reasonably imposed in lieu of the Unavoidable Breakdown Rule, then the Limit should provide MagCorp the same degree of flexibility and protection afforded other operators for unavoidable breakdowns. It clearly does not.

C. The Inability to Curtail Operations Does Not Preclude Application of the Unavoidable Breakdown Rule.

For the first time in these proceedings, the Agency argues that the nature of MagCorp's continuous batch process and its inability to curtail operations without catastrophic equipment failure precludes the application of the Unavoidable Breakdown Rule.¹² The Agency argues MagCorp cannot comply with the curtailment provisions of the Rule and, therefore, is not entitled to rely on the Rule. This argument is ridiculous. It not only

¹² The Agency argues "Recognizing that MagCorp would be unable to use the breakdown rule, the Executive Secretary wrote Approval Order Condition 1.B(3)(c) to allow MagCorp a margin . . ." (Respondents' Br. 34.) This theory is drawn from thin air. The Executive Secretary never testified, and there is nothing in the record and nothing in the Agency's decision finding that MagCorp's inability to curtail was in any way the basis for the way the Melt/Reactor Limit was drafted.

contradicts the Agency's stipulation that the breakdowns in question met the definition in the Unavoidable Breakdown Rule (R. 38-40, 381-2), but also flies directly in the face of the curtailment provisions of the Rule, which require only that "all reasonable measures be taken" and expressly recognize that if operations cannot be curtailed without jeopardizing equipment, the "operator of the source shall use the most rapid, reasonable procedure to reduce emissions."¹³ The Rule obviously applies with equal force to operations which cannot be curtailed, as well as to those that can.

MagCorp took the most rapid, reasonable procedure to reduce emissions. It promptly reported the breakdowns, repaired the Chlorine Reduction Burner, and put it back on line. The Agency has never suggested that the procedure followed by MagCorp was not the most rapid and reasonable, but argues, instead, that MagCorp should have obtained a variance after an unavoidable breakdown. Nowhere, however, is it stated in the curtailment provisions of the Unavoidable Breakdown Rule that an operator, such as MagCorp, that cannot shut down its operations without jeopardizing equipment, must obtain a variance once an unavoidable breakdown occurs.

¹³ Utah Admin. R307-1.4.7.3 (1996) provides: "The owner or operator shall take **all reasonable measures** which may include, but are not limited to the immediate curtailment of production, operations, or activities at all installations of the source if necessary to limit the total aggregate emissions from the source to no greater than the aggregate allowable emissions averaged over the periods provided in the source's approval orders or the UACR. **In the event that production, operations or activities cannot be curtailed so as to so limit the total aggregate emissions without jeopardizing equipment or safety or measures taken would result in even greater excess emissions, the owner or operator of the source shall use the most rapid, reasonable procedure to reduce emissions**" (Emphasis added.)

D. The Agency's Interpretation that a Variance is Required for Unavoidable Breakdowns is Unreasonable and Inconsistent with the Policy of the Utah Air Conservation Act.

The Agency curiously attempts to sidestep its holding that the "variance procedure is an integral part of the Unavoidable Breakdown Rule," by suggesting MagCorp misinterpreted its decision.¹⁴ Nevertheless, the agency continues to argue that MagCorp should have sought a variance.¹⁵

The Agency's interpretation that once a pollution control device breaks down, the resulting emissions become predictable and must, therefore, be authorized by a variance to avoid enforcement is unworkable and unreasonable. The Variance Rule in Utah Admin. R307-1-2.3 (1996) and the Unavoidable Breakdown Rule in Utah Admin. R307-1-4.7 (1996) are mutually exclusive procedures. (See Petitioner's Br. 36.)

The Agency argues, however, that depriving MagCorp of the Unavoidable Breakdown Rule and requiring it to seek a variance somehow fulfills policy objectives of the Utah Air Conservation Act. (Respondents' Br. 30). It is the policy of the Utah Air Conservation Act "to achieve and maintain levels of air quality which will protect human health and safety, and to the greatest degree practicable . . . promote the economic and social

¹⁴ The Agency argues: "MagCorp asserts that the Board held that a variance is an integral part of the breakdown rule. **That is incorrect.** The Board questioned why MagCorp did not apply for a variance . . ." (Respondents' Br. 30; emphasis added.) It is unclear whether the Agency now disclaims it ever rendered the holding or whether it simply acknowledges it is incorrect.

¹⁵ The Agency suggests that if MagCorp had sought a variance "it may not have been in violation of its approval order." (Respondents' Br. 30.) This statement implicitly acknowledges that the variance procedure provides no assurance against enforcement for excess emissions from an unavoidable breakdown, and thus, does not provide the same enforcement protection as the Unavoidable Breakdown Rule.

development of this state" Utah Code Ann. § 19-2-101(2) (1995). The Unavoidable Breakdown Rule is presumably a reasonable regulation, which furthers the policy of the Act by providing an incentive for operators to make the investment in innovative pollution control equipment with the expectation that they will not be subject to enforcement for excess emissions resulting from unavoidable breakdown of that equipment. Depriving an operator of that enforcement protection and subjecting it to penalties while it seeks a variance for an unavoidable breakdown hardly encourages investment in experimental control equipment or otherwise promotes the policy objectives of the Act.

E. Having Ruled that the Approval Order was Unambiguous, the Agency Cannot Now Support its Decision by Resorting to Selected Extrinsic Evidence and Ignoring Uncontradicted Evidence to the Contrary.

The Agency issued its decision on the basis of what it held to be the plain and unambiguous meaning of the "in no case" language, and chose not to support its decision with extrinsic evidence. It now argues, that selected testimony of Agency witnesses supports its decision. (Respondents' Br. 23-28.) If some extrinsic evidence is to be considered, then all of the considerable documentary and testimonial evidence regarding what was considered and what was intended by the parties should have been evaluated in construing the 1992 Approval Order. Cf. Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990) (finding error in failure to resolve intent from extrinsic evidence).

The Agency now relies on selected testimony of Agency witnesses regarding their personal interpretations of the Melt/Reactor Limit, but ignores the uncontradicted, competent, credible evidence to the contrary from MagCorp witnesses, as well as the

proffered testimony of former Agency employee David Kopta who was responsible for the language in the Approval Order. The court cannot sustain an agency's decision that ignores uncontradicted, competent, credible evidence to the contrary. Harken Southwest Corp. v. Board of Oil, Gas, and Mining, 920 P.2d 1176, 1180 (Utah 1996) (citing US West Communications, Inc.v. Public Serv. Comm'n, 901 P.2d 270, 275 (Utah 1995) and Jones v. California Packing Corp., 244 P.2d 640, 644 (Utah 1952)).

The evidence was undisputed that Tom Tripp and Ron Thayer of MagCorp, and Carl Broadhead and Dave Kopta of the Agency participated in the negotiation of the Approval Order. (R. 535.) The testimony of Messrs. Tripp and Thayer was uncontradicted. The Agency never discussed unavoidable breakdowns and never advised them that the Melt/Reactor Limit included emissions from unavoidable breakdowns. (R. 537, 553; R. 587-88.) They understood the "in no case" language of the Melt/Reactor Limit as simply imposing an annual tonnage restriction on the 80% conversion limit consistent with the amount of chlorine produced by the Melt/Reactor. (R. 536.)¹⁶

Neither Mr. Kopta nor Mr. Broadhead testified at the Hearing, but Mr. Kopta's testimony was proffered. (R. 587-88.) Mr. Kopta claimed responsibility for negotiating the limit, and did not recall any negotiation discussions about breakdowns or why the language ("in no case") was written the way it was. (R. 587.)

The testimony of the Agency's witnesses as to what they thought the Approval Order meant is not competent evidence of what was intended by the Approval Order, because

¹⁶ The Melt/Reactor produced approximately 24,000 tons of chlorine per year, and the 4,800 ton Melt/Reactor Limit was based on converting 80% of the 24,000 tons. (R. 536.)

none of them participated in the negotiation of the Approval Order. Moreover, there was no evidence that any of these witnesses ever communicated his interpretation to MagCorp until long after the breakdowns occurred. Agency Inspector Steven Arbaugh testified he was "going with MagCorp's interpretation" (R. 486.) and that neither he nor the Agency staff had a uniform interpretation concerning the "In no case" language until the Fall of 1993, when he met with other staff, and they came to an "agreement" on the meaning of the Melt/Reactor Limit. (R. 492, 511.) This was long after the breakdowns in question had occurred.

The Agency points to Don Robinson, who claimed he drafted the "in no case" language and intended it to include all emissions. (R. 468.) Mr. Robinson did not communicate his interpretation to MagCorp (R. 473), and he did not prepare and could not have prepared the final Approval Order, because he left the Agency's permit section before the Agency even issued the final Plan Review, which first proposed the Melt/Reactor and Cathode Limits to MagCorp. (R. 473-4; D11, R. 231.).

**III. THE AGENCY'S INTERPRETATION
CANNOT BE UPHELD AS THE BASIS FOR
A VIOLATION BECAUSE THE "IN NO
CASE" LANGUAGE DID NOT GIVE
MAGCORP FAIR WARNING OF THE
CONDUCT THE AGENCY NOW REQUIRES.**

The Agency virtually ignores MagCorp's contention that it never received fair warning of the Agency's interpretation. The Agency argues only that the "in no case" language was alone sufficient notice to MagCorp that it was not entitled to the enforcement protection of the Unavoidable Breakdown Rule. (Respondents' Br. 22.)

Even if otherwise permissible under an intermediate-deference standard, the Agency's interpretation is, nevertheless, not entitled to any deference, because it is being used as the basis for penal sanctions, and the Agency never provided fair warning of the conduct it seeks to prohibit or require. See Gates & Fox Co. v. Occupational Safety and Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986). The due process clause "prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." Id. at 156; see also, General Elec. Co. v. E.P.A., 53 F.3d 1324, 1328-9 (D.C. Cir. 1995).

With no pre-enforcement warning, the Agency chose to use the NOV as the initial means of announcing its interpretation. In such cases, the appropriate inquiry for the appellate court is whether MagCorp was put on notice of the Agency's interpretations by reading the Approval Order and the Agency's regulations. See General Electric, 53 F.3d at 1329. If, by reading the Approval Order and the regulations, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the Agency expects it to conform, then the Agency has fairly notified a party of the agency's interpretation. Id. (citing Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976)).

The Agency's interpretation of the "in no case" language is hardly "ascertainably certain" from an Approval Order that also contains Condition 24 expressly requiring MagCorp to comply with the Unavoidable Breakdown Rule. Moreover, a reading of the Rule itself gives no "ascertainably certain" notice that it may be suspended, or that it does

not apply to operations that cannot curtail operations during a breakdown, or that a variance is required for an unavoidable breakdown.

IV. THE NOV IS TIME-BARRED AS TO EMISSIONS PRIOR TO SEPTEMBER 1993 BECAUSE THE AGENCY HAD IN ITS POSSESSION MAGCORP'S QUARTERLY EMISSION REPORTS FROM WHICH IT KNEW, OR REASONABLY COULD HAVE DISCOVERED, THE AMOUNT OF EMISSIONS FROM THE MELT/REACTOR STACK.

It is undisputed that throughout the relevant time period, the Agency had in its possession MagCorp's Quarterly Emission Reports¹⁷ from which it could readily determine the total amount of chlorine emissions from the Melt/Reactor stack and MagCorp's compliance with the rolling 12-month limit.¹⁸ The Agency, however, did not issue the NOV until September 29, 1994, for alleged exceedances of the Melt/Reactor Limit over the period from June of 1992 through April of 1994.

Conveniently ignoring the Quarterly Reports already in its possession, the Agency argues that perceived insufficiencies in MagCorp's responses to information requests

¹⁷ The Quarterly Emissions Reports (R. F4, 302-360) and the method of reporting followed by MagCorp were expressly required by Condition 17B of the Approval Order (R. 113). Those reports stated monthly totals and quarterly average totals of chlorine emissions from the Melt/Reactor stack. The 12-month rolling sum began exceeding 4,800 tons in June 1992. (R. 571.)

¹⁸ It is uncontroverted that the 12-month rolling amount of chlorine emissions from the Melt/Reactor stack could be summed from the Quarterly Reports (R. 484-86, 489, 499, 503, 505, 571-72). Agency witness Larry Larkin testified it was the "standard practice" of an inspector to review the Quarterly Reports (R. 51), and Agency witness Steven Arbaugh testified he "summed" the Quarterly Reports (R. 503). The Hearing Examiner also found that the calculation "can be done," but the Board deleted his recommendation from its final decision. (R. 780.)

somehow prevented the Agency from discovering a violation until April 26, 1994. The only logical explanation why the Agency did not take enforcement action earlier on the basis of the Quarterly Reports is that it had not yet formulated its interpretation that the Melt/Reactor Limit included excess emissions from unavoidable breakdowns.¹⁹ The Agency cannot toll the running of the statute of limitations by making repeated information requests and ignoring the information already available in its own files from which it could have reasonably discovered the facts. Anderson v. Dean Witter Reynolds, Inc., 920 P.2d 575, 579 (Utah Ct. App. 1996) (plaintiff on inquiry notice failed to investigate the facts surrounding her claim). With the Quarterly Reports in its possession, the Agency has not and cannot make the requisite showing that it "did not know and could not reasonably have discovered the facts underlying the cause of action in time to commence an action within that period." Walker Drug Co., Inc. v. La Sal Oil Co., 902 P.2d 1229, 1231 (Utah 1995). The NOV, therefore, is time-barred by the one-year statute of limitations in Utah Code Ann. § 78-12-29(3) (1992 & Supp. 1996) as to any exceedance of the Melt/Reactor Limit that occurred prior to September 1993.

CONCLUSION

For the foregoing reasons, the Agency's Order should be reversed and vacated with directions that the Agency enter an Order determining that no violation occurred.

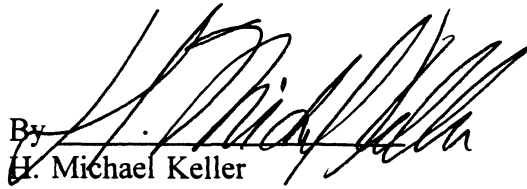
¹⁹ This is clearly evidenced by the testimony of Inspector Steven Arbaugh (R. 486-492) regarding the "agreement" reached among Agency staff in the Fall of 1993, as well as by the Agency's February 22, 1994 letter (A1; R. 54-5; see Addendum) to MagCorp. The letter requested information differentiating normal emissions from emissions due to unavoidable breakdown of the Melt/Reactor stack and sought "to clarify the definition of unavoidable breakdowns so MagCorp may understand what constitutes excess emissions."

ADDENDUM

1. Agency's February 22, 1994, letter to MagCorp (A1, R.54-5.)

DATED this 18th day of November, 1996.

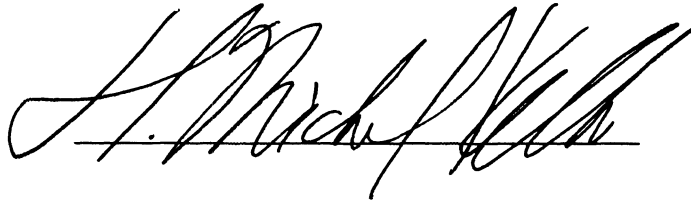
VAN COTT, BAGLEY, CORNWALL & McCARTHY

By 
H. Michael Keller
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby verify that on the 18th day of November, 1996, true and correct copies of the foregoing REPLY BRIEF OF PETITIONER were mailed, postage prepaid, to:

Janet C. Graham, Esq.
UTAH ATTORNEY GENERAL
Denise Chancellor, Esq.
Assistant Attorneys General
160 East 300 South, 5th Floor
Salt Lake City, UT 84114-0873
Attorneys for Respondents

A handwritten signature in black ink, appearing to read "S. Michael V. Smith", is written over a horizontal line.

Tab 1



DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF AIR QUALITY

Michael O. Leavitt
Governor
Dianne R. Nielson, Ph.D.
Executive Director
Russell A. Roberts
Director

150 North 1950 West
Salt Lake City, Utah 84114
(801) 536-4000
(801) 536-4099 Fax
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Reply to: State of Utah
Division of Air Quality
P.O. Box 144820
Salt Lake City, Utah 84114-4820

FILE 90F1

CERTIFIED MAIL

DAQC-290-94

February 22, 1994

Thomas Tripp
Manager, Environmental Affairs
Magnesium Corporation of America (Mag Corp)
238 North 2200 West
Salt Lake City, Utah 84116

RE: INFORMATION REQUEST REGARDING CONDITION 1.B.(3)c OF THE APPROVAL ORDER
(AO) DATED APRIL 16, 1992 - MAG CORP - TOOELE COUNTY

Dear Mr. Tripp:

The Division of Air Quality (DAQ) has performed several inspections of Mag Corp during the past year. As a result of those inspections and further dialogue with Mag Corp's environmental engineer, it has become apparent that more information is needed to evaluate the compliance status of Condition 1.B.(3)c of the AO dated April 16, 1992. The following information is requested in order to evaluate the compliance status of this condition.

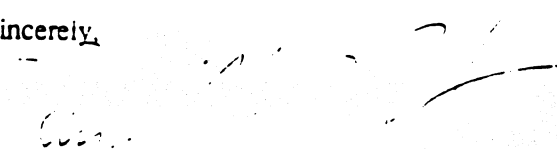
The following information is requested from July 1991, through December 1993, regarding the M/R stack:

1. The total number of operational hours and down time of the chlorine reduction burner for each month.
2. The monthly conversion rate of chlorine gas to HCL.
3. The monthly tons of chlorine emissions emitted.
4. The monthly tons of excess chlorine emissions emitted.
5. A. Monthly tons of chlorine emissions emitted from the tail gas of the chlorine plant.
B. Is the tail gas from the chlorine plant curtailed or diverted during the breakdown of the chlorine reduction burner?

The DAQ would like to clarify the definition of unavoidable breakdown so Mag Corp may understand what constitutes excess emissions. Excess emissions are emissions resulting from an **unavoidable breakdown** resulting in excess emissions beyond that which the control device is designed to control. Breakdowns that are caused entirely or in part by poor maintenance, careless operation, or other preventable upset condition or preventable equipment breakdown, shall not be considered an unavoidable breakdown.

Your reply to this information request should be returned to the DAQ within 15 days of receipt of this letter. Any questions may be directed to Steven Arbaugh at 536-4086. Your cooperation is appreciated.

Sincerely,



Russell A. Roberts, Executive Secretary
Utah Air Quality Board

RAR:SDA:kh

cc: EPA Region VIII, Mike Owens
Tooele County Health Department