

1996

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MAGNESIUM CORPORATION OF  
AMERICA,

Petitioner,

vs.

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

Respondents.

Case No. 960354-CA and  
Case No. 960433-CA

Priority No. 14

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QUALITY, DEPARTMENT OF ENVIRONMENTAL QUALITY, STATE OF UTAH  
ON A PETITION FOR REVIEW OF AN ORDER FROM THE  
UTAH AIR QUALITY BOARD

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COURT OF APPEALS

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STATEMENT OF JURISDICTION

The appeal by Magnesium Corporation of America ("MagCorp") is from final action by the Utah Air Quality Board ("Board") resulting from a formal adjudicative proceeding. The Court of Appeals has jurisdiction to review this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(a) (1992 and 1996 Supp.).

## STATEMENT OF ISSUES AND STANDARD OF REVIEW

*Issue:* Did the Utah Air Quality Board correctly conclude that MagCorp violated Utah Administrative Code R307-1-3.1 (1996) and Condition 1.B(3)(c) of its Approval Order dated April 16, 1992 for exceeding the 4,800 tons of chlorine gas per 12-month period at the melt/reactor stack from June 1992 through April 1994?

*Standard of Review:* Where the legislature has delegated to the agency an explicit or implicit grant of discretion, or where the agency interprets its own rules, the Court reviews the agency's action under the reasonable and rational intermediate-deference standard. Utah Code Ann. § 63-46b-16(4)(h) (1993); Morton Int'l, Inc. v. State Tax Comm'n, 814 P.2d 581, 589 (Utah 1991); Nucor Corp. v. State Tax Comm'n, 832 P.2d 1294, 1296 (Utah 1992); Thorup Bros Constr., Inc. v. Auditing Div., 860 P.2d 324, 327 (Utah 1993). However, absent a grant of discretion, or where the agency's actions are based on interpretations of general questions of law, review is under the correction-of-error standard. Utah Code Ann. § 63-46b-16(4)(d) (1993). Zissi v. Tax Comm'n, 842 P.2d 848, 852-53 & n.2 (Utah

1992).

#### **DETERMINATIVE LAW**

The following statutes and administrative rules are set forth either in the attached addendum or petitioner's addendum.

Utah Code Ann. § 19-2-101(2) (1995), Addendum A.

Utah Code Ann. § 19-2-108 (1995), Addendum B.

Utah Code Ann. § 19-2-110 (1995), Addendum C.

Utah Code Ann. § 63-46b-16(4) (1993), Addendum D.

Utah Code Ann. § 78-12-29(3), Pet Br. Addendum 4.

Utah Admin. R307-1-2.3, Pet. Br. Addendum 5.

Utah Admin. R307-1-3.1 (1996), Addendum E.

Utah Admin. R307-1-4, ¶ 1, Pet. Br. Addendum 6.

Utah Admin. R307-1-4.7 (1996), Id.

In addition, the Notice of Violation, dated September 29, 1994, is at Addendum F and the MagCorp Approval Order, dated April 16, 1992, is at Pet. Br. Addendum 7.

## STATEMENT OF THE CASE

### I. Nature of the Case

MagCorp, located on the edge of the Great Salt Lake, produces magnesium metal from brine extracted from the Great Salt Lake. MagCorp operates its plant under an Approval Order issued by the Executive Secretary. The Approval Order conditions specify certain limitations on air pollution emissions that are produced as part of MagCorp's magnesium production process.

The melt/reactor stack is one point at MagCorp where chlorine is emitted to the atmosphere. Under Approval Order Condition 1.B(3)(c), the annual limit on chlorine emissions from this stack is in no case to exceed 4,800 tons. On September 19, 1994, the Executive Secretary issued MagCorp a Notice of Violation alleging, among other things, violation of the 4,800 ton chlorine emission limitation.

A formal administrative hearing was held. By stipulation (R. MC-38), the only issue for hearing was:

Did MagCorp violate Utah Administrative Code R307-1-3.1 and Condition 1.B(3)(c) of the Approval Order dated April 16, 1992 for exceeding the 4,800 tons of chlorine gas per 12-month period at the melt/reactor stack from June 1992 through April 1994?

The Board concluded that MagCorp violated its 4,800 ton limit from June 1992 through April 1994 and upheld issuance of violation No. 5 of the Notice of Violation (R. MC 793-803). MagCorp is now appealing the Board's decision.

The crux of the dispute between MagCorp and the State is whether emissions from unavoidable breakdowns should be included in or excluded from the 4,800 ton limit. The Board concluded that Condition 1.B(3)(c) requires emissions from unavoidable breakdowns to be included in the annual 4,800 ton chlorine emission limitation totals (R. MC 795).

The unavoidable breakdown rule, Utah Admin. R307-1-4.7, is a generic rule whereby a pollution source may exclude emissions from its total allowable emissions when pollution control equipment is unexpectedly and temporarily broken down, provided that the source meets all the requirements of the rule. However, specific approval order conditions may override generic rules. Utah Admin. R307-1-4 (1996).

## **II. Course of Proceedings and Agency Disposition.**

On September 29, 1994, the Executive Secretary of the Utah Air Quality Board, pursuant to Utah Code Ann. § 19-2-110

(1995), issued a Notice of Violation and Order for Compliance to MagCorp, alleging violations of the Utah Air Conservation Regulations, Utah Admin. R307 (1996), and certain conditions of the 1992 Approval Order (R. MC 101-04). The parties entered into a partial settlement agreement to settle all the violations except Violation No. 5, which alleged MagCorp violated Condition 1.B(3)(c) of its 1992 Approval Order by exceeding the 4,800 ton chlorine emission limitation from June 1992 through April 1994.

A formal administrative adjudication was held February 14, 1996 to determine whether Violation No. 5 should be upheld. The Board appointed a Board member, Dr. Richard Kanner, to act as hearing officer. An administrative record was prepared (R. MC 48-359).<sup>1</sup> At the hearing witnesses were sworn, examined and cross-examined and evidence was taken (R. MC 373-579). The parties submitted pre-hearing and post-hearing briefs (R. MC 1-36, 597-667).

In written findings of fact and conclusions of law,

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<sup>1</sup> MagCorp and the State mutually agreed to a prehearing administrative record. For purposes of Utah R. App. P. 24(e) (1996), the documents that comprise the prehearing record will not be considered "exhibits." This brief cites to the prehearing record as paginated in accordance with Utah R. App. P. 11(b) (1996).

dated April 3, 1996, the hearing officer recommended to the Board that violation No. 5 should be upheld. After each Board member was given a copy of the administrative record and the hearing officer's recommendations to review (R. MC 674), the Board called a special meeting (R. MC 675-77), at which the parties through counsel made presentations to the Board and Board members had the opportunity to ask questions of counsel. The Board deliberated. It adopted the hearing officer's recommendation, with certain modifications, and issued Findings of Fact, Conclusions of Law and Order dated May 1, 1996 ("Order"), in which it upheld the issuance of Violation No. 5 (R. MC 793-803). It is from this Order that MagCorp filed a Petition for Writ of Review, Case No. 960354-CA. The Board issued a technical correction to its May 1 Order on June 12, 1996 (R. MC 804). MagCorp filed a Petition for Writ of Review, Case No. 960433-CA, and by Order of this Court dated July 23, 1996, the two appeals were consolidated.

Civil penalties may be judicially imposed for violation of approval order conditions. Utah Code Ann. § 19-2-115(1995). On June 6, 1996, the Board filed an action in Third District Court, Case No. 960903791, seeking imposition of civil penalties



against MagCorp based on the Board's Order upholding the issuance of Violation No. 5. In an Order dated July 11, 1996, the Third District Court stayed the action until completion of all appeals, based on a stipulation of the parties.

### **STATEMENT OF FACTS**

#### **I. MagCorp's Process**

Part of MagCorp's magnesium production involves a melt/reactor process. The melt/reactor is where concentrated magnesium and other salts, that have been dried to a powder, are melted to a molten salt. The melt/reactor is also where chlorine is injected into the system to convert magnesium oxide to magnesium chloride. Not all of the chlorine is consumed in the process because, in order to force this reaction, excess chlorine is used. Chlorine not consumed in the process is routed to pollution control equipment, if it is operating, and out the melt/reactor stack (R. MC 19-20, 142-45).

A piece of pollution control equipment, called a Chlorine Reduction Burner, is at the heart of this appeal. Chlorine not consumed in the melt/reactor process is routed to the Chlorine Reduction Burner where, at very high temperature,

chlorine gas is converted to hydrogen chloride gas. After conversion, additional pollution control equipment (water scrubbers) removes the hydrogen chloride gas (R. MC 392). If the Chlorine Reduction Burner is not operating, chlorine is not routed to the Chlorine Reduction Burner and the chlorine gas is emitted uncontrolled to the atmosphere.

Downstream from the melt/reactor stage, electrolytic cells continuously produce magnesium metal from magnesium chloride. The melt/reactor produces batches of molten magnesium chloride, which are fed into the electrolytic cells, where magnesium metal is continuously extracted from the magnesium chloride. If the cells are not continuously fed they will be destroyed (R. MC 397, 547). Thus, if the Chlorine Reduction Burner is not operating, MagCorp must still produce the molten material for the electrolytic cells to remain operational, and chlorine gas is emitted, uncontrolled, directly to the atmosphere. Given this continuous batch feed process, MagCorp has readily admitted that there are no production curtailment actions it can take to reduce chlorine emissions when the Chlorine Reduction Burner is off-line (R. MC 546-47).

## **II. The Approval Order Process**

An approval order is an Order by the Executive Secretary of the Board authorizing construction or modification of air pollution sources in accordance with specific conditions listed in the approval order. The Executive Secretary has statutory authority, and as authorized by the Board, to enforce rules through the issuances of orders. Utah Code Ann. § 19-2-107(2)(g)(1995). The Executive Secretary also has statutory authority to issue notices of violation to alleged violators "[w]henever the executive secretary has reason to believe that a violation of any provision of this chapter [Title 19, Chapter 2] or any rule issued under it has occurred.... Utah Code Ann. § 19-2-110(1)(a)(1995).

As required by Utah Code Ann. § 19-2-108(1)(1995) and Utah Admin. R307-1-3.1 (1996), on June 12, 1989, MagCorp submitted a Notice of Intent to the Executive Secretary for the installation of the Chlorine Reduction Burner (R. MC 206-221). MagCorp had considered other pollution control measures but it eventually settled on the Chlorine Reduction Burner (R. MC 400). The Chlorine Reduction Burner is a unique piece of equipment,

specially designed for the MagCorp facility. Pet. Br. at 7.<sup>2</sup>

The Executive Secretary may not require equipment from a particular supplier or manufacturer. The Executive Secretary reviews the information supplied in the Notice of Intent to determine whether the equipment will meet performance standards. Utah Code Ann. § 19-2-108(5)(1995), Utah Admin. R307-1-3.1(1996).

The Executive Secretary issued an Approval Order to MagCorp after evaluating the information contained in the Notice of Intent, such as the specifications of the Chlorine Reduction Burner, its expected performance and the nature of the emissions-causing process. The Chlorine Reduction Burner became operational on or about June 15, 1990 (R. MC 292).

Given the performance uncertainties with this piece of pollution control equipment, the Approval Order allowed a rolling 12 month chlorine emission limitation of 12,000 tons during the first 12 months of operation. In all subsequent operation, by the language of Approval Order Condition 1.B(3)(c), the annual

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<sup>2</sup> MagCorp is one of three magnesium plants in the United States and the only plant that uses an anhydrous process. There is no comparable piece of pollution control equipment to the Chlorine Reduction Burner. MagCorp conducted a pilot scale project before installing the full scale model (R. MC 20, 189-195).

emission limitation was "in no case" to exceed 4,800 tons.

### **III. Emissions from the Melt/Reactor Stack**

Total chlorine emissions from the melt/reactor stack without pollution control equipment would be 24,000 tons annually. In order to allow MagCorp to shake down the Chlorine Reduction Burner, the initial limitation was set at 12,000 tons. During the first year of operation, from July 15, 1990 to July 15, 1991, MagCorp did not exceed the 12,000 ton limit. Thereafter, MagCorp was subject to the 4,800 ton limit--a limitation MagCorp should easily have met under normal operating conditions.<sup>3</sup>

It was not until early 1992, when MagCorp experienced problems with the liner of the Chlorine Reduction Burner, that MagCorp exceeded the 4,800 ton limit. MagCorp's limit is based on a "rolling" 12 month average. This means that emissions are counted for the most recent 12 months (e.g., July 1992 to June 1993). As emissions for a new month (e.g., August 1993) are added to the total, the emissions for the thirteenth month

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<sup>3</sup> The Board concluded that annual emission from the melt/reactor stack, under normal operating conditions, would be approximately 1,752 tons (R. MC 797). See *infra* pp. 28, 34.

previous (e.g., July 1992) are dropped. For the rolling 12 months starting in June 1992, MagCorp emitted 5,092 tons of chlorine to the atmosphere. For the rolling 12 months ending December 1992 through September 1993 annual chlorine emissions were 8,000 tons to more than 9,000 tons (R. MC 44). Since April 1994, MagCorp has stayed within its 4,800 ton limit (R. MC 527).

The "in no case" language does not allow MagCorp to rely on the unavoidable breakdown rule. However, a source experiencing more than temporary equipment failure may apply to the Board for a variance from its approval order conditions. Utah Admin. R307-1-2.3(1996). If such a variance were granted, the source would not be in violation if it exceeded its approval order limitation during the period approved by the Board for equipment repair. MagCorp did not apply to the Board for a variance to Approval Order Condition 1.B(3)(c).

#### **SUMMARY OF ARGUMENTS**

The Approval Order Condition 1.B(3)(c) language "In no case shall the chlorine gas emissions exceed 4,800 tons" is plain on its face and to a person of ordinary intelligence means that it is an absolute limit. When viewed in light of the policy of

the Air Conservation Act, the practical implications that follow if MagCorp's interpretation is followed, and MagCorp's inability to meet the curtailment provisions of the breakdown rule, it makes no sense to conclude that emissions that occur during unavoidable breakdowns are to be excluded from the 4,800 ton chlorine limitation.

Understanding MagCorp's unique continuous batch process and its inability to take curtailment actions when the Chlorine Reduction Burner is shut down, leads inexorably to the conclusion that the unavoidable breakdown rule does not apply to Approval Order Condition 1.B(3)(c). The Executive Secretary's approach of writing an emission limitation that allows an adequate margin of emissions to account for breakdowns, operator error, maintenance, etc., is rational and reasonable.

MagCorp violated its emission limitation on twenty three separate occasions from June 1992 through April 1994. MagCorp and the State appear to be in agreement that some of the violations are not time barred. However, MagCorp's obstinacy in not fully reporting emissions data in response to numerous information requests by the Executive Secretary does not bar any

of the twenty-three violations.

#### ARGUMENT

I. THE "IN NO CASE" APPROVAL ORDER CONDITION IS  
UNAMBIGUOUS AND IN ANY EVENT THE BOARD'S  
INTERPRETATION IS REASONABLE AND RATIONAL.

Beginning in July 1991, MagCorp was required to meet an annual chlorine emission limitation of 4,800 tons. MagCorp did not meet this limitation. MagCorp argued that it could meet the limitation by relying on the breakdown rule. The dispute between MagCorp and the Board turns on whether Approval Order Condition 1.B(3)(c) should be read as including or excluding emissions that occur during breakdown events. Condition 1.B(3)(c) states:

B. Melt/Reactor Stack

....

- (3) Cl<sub>2</sub> - The emissions shall be determined as follows:

....

- (c) All subsequent operation -  
conversion of no less than 80% of  
the chlorine gas to HCL in any 12-  
month period, in accordance with  
the chlorine balance procedure plan  
as required in Condition 16.D - In  
no case shall the chlorine gas  
emissions exceed 4,800 tons per 12-  
month period in any subsequent 12-



month period of operation.  
(emphasis in original)

Both parties have referred to the disputed language as the "in no case" condition.

**A. The Standard of Review is Reasonableness and Rationality.**

MagCorp has phrased its issues on appeal in an effort to lead the Court into reviewing the Board's action under a correction-of-error standard. MagCorp's rendition of the issues<sup>4</sup> is: (1) the Board exceeded its authority in not applying the breakdown rule to MagCorp (i.e. to emissions from the melt/reactor stack); (2) the Executive Secretary's failure to provide prior notice of the meaning of Condition 1.B(3)(c) violated due process; and (3) when interpreting Condition 1.B(3)(c) and the breakdown rule, the Board erroneously applied principles of general law. Pet. Br. at 1-3. What MagCorp is attempting to do on appeal is to re-litigate, de novo, issues that were decided by the Board after MagCorp had a full and fair opportunity to present its case at a formal adjudicative hearing and to argue its case before the Board.

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<sup>4</sup> Excluding the statute of limitations issue. See *infra*, Part III.

In requesting review under Utah Code Ann. § 63-46b-16(4)(b), MagCorp has not pointed to any statutory provision to show that the Board acted beyond its jurisdiction. There is no explicit or implicit statutory provision that states the Board shall always apply the breakdown rule to all sources. In fact, there are specific statutory provisions that give the Board and the Executive Secretary discretion to control air pollution sources. Utah Code Ann. § 19-2-104(1)(a)(1995 and 1996 Supp.), § 19-2-108(1995). Nor has MagCorp pointed to any unlawful procedure associated with the Board's action as required for relief under § 63-46b-16(4)(e)(1993).

MagCorp's first argument is that the Board has failed to follow its own rules. Pet. Br. at 19-20 (*see e.g.*, p.19, "The Agency is bound by its own rules."). Actually, what MagCorp is

requesting is review under § 63-46b-16(4)(h)<sup>5</sup>. And the standard of review under paragraph (4)(h) is that the court will not disturb the agency's ruling unless it determines it exceeds the bounds of reasonableness and rationality. Morton Int'l Inc. v. State Tax Comm'n, 814 P.2d 581, 587-88 (Utah 1991); Nucor Steel v. State Tax Comm'n, 832 P.2d 1294, 1297-98 (Utah 1992); Thorup Bros. Const., Inc. v. Auditing Div., 860 P.2d 324, 327 (Utah 1993); Pickett v. Utah Dep't of Commerce, 858 P.2d 187, 191 (Utah App. 1993).

To come within the ambit of the intermediate reasonable and rational review standard, the court determines whether the legislature has given the agency an explicit or implicit grant of discretion. See e.g., Morton Int'l, 814 P.2d 581, 589 (Utah 1992) (Court grants "an agency deference on the basis of an

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<sup>5</sup> Section 63-46b-16(4)(h)(1993) states: "The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

....

- (h) the agency action is:
  - (i) an abuse of the discretion delegated to the agency by statute;
  - (ii) contrary to a rule of the agency;
  - (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
  - (iv) otherwise arbitrary or capricious."

explicit or implicit grant of discretion contained in the governing statute"). In the complex and technical area of control of air pollution sources, the legislature has recognized that deference should rest with the Board and the Executive Secretary.

A general policy of the Air Conservation Act is to achieve and maintain air quality that will protect health, safety and the environment. Utah Code Ann. § 19-2-101(2) (1995). The legislature has granted statutory authority to the Utah Air Quality Board to make rules to control, abate and prevent air pollution from all sources and to establish "the maximum quantity of air contaminants that may be emitted by an air contaminant source." Utah Code Ann. § 19-2-104(1)(a) (1995 and 1996 Supp.). In addition, Utah Code Ann. § 19-2-108(1995) grants the Board and the Executive Secretary authority over the construction or modification of air pollution sources. Thus, the legislature's delegation of discretion to the Board and the Executive Secretary to make rules and decisions concerning control of air pollution sources brings review of their actions under the intermediate deference standard.

Second, MagCorp would have the Court review the Board's decision that the breakdown rule does not apply to Condition 1.B(3)(c) under the rules construing disputed contract language. Pet. Br. at 28. But the Approval Order is not a contract. It is the way in which the Board and the Executive Secretary carry out their statutory duty to place controls on air pollution sources. The interpretation of an approval order is also similar to application of an agency rule. Therefore, review of the Board's action should be under the intermediate deference standard.

**B. The "in no case" Language Denotes Prohibitory Action and Plainly States That There are No Exceptions to the 4,800 Ton Chlorine Emissions Limitation.**

The starting point in interpreting the approval order condition is the plain meaning of the language in question and only if there is some ambiguity is there a need to look further. See Schurtz v. BMW of N. Am., Inc., 814 P.2d 1108, 1112 (Utah 1991) (we first look to the statute's plain language); Archer v. Board of State Lands & Forestry, 907 P.2d 1142, 1145 (Utah 1995) (statutes and administrative rules should generally be construed according to their plain language); Trolley Square Assocs. v. Nielson, 886 P.2d 61, 63 (Utah App. 1994) (contract

interpretation begins with an examination of the contract itself).

The language at issue in the approval order, "in no case shall the chlorine gas emissions exceed 4,800 tons per 12-month period...", is clear on its face. The Board specifically found the language to be clear and unambiguous. Responding to MagCorp's argument "that administrative agencies formulate rules that 'are sufficiently definite and clear that a person of ordinary intelligence will be able to understand and abide by them,'" the Board concluded: "The 'In no case' language to a person of ordinary intelligence would mean just that - no exceptions." (*emphasis in original*) (R. MC 796-97). The Board's decision is consistent with the way in which "in no case shall" has been used in over twenty sections of the Utah Code to denote prohibitory actions.<sup>6</sup> Also, to further draw attention to its

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<sup>6</sup> Utah Code Ann. § 2-4-9, Airport zoning regulations (**in no case shall** such administrative agency be or include any member of the board of adjustment); § 6-1-6, Agriculture, Claims to be filed (**in no case shall** such extension be extended beyond nine months); § 13-14a-2(3)(a), Right of return on termination of retailing agreement (**in no case shall** the adjustment cause the value of the wholegood to go below the wholesale value listed....); § 17-5-232, County roads and airports (may designate the county roads to be maintained by the county... which **in no case shall** be more than three in the same direction); § 17A-2-543, Special Districts, Contractual powers, bond issues (**In no case shall** the amount of bonds exceed the benefits assessed); § 17A-2-719(5), Duty of County Assessor (**in no case shall** any land be taxed for irrigation purposes); § 35-1-65(1), Temporary disability (**in no case shall**

importance, the prohibitory language in Approval Order Condition 1.B(3)(c) was underlined.

MagCorp's assertion that failure to notify it of the Executive Secretary's interpretation of Condition 1.B(3)(c) is a violation of due process cannot stand given that the Board found the "in no case" language is plain on its face. In Camp v.

Deseret Mut. Benefit Ass'n, 589 P.2d 780, 782 (Utah 1979)

(citations omitted), the court stated: "A term is not necessarily ambiguous simply because one party seeks to endow it with a different meaning from that relied on by the drafter .... [A] party may get a different meaning by placing a force [sic] or strained construction on it in accordance with his interest."

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such compensation benefits exceed 312 weeks); § 35-1-75(1)(d), Average weekly wage (**in no case shall** the daily wage be multiplied by less than ...); § 35-2-108(3), Limitations (But **in no case shall** the dependents' claim for death benefits be actionable...); § 35-8-2(6)(c), Apprenticeship Council (establish standards for apprenticeship agreements which **in no case shall** be lower than...); § 35-9-6(2)(d)(i), Standards, Procedure.. (**In no case shall** the period of a temporary order exceed one year); § 40-10-15(1), Performance bond (**in no case shall** the bond for the entire area under one permit be less than \$10,000); § 59-7-201(3), Minimum tax (**in no case shall** the tax be less than \$100); § 59-7-602(1), Credit for cash contributions... (but **in no case shall** the credit allowed exceed \$1,000); § 76-8-711(3), Withdrawal of consent to remain on campus or facility (**In no case shall** consent be withdrawn for longer than fourteen days...); § 78-12-12, [Adverse possession] (**in no case shall** adverse possession be considered established ... unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously...); § 78-12-12.1, Possession and payment of taxes (**in no case shall** adverse possession be established ...); § 78-14-7.1 Limitation of award... (**In no case shall** the amount of damages awarded for such noneconomic loss exceed \$250,000).

MagCorp's interpretation that the "in no case shall" language excludes emissions from unavoidable breakdowns is not credible. It requires a forced and strained reading of the language and is entirely self-serving. Notwithstanding that the 4,800 ton emission rate had a large emissions margin over and above those emissions produced during normal operations,<sup>7</sup> MagCorp had to resort to excluding emissions from "significant unavoidable breakdowns"<sup>8</sup> when it could not meet the 4,800 ton limit (R. MC 58-66 ).

**C. Support for the Board's Decision, Even if the Language is Considered Ambiguous, Comes From Testimony of Witnesses, MagCorp's Inability to Meet the Requirements of the Breakdown Rule, and the Policy of the Air Conservation Act.**

Courts look beyond the document itself and resort to other methods of construing language only when the language is ambiguous. Stucker v. Summit County, 870 P.2d 283, 287, (Utah App.), cert. denied 879 P.2d 266 (1994). See also Hanchett v.

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<sup>7</sup> See *supra* note 3 and *infra* pp. 28, 34.

<sup>8</sup> In responding to the Executive Secretary's request for information about total chlorine emissions from the melt/reactor stack, Mr. Brent Cook, MagCorp's process engineer, wrote that MagCorp was in compliance with Condition 1.B(3) if emissions from significant unavoidable breakdowns were excluded from total emissions (R. MC 64-65). As discussed *infra*, pp. 43, "significant unavoidable breakdowns" is a term coined by Mr. Cook.



Burbidge, 59 Utah 127, 135, 202 P.377 379-80 (1921) ("When language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction."); accord Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick, 890 P.2d 1017, 1020 (Utah 1995). Even if the disputed condition is considered to be ambiguous, and even if the Court should view an approval order as a contract, based on the record, the Board's decision that unavoidable breakdown emissions are to be included in the 4,800 ton limitation is logical, reasonable and rational.

The task of interpreting an ambiguous agency order, such as an approval order, is similar to the task of interpreting an ambiguous court order. In Park City Utah Corp. v. Ensign Company, 586 P.2d 446, 450 (Utah 1978) (*quotation and citation omitted*), the court found that where construction of an ambiguity in a court order is called for, "it is the duty of the court to interpret an ambiguity which will make the judgment more reasonable, effective, conclusive, and one which brings the judgment into harmony with the facts and the law." The Board made its decision after reviewing the administrative record, including a transcript of the administrative hearing. Therefore,

the Board was in a position to resolve any conflicts in the evidence.<sup>9</sup> Furthermore, the Board's decision interprets any ambiguity in a manner that is reasonable and consistent with the overall purpose of the Air Conservation Act and with the MagCorp approval order.

The Board's decision involves the interplay of the unavoidable breakdown rule and Approval Order Condition 1.B(3)(c). In Union Pac. R.R. Co. v. Auditing Div., 842 P.2d 876, 879 (Utah 1992), the court stated that it will uphold agency rules if they are reasonable and rational and will apply an intermediate deference standard in reviewing whether an agency erred in applying its rules.<sup>10</sup> See also Williams v. Public Serv. Comm'n, 754 P.2d 42, 50 (Utah 1988). The plain language of the

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<sup>9</sup> On review, the appellate court will not substitute its judgment as between two reasonably conflicting views, even though the court might have come to a different conclusion had the case come before it de novo. Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989); accord Tasters Ltd. Inc. v. Dept. Employment Security, 819 P.2d 361, 365 (Utah App. 1991).

<sup>10</sup> Interpretation of an approval order is like the application of a rule. While an approval order is written specific to a source, it nonetheless has many similarities to a rule. The agency uses its technical expertise to draft both a rule and an approval order; it publishes either the proposed rule or approval order for public comment; and the rule or approval order may be changed as the result of public comment. Utah Code Ann. § 63-46a-4(1993 and 1996 Supp.) (rulemaking procedure) and Utah Admin. R 307-1-3.1.3(1996) (approval order procedure). Both a rule and an approval order regulate sources of air pollution--one is of general application, the other is source-specific.

approval order condition and the policy implications that follow if MagCorp's interpretation were to be adopted will show the Court that the Board's decision is reasonable and rational.

Condition 1.B(3)(c) is not a standard approval order condition and appears to be unique to MagCorp's approval order (R. MC 442). The Division of Air Quality staff involved with the development and application of this approval order condition testified that their understanding is that all chlorine emissions from the melt/reactor stack, including those from unavoidable breakdowns, are included in the 4,800 ton limitation.

In his testimony, Don Robinson, the permitting engineer who authored the language in condition 1.B(3)(c), was clear as to its meaning:

What that language means is that the limit of 4800 tons is never to be exceeded including breakdowns, shut downs, where the Chlorine Reduction Burner could not operate, or where it could operate only at a reduced efficiency. In other words, under all circumstances.

(R. MC 468). Mr. Robinson also testified that the language was underlined to draw to MagCorp's attention that "this was a very important condition and that specifically the breakdowns were to

be included in that limit." Id. Mr. Montie Keller, who attended some of the meetings with MagCorp prior to issuance of the Approval Order and who at the time was in charge of permitting, recalled that the 4,800 ton limit was applicable to all chlorine emissions from the melt/reactor stack, including those from unavoidable breakdowns (R. MC 444-45). Larry Larkin was assigned by the Division to the MagCorp facility as a compliance inspector from 1987 through 1992 (R. MC 390). He inspected the MagCorp facility when the Chlorine Reduction Burner first started up, during its first year of operation when the 12,000 ton limit was in effect, and also during the burner's second year of operation when the 4,800 ton limit became effective (R. MC 408). Mr. Larkin's determination was that all chlorine emissions would be included in the 4,800 ton limit, including:

Emissions from normal operations, from breakdowns, power outages, scheduled maintenance, any emissions from when the Chlorine Reduction Burner was operating and from when it wasn't operating, any chlorine that was included in the material balance would be included in the emission limit.

(R. MC 409). Mr. Larkin formed his understanding of the meaning of Condition 1.B(3)(c) at the time the approval order was issued.

There is consistency in the testimony of the author of the approval order condition, Mr. Robinson, the branch manager in charge of permitting, Mr. Keller, and the compliance inspector at the time the Chlorine Reduction Burner commenced operation, Mr. Larkin, bearing out that the Division expected MagCorp to comply with the 4,800 ton limit under all circumstances. Mr. Arbaugh, the compliance inspector who was assigned to MagCorp after Mr. Larkin, also arrived at the same conclusion (R. MC 489).

It is undisputed that MagCorp, under normal operating conditions, can easily meet its 4,800 ton emission limitation. The Board was persuaded that MagCorp had a margin of 3,048 tons per year to account for unavoidable breakdowns, etc. based on running the Chlorine Reduction Burner 24 hours per day 365 days a year at an hourly rate of 400 pounds per hour (R. MC 797).<sup>11</sup>

The prohibitory "in no case shall" phrase and MagCorp's inability to change its manufacturing process, which results in chlorine emissions 365 days a year whether or not the Chlorine

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<sup>11</sup> In questioning before the Board, MagCorp's attorney admitted to Board member Vanboerum: "If the burner is operating properly, it meets the 400 pounds" (R. MC 753). The 400 pounds is the short term hourly limit on the melt/reactor stack as specified in Approval Order Condition 1.B(3) (R. MC 106).

Reduction Burner is operating, convinced the Board that MagCorp cannot claim compliance with its emissions limitation by relying on the unavoidable breakdown rule. During the disputed period MagCorp relied on the unavoidable breakdown rule to exclude from its 4,800 ton emission limit those chlorine emissions discharged uncontrolled to the atmosphere for periods of up to six weeks.<sup>12</sup> (R. MC 541). In the rolling 12 month period from December 1992 through September 1993 annual chlorine emissions were 8,000 tons to over 9,000 tons (R. MC 44). To interpret the breakdown rule as applying under those conditions would effectively result in no emissions limitation being applied to the melt/reactor stack.

The variance rule is available to MagCorp if it experiences expected or catastrophic equipment failure. Utah Admin. R307-1-2.3(1996). MagCorp, could have applied to the Board for a variance from its approval order conditions under Utah Admin. R307-1-2.3. If such a variance were granted, MagCorp would not have had to meet its 4,800 ton emission limitation

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<sup>12</sup> MagCorp's Production Engineer, Mr. Tripp, testified that because of liner problems with the Chlorine Reduction Burner, MagCorp had to take the burner down for three weeks on five or six separate occasions. Further, the Chlorine Reduction Burner was not operating during the six weeks it took to reline the unit in May 1993. R. MC 542-44.

during the period approved by the Board to repair the liner.

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 when the Chlorine Reduction Burner was down for periods as long as six weeks (R. MC 798). Had MagCorp applied for a variance, it may not have been in violation of its approval order. Furthermore, the variance process allows public review and scrutiny of expected exceedences during the variance period. Utah Code Ann. § 19-2-113(1)(b)(1995) ("the Board may grant the requested variance following an announced public meeting..."). Such scrutiny was avoided by MagCorp.

MagCorp's interpretation of Condition 1.B(3)(c) does not promote the policy and purpose of the Utah Air Conservation Act, which, among other things, is to achieve and maintain levels of air quality that protect human health and safety and prevent injury to plant and animal life and property. Utah Code Ann. § 19-2-101(2)(1995). The Board's decision is consistent with that policy.

II. IT IS FAIR AND RATIONAL NOT TO APPLY THE  
BREAKDOWN RULE TO THE APPROVAL ORDER  
CONDITION LIMITING CHLORINE EMISSIONS FROM  
THE MELT/REACTOR STACK BECAUSE OF MAGCORP'S  
UNIQUE PRODUCTION PROCESS.

In general, the unavoidable breakdown rule, Utah Admin. R307-1-4.7, states that emissions resulting from unavoidable breakdowns will not be a violation of Utah Admin. R307. However, application of the breakdown rule requires the source to take certain measures that reduce emissions during breakdown conditions. Utah Admin. R307-1-4.7.3(1996). An objective way to evaluate whether the breakdown rule should apply to Approval Order Condition 1.B(3)(c), chlorine emissions from the melt/reactor stack, is to determine whether MagCorp can meet all of the requirements of the breakdown rule. Also, approval order conditions are source-specific and may differ from generic rules. See e.g., Utah Admin. R307-1-4(1996).

MagCorp contends that the breakdown rule is universally applicable and should also apply to MagCorp. In essence, MagCorp argues that the Board's action is contrary to its rule or prior practice and, in any event, such action is arbitrary and capricious. See e.g., Pet Br. at 17, 19, and 30. Accordingly,



review is under Utah Code Ann. § 63-46b-16(4)(h)(1993), where the court gives the agency intermediate deference under the reasonable and rational standard of review.<sup>13</sup> See the following cases as supporting the intermediate deference standard: Morton Int'l Inc. v. State Tax Comm'n, 814 P.2d 581, 587-88 (Utah 1991) and Nucor Steel v. State Tax Comm'n, 832 P.2d 1294, 1296 (Utah 1992) (review of agency action that is an abuse of discretion delegated to the agency by statute); Thorup Bros. Const., Inc. v. Auditing Div., 860 P.2d 324, 327 (Utah 1993) (review of agency action that is contrary to the agency's rule); Pickett v. Utah Dep't of Commerce, 858 P.2d 187, 191 (Utah App. 1993) (review of agency action that is contrary to the agency's prior practice); Anderson v. Public Serv. Comm'n, 839 P.2d 822, 824 (Utah 1992) (review of agency action that is arbitrary and capricious).

The Petitioner's brief does not offer a full discussion of the breakdown rule. Importantly, a part of the breakdown rule, Utah Admin. R307-1-4.7.3(1996), requires:

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<sup>13</sup> As discussed in Part I above, the Board's action comes within the intermediate standard of review because the legislature has delegated to the Utah Air Quality Board and the Executive Secretary broad discretion to make rules and decisions concerning the control of air pollution sources.

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.

The breakdown rule, at Utah Admin. R307-1-4.7.4, goes on further to state: "Failure to comply with curtailment actions required by R307-1-4.7.3 will constitute a violation of these rules."

Because of its production process, MagCorp by definition cannot meet the curtailment requirements of the breakdown rule.

Mr. Tom Tripp, MagCorp's Production Manager, testified at the administrative hearing that the melt/reactor cells are fed magnesium chloride daily in three batches, each batch of six hours duration, 365 days per year (R. MC 518, 544-546). Mr. Tripp further testified that because the melt/reactor cells provide the feed for the electrolytic cells--which have a continuous demand for the feed material--MagCorp cannot reduce production or take other curtailment actions when the Chlorine

Reduction Burner is off-line or inoperable<sup>14</sup> (R. MC 517-518, 546-547).

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 over and above emissions produced during normal operation to accommodate breakdown and other emissions. The Board concluded that MagCorp could operate under normal conditions with emissions of 1,752 tons annually (36.5 percent of the 4,800-ton emission limit), leaving a margin of 3,048 tons annually (63.5 percent of the 4,800-ton limit) to account for periods of unavoidable breakdown (R. MC 786). The Executive Secretary's approach, as upheld by the Board, is fair, rational and consistent with the rules. Moreover, Utah Admin. R307-1-4(1996) states: "Section R307-1-3

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<sup>14</sup> The breakdown rule, Utah Admin. R307-1.4.7.4(1996), further states:

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...

MagCorp states that the electrolytic cells would suffer catastrophic damage if they were allowed to cool (R. MC 515). It is obvious from the nature of the process that all parties knew, prior to the issuance of the approval order, that MagCorp would not be able to take any effective steps to reduce emissions when the Chlorine Reduction Burner was off-line.

may require more stringent controls than listed herein, in which case the requirements of R307-1-3 [Approval Orders] must be met." Thus, the specific Approval Order Condition 1.B(3)(c), not the generic breakdown rule, Utah Admin. R307-1-4.7, is controlling with respect to emissions from the melt/reactor stack.

The cases cited by MagCorp to buttress its claim that the breakdown rule is universally applicable (Pet. Br. at 20) are not on point. First, MagCorp's continuous batch process is unique and is unlike processes used by other industries. Second, unlike other sources, MagCorp has a latitude in its emission limitation over an above emissions produced during normal operating conditions. The cases cited by MagCorp generally involve standards that could be met most of the time by a source using best available pollution control equipment but during malfunctions, process startup and shutdowns, the source may temporarily exceed the standard. See Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 432-33 (D.C. Cir. 1973) (no showing in the record that standard can be equaled during periods of less than normal operation); FMC Corp. v. Train, 539 F.2d 973, 977, 985 (4th Cir. 1976) (pollution control standard developed by

allowing a variability factor of 0.00-0.5 percent daily and 2-3 percent monthly for properly designed and operated treatment facilities); American Petroleum Institute v. EPA, 661 F.2d 340, 351 (5th Cir. 1981) (standards for deck drainage could be met 97.5 percent of the time and those for produced water 99 percent of the time); Marathon Oil v. EPA, 564 F.2d 1253, 1273 (9th Cir. 1977) (same as preceding case). Unlike MagCorp, the sources in the foregoing cases did not have the latitude in their permits to accommodate upset operating conditions.

In the cases cited above, EPA argued that it could use prosecutorial discretion if a source temporarily violated the standard. The court found this informal approach unsatisfactory. See e.g., Marathon Oil, 564 F.2d at 1273. The Executive Secretary's approach to setting an emission limitation on the melt/reactor stack is different from the breakdown cases cited above. Under the Executive Secretary's approach, MagCorp has the certainty of knowing the standard it must meet and the flexibility to meet the standard even under less than ideal operating conditions. Such an approach is reasonable given MagCorp's unique operating process.

**III. BECAUSE OF MAGCORP'S OBSTINACY IN NOT FULLY  
REPORTING EMISSIONS DATA, THE NOTICE OF  
VIOLATION WAS TIMELY ISSUED FOR ALL TWENTY-  
THREE VIOLATIONS.**

MagCorp is required to comply with the 4,800 ton emission limitation on a rolling 12 month period. Each month, emissions are summed for the previous 12 months. Thus, every month a new 12 month period is established. The Notice of Violation issued to MagCorp is for exceeding the rolling 12 month 4,800 ton emission limitation on 23 separate occasions, from June 1992 through April 1994. The Board found that because of MagCorp's confusing data submissions to the Executive Secretary, MagCorp's reluctance to submit data on certain emissions, and MagCorp's review and re-submission of data, the Executive Secretary was not in a position to have accurate emissions data upon which to base the issuance of a Notice of Violation prior to April 26, 1994 (R. MC 799-800).

MagCorp has argued there is a one-year statute of limitations on actions upon a statute for a penalty to the state. Utah Code Ann. § 78-12-29 (1992 and 1996 Supp.). However, MagCorp does not challenge, as time barred, those violations that

occurred in September 1993 or later. Pet. Br. at 38.<sup>15</sup> The State and MagCorp agree that the eight violations that occurred from September 1993 through April 1994 are not barred by a one-year statute of limitations.

At issue is when the cause of action accrues for the fifteen violations that occurred each month from June 1992 through August 1993. The Utah Supreme Court has held that statutes of limitations commence to run when the cause of action accrues when all elements of the cause of action come into being and the claim is remediable in the courts. Retherford v. AT&T Communications of Mt. States, 844 P.2d 949, 975 (Utah 1992); Davidson Lumber Sales, Inc. v. Bonneville Inv., 794 P.2d 11, 19 (Utah 1990). Furthermore, when the action is dependent on the filing of a return, the statute of limitations does not begin to

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<sup>15</sup> Utah Code Ann. § 19-1-305(1995) provides that the issuance of a Notice of Violation under Utah Code Ann. § 19-2-110

tolls the running of the period of limitation for commencement of a civil action brought to assess or collect a penalty until the date the notice of violation, order, or agency action becomes final under Title 63, Chapter 46b, Administrative Procedures Act, or for a period of three years, whichever occurs first.

Issuance of the Notice of Violation on September 29, 1994 to MagCorp tolled the statute of limitations.

run until the return is filed. Gay Hill Field Serv. v. Board of Review of Industrial Comm'n, 750 P.2d 606, 609-10 (Utah App. 1988); State Tax Comm'n v. Spanish Fork, 99 Utah 177, 182, 100 P.2d 575, 577 (1940).

The appellate court affirms an agency's factual findings if supported by substantial evidence<sup>16</sup> when viewed in light of the whole record before the court. Utah Code Ann. § 63-46b-16(4)(g) (1993); see also Elks Lodges #719 (Ogden) & #2021 (Moab) v. Department of Alcoholic Beverage Control, 905 P.2d 1189, 1193 (Utah 1995); Kennecott Corp. v. State Tax Comm'n, 858 P.2d 1381, 1385 (Utah 1993). The appellate court defers assessment of conflicting evidence to the agency. Albertsons, Inc. v. Department of Emp. Sec. 854 P.2d 570, 575 (Utah App. 1993); Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989) (appellate court defers to the agency and will not substitute its judgment as between two reasonably conflicting views, even though the court might have come to a different conclusion had the case come before it for de novo review).

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<sup>16</sup> Substantial evidence is the quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. Elks Lodge, 905 P.2d at 1193. See also First Nat'l Bank v. County Bd. of Equalization, 799 P.2d 1163, 1165 (Utah 1990).



MagCorp challenges the Board's conclusion, that there is no time bar to any of the violations that occurred June 1992 to April 1994, as not being supported by substantial evidence. Pet. Br. at 39-40. MagCorp is required to marshal all the evidence supporting the Board's findings and demonstrate that despite such evidence, those factual findings are not supported by substantial evidence from the record. See Elks Lodge, 905 P.2d at 1193, Kennecott, 858 P.2d at 1385 (challenge to an agency's factual findings imposes a marshaling burden on the petitioner). MagCorp has not met its marshaling burden. See Pet. Br. at 40, n. 22. However, as recounted below, MagCorp's reluctance to submit data requested by the Executive Secretary shows there is substantial evidence in the record for the Board's decision in upholding the issuance of the Notice of Violation for all twenty-three violations.

Under Approval Order Condition 17B, MagCorp is required to submit quarterly emission reports, including "[a]verage quarterly values of chlorine emissions and the daily exceedances of the 30-day period rolling sum of condition numbers 1B(3) [melt/reactor stack] and 1C(3) [cathode stack]" (R. MC 113).

Those reports do not contain rolling twelve month totals of chlorine emissions from the melt/reactor stack but do include all chlorine emissions from the stack computed on an average 30-day rolling total.

MagCorp submitted quarterly emissions reports to the Executive Secretary showing "average 30 days rolling sum melt/reactor chlorine emissions." (R. MC 318-60). The quarterly report dated July 7, 1992 (sic)<sup>17</sup> is for the months April, May and June, 1993; the report dated October 5, 1993 is for the months July, August and September, 1993. Any hint the Executive Secretary could glean that MagCorp may have been exceeding its 4,800 ton chlorine approval order limit was from the quarterly emissions report. The first opportunity the Executive Secretary had to rely on a quarterly report submitted less than one year before the issuance of the Notice of Violation was the report dated October 5, 1993 listing average 30-day rolling totals of chlorine emissions for July, August and September, 1993. Therefore, the ten violations for the months of July 1993 through April 1994 should not be barred by a one-year statute of

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<sup>17</sup> It is obvious that the year should be 1993 not 1992 because the report is for the quarter April, May and June 1993.

limitations. As discussed below, the data in the quarterly emission reports did not accurately reflect the data needed to compute the rolling 12 months emission limitation.

The remainder of the violations, from June 1992 through June 1993, are not subject to a one-year statute of limitations because they were not reasonably discoverable until MagCorp fully responded to the Executive Secretary's written requests and Order to Comply for accurate data involving all chlorine emissions from the melt/reactor stack. See R. MC 53-77, 364-67. The "reasonably discoverable" requirement with respect to the thirteen violations that occurred from June 1992 through June 1993 is consistent with case law.

The Utah Supreme Court in Warren v. Provo City Corp., 838 P.2d 1125, 1129 (Utah 1992) (footnotes omitted) announced three circumstances when the discovery rule applies:

(1) in situations where the discovery rule is mandated by statute; (2) in situations where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct; and (3) in situations where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action.

The exceptional circumstances test requires the plaintiff to make an initial showing "that the plaintiff did not know of and could not reasonably have known of the existence of the cause of action in time to file a claim within the limitation period." Warren, 838 P.2d at 1129. Accord Walker Drug Co. v. La Sal Oil Co., 902 P.2d 1229, 1231 (Utah 1995).

Starting in March 1993, the Executive Secretary endeavored to obtain from MagCorp accurate and complete chlorine emissions data from the melt/reactor stack (R. MC 366-67, 483). In his March 29, 1994 response to the Executive Secretary's February 22, 1994 letter R. MC 53-55,, Mr. Brent Cook, Process Engineer at MagCorp, supplied some data on monthly tons of chlorine emissions. However, Mr. Cook recited in his response: "This data does not include chlorine emissions emitted during reported significant unavoidable breakdowns...." (R. MC 64). Under questioning Mr. Cook admitted that "significant unavoidable breakdowns" were not defined in the Utah Air Conservation Regulations (R. MC 565). It appears that Mr. Cook invented the term and withheld the amount of emissions that occurred during those "significant unavoidable breakdown" events. On April 11,

1994, the Executive Secretary issued MagCorp an Order to Comply with the information request (R. MC 67-69). MagCorp responded to the Order to Comply on April 23, 1994 (R. MC 70-75). With this response, finally, the Executive Secretary had received data from MagCorp detailing the rolling 12 month total chlorine emissions, including emissions that occurred during all unavoidable breakdowns events (R. MC 70-75). However, the data submission was not complete until May 24, 1994 when MagCorp submitted firm numbers, rather than estimates, for chlorine emissions that occurred during the first six months that the 4,800 ton limit was in effect (R. MC 76-77).

It was brought out during Mr. Cook's testimony that there is considerable difference in the amount of chlorine emissions from the melt/reactor stack reported in the quarterly emissions report and the chlorine emissions accounted for in data submitted by MagCorp in April and May 1994 (R. MC 566-68). In fact, Mr. Cook admitted that in order to accurately quantify whether the rolling 12 month total chlorine emissions, including all emissions from unavoidable breakdowns, exceeded the 4800 ton limitation, the Executive Secretary needed to use the emissions

data MagCorp submitted to it in April and May 1994 (R. MC 569).

The Executive Secretary has legal authority to issue a Notice of Violation "whenever ...[he] has reason to believe that a violation of any provision of this chapter or any rule issued under it has occurred...." Utah Code Ann. § 19-2-110(1995). Prior to issuing a Notice of Violation and subjecting MagCorp to a civil penalty, it was prudent and reasonable for the Executive Secretary to give MagCorp the opportunity to submit data of actual chlorine emissions from the melt/reactor stack. MagCorp's grudging piecemeal submittal of data should not act against the Executive Secretary's rational approach to initiating enforcement action. Accordingly, all twenty-three violations are not barred by the statute of limitations.

#### **CONCLUSION**

For the foregoing reasons, the Court should affirm the Board's reasonable and rational decision in upholding Violation No. 5 of the Notice of Violation and enter a decision to that effect.

DATED this 15<sup>th</sup> day of October, 1996.



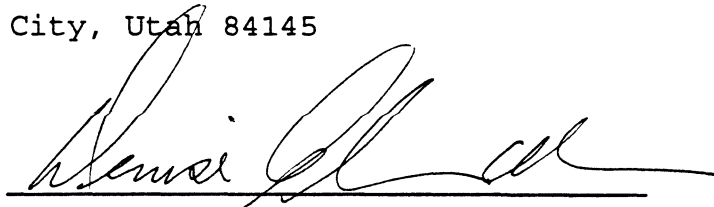
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CERTIFICATE OF SERVICE

I hereby certify that on the 15<sup>th</sup> day of October, 1996,  
true and correct copies of the foregoing BRIEF OF RESPONDENT was  
mailed, first-class, postage prepaid to:

H. Michael Keller  
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## Addenda



## Addendum A

Section		Section	
	cation of installations required — Authority of executive secretary to prohibit construction — Hearings — Limitations on authority of board — Inspections authorized.	19-2-116.	Injunction or other remedies to prevent violations — Civil actions not abridged.
		19-2-117.	Attorney general as legal advisor to board — Duties of attorney general and county attorneys.
19-2-109.	Air quality standards — Hearings on adoption — Orders of executive secretary — Adoption of emission control requirements.	19-2-118.	Violation of injunction evidence of contempt.
19-2-109.1.	Operating permit required — Emissions fee — Implementation.	19-2-119.	Civil or criminal remedies not excluded — Actionable rights under chapter — No liability for acts of God or other catastrophes.
19-2-109.2.	Small business assistance program.	19-2-120.	Information required of owners or operators of air contaminant sources.
19-2-109.3.	Public access to information.	19-2-121.	Ordinances of political subdivisions authorized.
19-2-110.	Violations — Notice to violator — Corrective action orders — Conference, conciliation, and persuasion by board.	19-2-122.	Cooperative agreements between political subdivisions and department.
19-2-111.	Review of orders of hearing examiner — Procedure.	19-2-123.	Tax relief to encourage investment in facilities — Sales and use tax exemption.
19-2-112.	<i>Generalized condition of air pollution creating emergency</i> — Sources causing imminent danger to health — Powers of executive director — Declaration of emergency.	19-2-124.	Application for certification of pollution control facility.
19-2-113.	Variances — Judicial review.	19-2-125.	Action on application for certification.
19-2-114.	Activities not in violation of chapter or rules.	19-2-126.	Revocation of certification — Grounds — Procedure.
19-2-115.	Violations — Penalties — Reimbursement for expenses.	19-2-127.	Rules for administering certification for tax relief.

**19-2-101. Short title — Policy of state and purpose of chapter — Support of local and regional programs — Provision of coordinated statewide program.**

(1) This chapter is known as the "Air Conservation Act."

(2) It is the policy of this state and the purpose of this chapter to achieve and maintain levels of air quality which will protect human health and safety, and to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the economic and social development of this state, and facilitate the enjoyment of the natural attractions of this state.

(3) Local and regional air pollution control programs shall be supported to the extent practicable as essential instruments to secure and maintain appropriate levels of air quality.

(4) The purpose of this chapter is to:

(a) provide for a coordinated statewide program of air pollution prevention, abatement, and control;

(b) provide for an appropriate distribution of responsibilities among the state and local units of government;

(c) facilitate cooperation across jurisdictional lines in dealing with problems of air pollution not confined within single jurisdictions; and

(d) provide a framework within which air quality may be protected and consideration given to the public interest at all levels of planning and development within the state.

**History:** C. 1953, 26-13-1, enacted by L. 1981, ch. 126, § 14; renumbered by L. 1991, ch. 112, § 39.

**Amendment Notes.** — The 1991 amend-

ment, effective July 1, 1991, renumbered this section, which formerly appeared as § 26-13-1, and made stylistic changes throughout.

#### NOTES TO DECISIONS

##### **Constitutionality.**

The provisions of the former Air Conservation Act, taken as a whole, provided sufficient standards to guide the Air Conservation Committee in the performance of its administrative

duties; therefore, act was not improper delegation of legislative authority. *Lloyd A. Fry Co. v. Utah Air Conservation Comm.*, 545 P.2d 495 (Utah 1975).

#### COLLATERAL REFERENCES

**Utah Law Review.** — Ecology Symposium, 1970 Utah L. Rev. 383 et seq.

**Environmental Contamination: A Foul and Pestilent Congregation of Vapors**, 1970 Utah L. Rev. 414.

**Air Pollution, Nuisance Law, and Private Litigation**, 1971 Utah L. Rev. 142.

**Utah Environmental Problems and Legislative Response**, 1972 Utah L. Rev. 479, 1973 Utah L. Rev. 1.

**Journal of Energy, Natural Resources, and Environmental Law.** — The General Duty to Prevent Accidental Releases of Extremely Hazardous Substances: The General Duty Clause of Section 112(r) of the Clean Air Act, 13 J. Energy, Nat. Resources, & Envtl. L. 61 (1993).

**Am. Jur. 2d.** — 61A Am. Jur. 2d Pollution Control § 52 et seq.

**C.J.S.** — 39A C.J.S. Health and Environment § 130.

**A.L.R.** — Class action for relief against air or water pollution, maintainability in state court of, 47 A.L.R.3d 769.

**Validity of legislation permitting administrative agency to fix permissible standards of pollutant emission**, 48 A.L.R.3d 326.

**Sufficiency of evidence of violation in administrative proceeding terminating in abatement order**, 48 A.L.R.3d 795.

**Preliminary mandatory injunction to pre-**

vent, correct, or reduce effects of polluting practices, 49 A.L.R.3d 1239.

**Evidence as to Ringelmann Chart observations**, 51 A.L.R.3d 1026.

**Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency**, 60 A.L.R.3d 665.

**When statute of limitations begins to run as to cause of action for nuisance based on air pollution**, 19 A.L.R.4th 456.

**Standing to sue for violation of state environmental regulatory statute**, 66 A.L.R.4th 685.

**Liability insurance coverage for violations of antipollution laws**, 87 A.L.R.4th 444.

**Control of interstate pollution under Clean Air Act, as amended in 1977 (42 USCS §§ 7401 to 7626)**, 82 A.L.R. Fed. 316.

**Application of air quality modeling to decision making under Clean Air Act (42 USCS §§ 7401-7426)**, 84 A.L.R. Fed. 710.

**Standing of air pollution source to challenge Clean Air Act (42 USCS §§ 7401-7626) or its implementation**, 85 A.L.R. Fed. 515.

**What constitutes modification of stationary source, under § 111 (a)(3), (4) of Clean Air Act (42 USCS § 7411 (a)(3), (4)), so as to subject source to Environmental Protection Agency's new source performance standards**, 94 A.L.R. Fed. 750.

**Key Numbers.** — Health and Environment ☞ 25.6, 28.

## 19-2-102. Definitions.

As used in this chapter:

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

## Addendum B

- (ii) requiring the construction of new control facilities or any parts of new control facilities or the modification, extension, or alteration of existing control facilities or any parts of new control facilities; or
- (iii) the adoption of other remedial measures to prevent, control, or abate air pollution;
- (h) review plans, specifications, or other data relative to pollution control systems or any part of the systems provided in this chapter;
- (i) as authorized by the board, subject to the provisions of this chapter, exercise all incidental powers necessary to carry out the purposes of this chapter, including certification to any state or federal authorities for tax purposes the fact of construction, installation, or acquisition of any facility, land, building, machinery, or equipment or any part of them, in conformity with this chapter;
- (j) cooperate with any person in studies and research regarding air pollution, its control, abatement, and prevention; and
- (k) represent the state with the specific concurrence of the executive director in all matters pertaining to interstate air pollution, including interstate compacts and similar agreements.

**History:** C. 1953, 26-13-9, enacted by L. 1981, ch. 126, § 14; renumbered by L. 1991, ch. 112, § 45.

**Amendment Notes.** — The 1991 amendment, effective July 1, 1991, renumbered this section, which formerly appeared as § 26-13-9, substituted "board" for "committee" through-

out, made designation changes throughout, made stylistic changes throughout, and in Subsection (2)(g) substituted "including" for "which may be subsequently amended or revoked by the committee. Such order may include, but not be limited to."

**19-2-108. Notice of construction or modification of installations required — Authority of executive secretary to prohibit construction — Hearings — Limitations on authority of board — Inspections authorized.**

(1) The board shall require that notice be given to the executive secretary by any person planning to construct a new installation which will or might reasonably be expected to be a source or indirect source of air pollution or to make modifications to an existing installation which will or might reasonably be expected to increase the amount of or change the character or effect of air contaminants discharged, so that the installation may be expected to be a source or indirect source of air pollution, or by any person planning to install an air cleaning device or other equipment intended to control emission of air contaminants.

(2) (a) (i) The executive secretary may require, as a condition precedent to the construction, modification, installation, or establishment of the air contaminant source or indirect source, the submission of plans, specifications, and other information as he finds necessary to determine whether the proposed construction, modification, installation, or establishment will be in accord with applicable rules in force under this chapter.

(ii) Plan approval for an indirect source may be delegated by the executive secretary to a local authority when requested and upon assurance that the local authority has and will maintain sufficient

expertise to insure that the planned installation will meet the requirements established by law.

(b) If within 90 days after the receipt of plans, specifications, or other information required under this subsection, the executive secretary determines that the proposed construction, installation, or establishment or any part of it will not be in accord with the requirements of this chapter or applicable rules or that further time, not exceeding three extensions of 30 days each, is required by the board to adequately review the plans, specifications, or other information, he shall issue an order prohibiting the construction, installation, or establishment of the air contaminant source or sources in whole or in part.

(3) In addition to any other remedies, any person aggrieved by the issuance of an order either granting or denying a request for the construction of a new installation, and prior to invoking any such other remedies shall, upon request, in accordance with the rules of the board, be entitled to a hearing. Following the hearing, the permit may be affirmed, modified, or withdrawn.

(4) Any features, machines, and devices constituting parts of or called for by plans, specifications, or other information submitted under Subsection (1) shall be maintained in good working order.

(5) This section does not authorize the board to require the use of machinery, devices, or equipment from a particular supplier or produced by a particular manufacturer if the required performance standards may be met by machinery, devices, or equipment otherwise available.

(6) (a) Any authorized officer, employee, or representative of the board may enter and inspect any property, premise, or place on or at which an air contaminant source is located or is being constructed, modified, installed, or established at any reasonable time for the purpose of ascertaining the state of compliance with this chapter and the rules adopted under it.

(b) (i) A person may not refuse entry or access to any authorized representative of the board who requests entry for purposes of inspection and who presents appropriate credentials.

(ii) A person may not obstruct, hamper, or interfere with any inspection.

(c) If requested, the owner or operator of the premises shall receive a report setting forth all facts found which relate to compliance status.

**History:** C. 1953, 26-13-10, enacted by L. 1981, ch. 126, § 14; renumbered by L. 1991, ch. 112, § 46.

**Amendment Notes.** — The 1991 amendment, effective July 1, 1991, renumbered this

section, which formerly appeared as § 26-13-10, substituted "board" for "committee" throughout, and made designation and stylistic changes throughout.

#### COLLATERAL REFERENCES

**A.L.R.** — Application of § 165 of Clean Air Act (42 USCS § 7475), pertaining to pre-construction requirements for prevention of

significant deterioration, to particular emission sources, 86 A.L.R. Fed. 255.

## Addendum C

**19-2-109.3. Public access to information.**

A copy of each permit application, compliance plan, emissions or compliance monitoring report, certification, and each operating permit issued under this chapter shall be made available to the public in accordance with Title 63, Chapter 2, Government Records Access and Management Act.

**History:** C. 1953, 19-2-109.3, enacted by L. 1992, ch. 105, § 4. became effective on April 27, 1992, pursuant to Utah Const., Art. VI, Sec. 25.

**Effective Dates.** — Laws 1992, ch. 105

**19-2-110. Violations — Notice to violator — Corrective action orders — Conference, conciliation, and persuasion by board.**

(1) (a) Whenever the executive secretary has reason to believe that a violation of any provision of this chapter or any rule issued under it has occurred, he may serve written notice of the violation upon the alleged violator. The notice shall specify the provision of this chapter or rule alleged to be violated, the facts alleged to constitute the violation, and may include an order that necessary corrective action be taken within a reasonable time.

(b) In lieu of beginning an adjudicative proceeding under Subsection (1)(a), the board may initiate an action pursuant to Section 19-2-115.

(2) Nothing in this chapter prevents the board from making efforts to obtain voluntary compliance through warning, conference, conciliation, persuasion, or other appropriate means.

(3) Hearings may be held before:

(a) the board;

(b) a hearing examiner of the board; or

(c) a board member especially appointed by the board to hold the hearing.

**History:** C. 1953, 26-13-12, enacted by L. 1981, ch. 126, § 14; 1987, ch. 12, § 7; 1987, ch. 161, § 54; 1988, ch. 72, § 3; renumbered by L. 1991, ch. 112, § 48.

**Amendment Notes.** — The 1991 amendment, effective July 1, 1991, renumbered this section, which formerly appeared as § 26-13-

12, substituted "board" for "committee" throughout, deleted former Subsection (4), which read "Hearings shall be conducted according to the procedures and requirements of Chapter 46b, Title 63, the Administrative Procedures Act," and made stylistic changes throughout.

**NOTES TO DECISIONS****Burden of proof.**

A hearing under this section is an administrative procedure, not a criminal trial, and the state need not prove every element of the al-

leged violation beyond a reasonable doubt. *Lloyd A. Fry Co. v. Utah Air Conservation Comm.*, 545 P.2d 495 (Utah 1975).

**COLLATERAL REFERENCES**

**A.L.R.** — Necessity of showing scienter, knowledge, or intent, in prosecution for violation of air pollution or smoke control statute or ordinance, 46 A.L.R.3d 758.

Sufficiency of evidence of violation in administrative proceeding terminating in abatement order, 48 A.L.R.3d 795.



## Addendum D

- (3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.  
 (b) The Utah Rules of Evidence apply in judicial proceedings under this section.

**History:** C. 1953, 63-46b-15, enacted by L. 1987, ch. 161, § 271; 1988, ch. 72, § 25; 1990, ch. 132, § 1.

**Amendment Notes.** — The 1990 amendment, effective April 23, 1990, added the exception at the end of Subsection (1)(a).

#### NOTES TO DECISIONS

##### ANALYSIS

Final agency action  
 Function of district court.  
 Right to judicial proceeding.  
 Cited

##### Final agency action.

Industrial Commission's determination of wrongful discharge was not final, and so not reviewable under this section, because the commission and the parties had not resolved the issue of reimbursement for lost wages and benefits as required by § 34-28-19(2). *Parkdale Care Ctr. v. Frandsen*, 837 P.2d 989 (Utah Ct. App. 1992).

##### Function of district court.

Section 63-46b-16(1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore, the district court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to Subsection (1)(a) of this section. In re Topik, 761 P.2d 32 (Utah Ct. App. 1988), cert. denied, 773 P.2d 45 (Utah 1989).

The only appellate jurisdiction statutorily delegated to the district court is to review informal agency adjudicative proceedings. *State v. Humphrey*, 794 P.2d 496 (Utah Ct. App. 1990).

**Right to judicial proceeding.**  
 District court erred in declining a de novo review of a dentist's claim to licensure by reciprocity, where there had been no proceeding on his application that was sufficiently judicial in nature, and he had not yet had the licensing agency's action reviewed in a "trial-type hearing." *Kirk v. Division of Occupational & Professional Licensing*, 815 P.2d 242 (Utah Ct. App. 1991).

Cited in *Southern Utah Wilderness Alliance v. Board of State Lands & Forestry*, 830 P.2d 233 (Utah 1992); *Bonneville Int'l Corp. v. Utah State Tax Comm'n*, 219 Utah Adv. Rep. 52 (Ct. App. 1993).

#### 63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

- (i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or
  - (ii) according to any other provision of law.
- (4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:
- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
  - (b) the agency has acted beyond the jurisdiction conferred by any statute;
  - (c) the agency has not decided all of the issues requiring resolution;
  - (d) the agency has erroneously interpreted or applied the law;
  - (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
  - (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
  - (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
  - (h) the agency action is:
    - (i) an abuse of the discretion delegated to the agency by statute;
    - (ii) contrary to a rule of the agency;
    - (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
    - (iv) otherwise arbitrary or capricious.

**History:** C. 1953, 63-46b-16, enacted by L. 1987, ch. 161, § 272; 1988, ch. 72, § 26.

**Cross-References.** — Review of proceed-

ings before State Tax Commission, jurisdiction and standard, §§ 59-1-601, 59-1-610.

## NOTES TO DECISIONS

### ANALYSIS

Agency action.  
 Applicability of section.  
 Arbitrary action.  
 Conflicting evidence.  
 Factual findings.  
 Final order.  
 Function of district court.  
 Jurisdictional hearing by board.  
 Prior practice.  
 Review.  
 Standard of review.  
 — Interpretation of statutory term.  
 — Questions of law.  
 Substantial evidence test.  
 Substantial prejudice.  
 Whole record test.  
 Cited.

### Agency action.

Whether the Industrial Commission acted contrary to its own rule is governed by Subsection (4)(h)(ii) of this section. *Ashcroft v. Indus-*

*trial Comm'n*, 855 P.2d 267 (Utah Ct. App. 1993).

### Applicability of section.

Subsection (4) deals with judicial relief, not judicial review. It does not affect the degree of deference an appellate court grants to an agency's decision. Rather, it ensures that relief should not be granted when, although the agency committed error, the error was harmless. *Morton Int'l, Inc. v. Utah State Tax Comm'n*, 814 P.2d 581 (Utah 1991).

### Arbitrary action.

Industrial commission's denial of occupational disease disability benefits based upon a solitary finding regarding the ultimate issue of causation failed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, were reached, and therefore rendered the action arbitrary. *Adams v. Board of Review*, 821 P.2d 1 (Utah Ct. App. 1991).

## Addendum E

(5) open burning of clippings, bushes, plants and prunings from trees incident to property clean-up activities provided that the following conditions have been met:

(a) in any area of the state, the local county fire marshall has established a 30 day period between March 30 and May 30 for such burning to occur and notified the executive secretary of the open burning period prior to the commencement of the 30 day period, or, in areas which are located outside of Salt Lake, Davis, Weber, and Utah Counties, the local county fire marshall has established, if allowed by the state forester under Section 65A-8-9, a 30 day period between September 15 and October 30 for such burning to occur and has notified the executive secretary of the opening burning period prior to the commencement of the 30 day period;

(b) such burning occurs during the period established by the local county fire marshall;

(c) materials to be burned are thoroughly dry;

(d) no trash, rubbish, tires, or oil are used to start fires or included in the material to be burned.

C. The Board may grant a permit for types of open burning not specified in R307-1-2.4.4.B on written application if the Board finds that the burning is not inconsistent with the State Implementation Plan.

2.4.5 Special Conditions. Open burning for special purposes, or under unusual or emergency circumstances, may be approved by the executive secretary.

#### 2.5 Confidentiality of Information

Any person submitting information pursuant to these regulations may request that such information be treated as a trade secret or on a confidential basis, in which case the executive secretary and Board shall so treat such information. If no claim is made at the time of submission, the executive secretary may make the information available to the public without further notice. Information required to be disclosed to the public under State or Federal law may not be requested to be kept confidential. Justification supporting claims of confidentiality shall be provided at the time of submission on the information. Each page claimed "confidential" shall be marked "confidential business information" by the applicant and the confidential information on each page shall be clearly specified. Claims of confidentiality for the name and address of applicants for an approval order will be denied. Confidential information or any other information or report received by the executive secretary or Board shall be available to EPA upon request and the person who submitted the information shall be notified simultaneously of its release to EPA.

2.5.1 The following proceedings and actions are designated to be conducted either formally or informally as required by Section 63-46b-4:

A. Notices of Intent and Approval Orders shall be processed informally using the procedures identified in Section R307-1-3. Appeals of denials of or conditions in an approval order shall be conducted formally.

B. Issuance of Notices of Violations and Orders are exempt under Section 63-46b-1(2)(k). Appeals of

Notices of Violation and Orders shall be processed as formal proceedings.

C. Requests for variances shall be processed informally using the procedures in Section 19-2-113 and Subsection R307-1-2.3.

D. Qualification for Tank Vapor Tightness Testing shall be conducted informally using the procedures identified in Section R307-3-4.

E. Certification of Asbestos Contractors shall be conducted informally using the procedures identified in Section R307-1-8.

F. Any other request or approvals for experiments, testing, control plans, etc., shall be conducted informally using the procedures identified in R307-1.

2.5.2 At any time before a final order is issued, the Board or appointed hearing officer may convert proceedings which are designated to be informal to formal, and proceedings which are designated as formal to informal if conversion is in the public interest and rights of all parties are not unfairly prejudiced.

2.5.3 Rules for conducting formal proceedings shall be as provided in Section 63-46b-3 and in Sections 63-46b-6 through 63-46b-13. In addition to the procedures referenced in Subsection R307-1-2.5.1 above, the procedures in Sections 63-46b-3 and 63-46b-5 apply to informal proceedings.

2.5.4 Declaratory Orders. In accordance with the provisions of Section 63-46b-21, any person may file a request for a declaratory order. The request shall be titled a petition for declaratory order and shall specifically identify the issues requested to be the subject of the order. Requests for declaratory order, if set for adjudicative hearing, will be processed informally using the procedures identified in Sections 63-46b-3 and 63-46b-5 unless converted to a formal proceeding under Subsection R307-1-2.5.2 above. No declaratory orders will be issued in the circumstances described in Subsection 63-46b-21(3)(a). Intervention rights and other procedures governing declaratory orders are outlined in Section 63-46b-21.

#### R307-1-3. Control of Installations.

##### 3.1 Notice of Intent and Approval Order

3.1.1 Except for the exemptions listed herein, any person planning to construct a new installation which will or might reasonably be expected to become a source or an indirect source of air pollution or to make modifications or relocate an existing installation which will or might reasonably be expected to increase the amount or change the effect of, or the character of, air contaminants discharged, so that such installation may be expected to become a source or indirect source of air pollution, or any person planning to install an air cleaning device or other equipment intended to control emission of air contaminants from a stationary source, shall submit to the Executive Secretary a notice of intent and receive an approval order prior to initiation of construction, modification or relocation. The notice of intent shall include plans, specifications and such other information as is necessary to determine

whether the proposed construction, installation, modification, relocation or establishment will be in accord with applicable requirements of these regulations as he deems necessary to review the proposal. Within 30 days after receipt of a notice of intent, or any additional information necessary to the review, the Executive Secretary shall advise the applicant of any deficiency in the notice or the information submitted. The Executive Secretary shall transmit to the Administrator, EPA, a copy of each notice of intent for each major source or major modification and provide notice to the Administrator, EPA, of every action related to the consideration of such permit.

3.1.2 Within 90 days of receipt of all plans, specifications and other information required under this subsection 3.1, the Executive Secretary shall issue an order prohibiting the proposed construction, installation, modification, relocation or establishment if he deems any part of it inadequate to meet the applicable requirements of these regulations. If more time is needed to review the proposal it shall not exceed three 30-day extensions.

3.1.3 Prior to issuing an approval or disapproval order, the Executive Secretary shall advertise his intent to approve or disapprove in a newspaper of general circulation in the locality of the proposed construction, installation, modification, relocation or establishment. A copy of the notice of intent to approve or disapprove shall be sent to the applicant, the Administrator, EPA and to officials and agencies having cognizance over the location where the proposed construction would occur as follows: any other state or local air pollution control agencies, the chief executives of the city and county where the source would be located; any comprehensive regional land use planning agency, and any State, Federal Land Manager, or Indian Governing body whose lands may be affected by emissions from the source or modification. Any expected degree of consumption of the maximum allowable increases as stated in subsection 3.6 and proposed emission and/or operating limitations shall be included in the notice. The Executive Secretary shall consider any analysis performed by a Federal Land Manager and provided to the Executive Secretary within the public comment period. If the Executive Secretary concurs with a demonstration of the Federal Land Manager that the emissions from the proposed source or modification would have an adverse impact on the air quality related values (including visibility) in any Federal Class I area, notwithstanding that the change in air quality resulting from emissions from such source or modification would not cause or contribute to concentrations which would exceed the maximum allowable increases, the Executive Secretary shall not issue an approval order for the source or modification.

At least one location will be provided where the information submitted by the owner or operator and the State's analyses of the proposal will be available for public inspection. A 30-day period shall be al-

lowed for submission of public comment. If requested within 15 days of publication of notice, a hearing shall be held in the area of the proposed construction, installation, modification, relocation or establishment. Any comments or statements received shall be considered before an order is issued. The public comment and hearing procedure shall not be required when an order is issued for the purpose of extending the time to review plans and specifications.

3.1.4 Whenever the Executive Secretary determines that the plans, specifications and other information submitted, with such revisions as he may require, are in accord with applicable requirements, he shall issue an order permitting the proposed construction, installation, modification, relocation or establishment, with the further stipulation that all required facilities be adequately and properly maintained. Issuing of an approval order does not relieve any owner or operator of the responsibility to comply with the provisions of these regulations or the State Implementation Plan. To accommodate stage construction of a large source, he may issue an order authorizing construction of an initial stage prior to receipt of detailed plans for the entire proposal provided he is satisfied through a review of general plans, engineering reports and other information that the proposal is feasible under the intent of these regulations. Subsequent detailed plans will then be processed as prescribed in this paragraph. For phased construction projects the determination under paragraph 3.1.8 shall be reviewed and modified as appropriate at the earliest reasonable time prior to commencement of construction of each independent phase of the proposed source or modification.

3.1.5 Approval orders issued by the Executive Secretary in accordance with the provisions of this subsection 3.1 shall be reviewed eighteen months after the date of issuance to determine the status of construction, installation, modification, relocation or establishment. If a continuous program of construction, installation, modification, relocation or establishment is not proceeding, the Executive Secretary may revoke the approval order.

3.1.6 The following information, where applicable, should be submitted with the notice of intent:

A. A description of the nature of the process(es) involved; the nature, procedures for handling and the quantities of raw materials; the type and quantity of fuels employed; and the nature and quantity of finished product.

B. Expected composition and physical characteristics of effluent stream both before and after treatment by an air cleaning device, including emission rates, volume, temperature and concentration of air contaminants.

C. Size, type and performance characteristics of air cleaning devices.

D. Location and elevation of the emission point and other factors relating to dispersion and diffusion of the air contaminant in relation to the emission to

nearby structures and window openings, and other information necessary to appraise the possible effects of the effluent.

E. The location of planned sampling points and the tests of the completed installation to be made by the owner when necessary to ascertain compliance.

F. The typical operating schedule.

G. A schedule for construction.

H. Any plans, specifications and related information which are in final form at the time of submission of notice of intent.

I. Any other information necessary to determine if the proposed source or modification will be in compliance with these regulations.

3.1.7 The following are exempt from the notice of intent requirement:

A. Fuel-burning equipment, in which combustion takes place at no greater pressure than one inch of mercury above ambient pressure, with a rated capacity of less than five million BTU per hour using no other fuel than natural gas, or LPG or other mixed gas distributed by a utility in accordance with the rules of the Public Service Commission of the State of Utah, unless there are emissions other than combustion gases.

B. Comfort heating equipment (i.e., boilers, water heaters, air heaters and steam generators) with a rated capacity of less than one million BTU per hour if fueled only by fuel oil numbers 1 - 6.

C. Emergency heating equipment, using coal or wood for fuel, with a rated capacity less than 50,000 BTU per hour.

D. Exhaust systems for controlling steam and heat that do not contain combustion products.

E. New parking areas of less than 600 vehicles capacity or modified parking areas increasing capacity by less than 350 vehicles.

F. Emissions of 1,1,1-trichloroethane, methylene chloride, trichlorofluoromethane, dichlorodifluoromethane, chlorodifluoromethane, trifluoromethane, 1,1,2-trichloro-1,2,2-trifluoroethane, 1,2-dichloro-1,1,2,2-tetrafluoroethane, methane, ethane, and chloropentafluoroethane. However, the owner or operator of a source emitting 10 tons per year or more of any of these compounds must submit a notice of intent to the Executive Secretary prior to construction of the source and an annual report of emissions thereafter.

3.1.8 The Executive Secretary shall issue an approval order if he determines through plan review that the following conditions have been met:

A. The degree of pollution control for emissions, to include fugitive emissions and fugitive dust, is at least best available control technology except as otherwise provided in these regulations.

B. The proposed installation will be in accord with applicable requirements of: Utah Air Conservation Regulations; National Standards of Performance for New Stationary Sources; National Primary and Secondary Ambient Air Quality Standards; National Emission Standards for Hazardous Air Pollutants; new source review criteria; maximum allowable

increase and maximum allowable concentrations requirements for Prevention of Significant Deterioration; the nonattainment plan for the area, if the area is classified as a nonattainment area; and new source requirements for nonattainment areas under the Federal Clean Air Act.

C. The Executive Secretary shall only issue an approval order under paragraph 3.6.5, for a major source or major modification which consumes more than 50% of the increments in paragraph 3.6.3, after receiving the approval of the Board.

3.1.9 The owner or operator of a source previously approved under this paragraph who intends to temporarily relocate the source (not to exceed 180 consecutive days) shall submit a notice of intent to relocate but is not required to submit additional plans and specifications nor is the Executive Secretary required to submit the proposal for public comment prior to approval or disapproval.

3.1.10 The owner or operator of a major new source or major modification to be located in a nonattainment area or which would impact an area of nonattainment must, in addition to the requirements in Subsection R307-1-3.1, submit with the notice of intent an adequate analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source which demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification. The Executive Secretary shall review the analysis. The analysis and the Executive Secretary's comments shall be subject to public comment as required by R307-1-3.1.3. The preceding shall also apply in Salt Lake and Davis Counties for new major sources or modifications which are considered major for precursors of ozone, including volatile organic compounds and nitrogen oxides.

3.1.11 At a time that a source or modification becomes a major source or major modification because of a relaxation of any enforceable limitation which was established after August 7, 1980, on the capacity of a source or modification otherwise to emit a pollutant, such as a restriction on the hours of operation, then the preconstruction requirements shall apply to the source as though construction had not yet commenced on the source or modification.

3.1.12 Low Oxides of Nitrogen Burner Technology.

A. All sources (excluding non-commercial residential dwellings) shall install oxides of nitrogen control/low oxides of nitrogen burners or controls resulting from application of an equivalent technology, as determined by the Executive Secretary, whenever existing fuel combustion burners are replaced, unless such replacement is not physically practical or cost effective. The request for an exemption shall be presented to the Executive Secretary for review and approval.

B. Contingency Requirement for Ozone Nonattainment Areas and Salt Lake and Davis Counties. If the Contingency Requirements for ni-

nitrogen oxides are triggered as outlined in Section IX.D.2.h(2) of the State Implementation Plan, all existing sources (excluding non-commercial residential dwellings) shall install either low oxides of nitrogen burner technology as described in R307-1-3.1.12(a), unless such requirement is not physically practical or cost effective, or controls resulting from application of an equivalent technology, both of which shall be determined by the executive secretary. All sources required to install new controls under R307-1-3.1.12.B shall submit, within two months after the trigger date, either a schedule for installing the equipment or a request for an exemption. The required equipment shall be operational as soon as practicable or within a reasonable time agreed upon by the source and the executive secretary.

### 3.2 Nonattainment Area Requirements And PM10 Nonattainment Area Requirements - Existing Sources.

#### 3.2.1 Particulate Emission Limitations And Operating Parameters (TSP).

A. Existing sources located in or affecting areas of nonattainment shall use reasonably available control measures to the extent necessary to insure the attainment and maintenance of the National Ambient Air Quality Standards (NAAQS). The emission limitations specified in this paragraph constitute, in the judgment of the Board, reasonably available control measures necessary to insure attainment and maintenance of the NAAQS as of the date of promulgation of these regulations. Specific limitations for installations within a source listed below which are not specified will be set by order of the Board. Specific limitations for installations within a source listed below may be adjusted by order of the Board provided the adjustment does not adversely affect achieving the applicable NAAQS.

B. The owner or operator of any source listed in this paragraph shall not allow exceedance of the emission limitation or violation of any other listed requirement (See schedule for compliance listed in paragraph 3.2.2). The requirements listed for the sources in Weber County apply unless modified by an approval order or compliance order issued after February 16, 1982.

TABLE 1

IDENTIFICATION OF SOURCE (SOURCES 25 TONS/YEAR OR GREATER ACTUAL EMISSIONS)	EMISSION LIMITATIONS
<b>WEBER COUNTY (TSP)</b>	
1. Farmers Grain Coop unloading/loading/cleaning and grinding stacks/vents	20% opacity each stack/vent
2. Fife Rock Products Asphalt Plant (Hot mix dryer)	0.040 gr/dscf, 20% opacity (stack and fugitive emissions)
3. Interpace Corporation - 4/2/81 Grinding and screening	20% opacity (vents and fugitive emissions)
4. Parsons Asphalt Plant	0.040 gr/dscf, 20% opacity (stack and fugitive emissions)

#### IDENTIFICATION OF SOURCE (SOURCES 25 TONS/YEAR OR GREATER ACTUAL EMISSIONS)

#### EMISSION LIMITATIONS

#### WEBER COUNTY (TSP)

5. Pillsbury Co. Loading, milling, unloading	20% opacity each vent
6. Teledyne Incinerator	0.060 gr/dscf, 20% opacity
7. Gibbons and Reed Asphalt Plant - 4/2/81	0.030 gr/dscf, 20% opacity

3.2.2 Compliance Schedule (TSP). The owner or operator of an existing installation which is a source of a pollutant in a nonattainment area for the pollutant, or which has significant impact (Based on the increment levels in subparagraph 3.3.2.A) upon a nonattainment area, is required to achieve the established emission limitation or other requirements established by these regulations as expeditiously as practicable but no later than December 31, 1982, or such later date as may be specified by Congress or EPA under the Clean Air Act. Within 180 days after the effective date of a regulation establishing a standard of pollutant control pursuant to an emission limitation under paragraph 3.2.1 or paragraph 4.1.1 of R307-1-4, the owner or operator of an existing installation not meeting these requirements must submit a notice of intent as outlined in subsection 3.1 together with a compliance schedule. The compliance schedule shall contain proposed interim measures to control and identify the degree of emission reduction to be achieved by each such interim measure of control.

#### 3.2.3 Compliance Testing (TSP)

A. Testing Methodology. Except as otherwise provided in this paragraph 3.2.3, compliance testing for gravimetric emission limitations for particulate shall be pursuant to EPA reference Method 5 or EPA reference Method 17 where appropriate and approved by the Executive Secretary. Where EPA reference Method 5 is used for compliance testing, determination of compliance with gravimetric emission limitations shall be made through the use of front half catch. The Executive Secretary may require that Method 5 full train analysis be conducted and that back half data also be submitted but only for information purposes. Such information shall not be used to determine compliance with gravimetric emission limitations. EPA reference Method 1 shall be used to select the sampling site and number of traverse sampling points. Where necessary for determination of stack gas velocities, EPA reference Method 2 shall be used. Where necessary for determination of dry molecular weight, EPA reference Method 3 shall be used. Where necessary for determination of moisture content in stack gases EPA reference Method 4 shall be used. All EPA reference methods referred to in this paragraph 3.2.3 are those found in 40 CFR Part 60 Appendix A.

Except as provided below in these regulations any alternate test methods or sampling methods may be



## Addendum F



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  
P.O. Box 144820  
Salt Lake City, Utah 84114-4820  
(801) 536-4000  
(801) 536-4099 Fax  
(801) 536-4414 T.D.D.

FILE COPY

**CERTIFIED MAIL**

DAQC-1075-94

September 29, 1994

Thomas Tripp, Manager  
Environmental Affairs  
Magnesium Corporation of America  
Salt Lake City, Utah 84116

RE: NOTICE OF VIOLATION AND ORDER FOR COMPLIANCE - Sections 3.1, 4.7, Utah Air Conservation Rules (UACR), Conditions 8.B and 8.C of the Approval Order (AO) Dated August 14, 1989, and Conditions 1.B.(3)c, and 24 of the AO Dated April 16, 1992 - Tooele County - 045 00030 (A.)

Dear Mr. Tripp:

On September 24, 27, and 29, 1993, and March 25, 1994, an inspector from the Division of Air Quality performed an annual inspection of Magnesium Corporation of America, located 15 miles north of exit 77 on Interstate 80.

The enclosed NOTICE OF VIOLATION AND ORDER FOR COMPLIANCE is based on findings observed during these inspections and further correspondence. Please be advised that compliance with this ORDER is mandatory and will not relieve the company of liability for any past violations.

You will be contacted soon to arrange a meeting to discuss the violation, findings, and resolution. Questions regarding this matter may be directed to Jeff Dean at 536-4000.

Sincerely,



Russell A. Roberts, Executive Secretary  
Utah Air Quality Board

RAR:SDA:kh

Enclosure: NOTICE OF VIOLATION AND ORDER FOR COMPLIANCE

cc: Department of Environmental Quality, Dianne R. Nielson  
EPA Region VIII, Mike Owens  
Tooele County Health Department

THE UTAH AIR QUALITY BOARD

ooOoo

In the Matter of	:	NOTICE OF VIOLATION
	:	AND ORDER FOR
Magnesium Corporation	:	COMPLIANCE
of America (Mag Corp)	:	
	:	No. 94090021

ooOoo

This NOTICE OF VIOLATION AND ORDER FOR COMPLIANCE is issued by the UTAH AIR QUALITY BOARD (the Board) pursuant to the Utah Air Conservation Act (Act) Section 19-2-101, et seq., Utah Code Annotated 1953, as amended. The Executive Secretary is authorized to issue Notices of Violation pursuant to Section 19-2-110 of Utah Code Annotated. The Board has delegated to the Executive Secretary authority to issue ORDERS in accordance with Section 19-2-107(2)(g) of the Utah Code Annotated.

FINDINGS

1. Mag Corp is located at Rowley, Utah, in Tooele County.
2. Mag Corp is required to comply with Notice of Intent and Approval Order (AO) requirements in the Utah Administrative Code R307-1-3.
3. Mag Corp was issued an AO by the Executive Secretary, Utah Air Quality Board, dated August 14, 1989, and April 16, 1992.
4. According to:
  - (a) Section 3.1, Utah Air Conservation Rules (UACR), Mag Corp shall submit a notice of intent for an installation which will or might reasonably be expected to become a source or an indirect source of air pollution.
  - (b) Section 4.7, UACR, Mag Corp's breakdowns that result in emissions from an **unavoidable** breakdown will not be deemed a violation. **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 unavoidable breakdown.**

- (c) Condition 8.B of the AO dated August 14, 1989, the liquid injection rate shall be no less than 140 gallons per minute at the 05 scrubber.
  - (d) Condition 8.C of the AO dated August 14, 1989, Mag Corp shall install a temperature gauge on the 05 wet scrubber. Mag Corp shall maintain the gas stream from the acid neutralization system at a temperature not to exceed 150°F.
  - (e) Condition 1.B.(3)c of the AO dated April 16, 1992, Mag Corp shall not exceed the 4,800 tons of chlorine per 12-month period from the melt/reactor stack.
  - (f) Condition 24 of the AO dated April 16, 1992, Mag Corp shall adequately and properly maintain all of the installations and facilities authorized by this AO.
5. The following were found during the annual inspections conducted at the Mag Corp facility on September 24, 27, 29, 1993, and March 25, 1994.
- (a) During the September 29, 1993, inspection of the facility, a paint booth was identified as being installed after November 26, 1969.
  - (b) A review of the breakdown emission reports dated September 23, 1993, October 14, 1993, and May 13, 1994, indicates the causes of the breakdowns at Mag Corp were due to routine or poor maintenance and as such do not constitute unavoidable breakdowns.
  - (c) During the March 25, 1994, inspection of the 05 scrubber, the inlet scrubber flow was 66 gallons per minute.
  - (d) During the September 27, 1993, inspection of the 05 scrubber, no temperature gauge was installed to measure the temperature of the gas stream from the acid neutralization system. During the March 25, 1994, inspection, the temperature gauge on the 05 scrubbing system was installed and read at 190°F.
  - (e) The Executive Secretary issued Mag Corp an Order To Comply on April 11, 1994. The Order To Comply required Mag Corp to submit monthly tons of chlorine emissions from the melt/reactor which included emissions from unavoidable breakdowns from July, 1991, through December, 1993. Mag Corp responded in a letter dated April 23, 1994. The chlorine quarterly emission reports were not fully completed by Mag Corp until April 23, 1994. A review of the quarterly emission reports of chlorine emissions from the melt/reactor stack reveals exceedances of the 4,800 ton per 12-month period limitation from June, 1992, through April, 1994.

- (f) The chlorine reduction burner (CRB) is a pollution control device installed on the melt/reactor stack. A review of the CRB operational data revealed that the CRB operated 70% and 65% of the time in 1992 and 1993, respectively.

### VIOLATIONS

Based on the foregoing FINDINGS, Mag Corp is in violation of the following:

1. Section 3.1, UACR, for not submitting a notice of intent for a paint booth installed after November 26, 1969.
2. Section 4.7, UACR, for chlorine emissions due to shutdowns that were a result of routine or poor maintenance and not considered unavoidable breakdowns.
3. Section 3.1, UACR, condition 8.B of the AO dated August 14, 1989, for having a liquid injection rate less than 140 gallons per minute at the 05 scrubber during the March 25, 1994, inspection.
4. Section 3.1, UACR, condition 8.C of the AO dated August 14, 1989, for not having installed a temperature gauge on the 05 wet scrubber at the time of the September 27, 1993, inspection and for exceeding the 150° temperature of the gas stream from the acid neutralization system during the March 25, 1994, inspection.
5. Section 3.1, UACR, condition 1.B.(3)c of the AO dated April 16, 1992, for exceeding the 4,800 tons of chlorine gas per 12-month period at the melt/reactor stack from June, 1992, through April, 1994.
6. Section 3.1, UACR, condition 24 of the AO dated April 16, 1992, for not adequately and properly maintaining the CRB during 1992 and 1993.

### ORDER

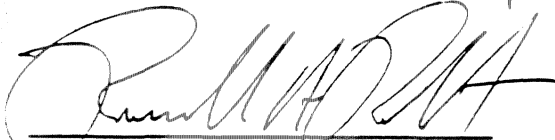
Based on the foregoing FINDINGS AND VIOLATIONS, Mag Corp, pursuant to Section 19-2-107(2)(g) of the Utah Code Annotated, is hereby ORDERED TO:

1. Immediately initiate all actions necessary to achieve total compliance with all applicable provisions of the Act.
2. Notify this office in writing on or before October 14, 1994, of Mag Corp's intent to comply with this ORDER and indicate how compliance is to be achieved.

**COMPLIANCE, OPPORTUNITY FOR A HEARING**

This ORDER is effective immediately and shall become final unless Mag Corp requests, in writing, a hearing within thirty (30) days pursuant to Utah Code Annotated 19-2-110. Section 19-2-115 of the Utah Code Annotated provides that violators of the Utah Air Conservation Act and/or any ORDER issued thereunder may be subject to a civil penalty of up to \$10,000.00 per day for each violation.

Dated 29th day of September, 1994.

A handwritten signature in dark ink, appearing to read "Russell A. Roberts", written over a horizontal line.

Russell A. Roberts, Executive Secretary  
Utah Air Quality Board