

1996

Magnesium Corporation of America v. Air Quality Board and Division of air quality department of environmental quality, State of Utah : Brief of Petitioner

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

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| MAGNESIUM CORPORATION OF AMERICA, |) | |
| |) | |
| Petitioner, |) | |
| |) | Case Nos. 960354-CA and |
| vs. |) | 960433-CA |
| |) | |
| AIR QUALITY BOARD and DIVISION |) | Priority No. 14 |
| OF AIR QUALITY, DEPARTMENT OF |) | |
| ENVIRONMENTAL QUALITY, |) | |
| STATE OF UTAH, |) | |
| |) | |
| Respondents. |) | |

BRIEF OF PETITIONER, MAGNESIUM CORPORATION OF AMERICA

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

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Utah Court of Appeals
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Marilyn M. Branch
Clerk of the Court

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| STATE OF UTAH, |) | |
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| Respondents. |) | |

BRIEF OF PETITIONER, MAGNESIUM CORPORATION OF AMERICA

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction of this appeal by Magnesium Corporation of America ("MagCorp") pursuant to Utah Code Ann. § 78-2a-3(2) (1992 & Supp. 1996), which grants the Court of Appeals appellate jurisdiction over final orders and decrees from formal adjudicative proceedings of state agencies, such as Respondents Air Quality Board ("Board") and Division of Air Quality ("Division"), hereinafter sometimes collectively referred to as the "Agency."

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

I. Did the Agency exceed its authority by ruling that the Unavoidable Breakdown Rule, an air quality regulation of general application which exempts excess

emissions from unavoidable breakdowns of pollution control equipment, did not extend to MagCorp? (R. 643-50.)

Standard of Review: Whether an agency has acted beyond the scope of its jurisdiction or in an unlawful manner is reviewed under a correction of error standard. See Utah Code Ann. § 63-46b-16(4)(b),(e) (1993); Bennion v. ANR Prod. Co., 819 P.2d 343, 349 (Utah 1991).

II. Did the Agency's failure to provide MagCorp prior notice of the Agency's interpretations of the Agency's Approval Order governing MagCorp and the Unavoidable Breakdown Rule violate MagCorp's right to due process, precluding enforcement action against MagCorp? (R. 663-64, 690.)

Standard of Review: The constitutionality of agency action is reviewed under a correction of error standard. See Utah Code Ann. § 63-46b-16(4)(a) (1993); Kennecott Corp. v. State Tax Comm'n, 858 P.2d 1381, 1384 (Utah 1993).

III. Are the Agency's interpretations of the Approval Order and the Unavoidable Breakdown Rule unreasonable, arbitrary and capricious? (R. 663-64.)

Standard of Review: As a general rule, an agency's interpretation of its own rules is reviewed under an intermediate-deference, reasonableness and rationality standard. See Utah Code Ann. § 63-46b-16(h)(ii), (iii)(1993); Thorup Bros. Constr., Inc. v. Auditing Div., 860 P.2d 324, 327 (Utah 1993); SEMECO Indus., Inc. v. Auditing Div., 849 P.2d 1167, 1174 (Utah 1993) (Durham, J. dissenting). In this case, however, the Agency based its interpretations on erroneous application of principles of general law governing construction of documents. The appellate court should, therefore, review the Agency's

interpretations of general law under a correction of error standard. See Utah Code Ann. § 63-46b-16(4)(d)(1993); Zissi v. Tax Comm'n, 848 P.2d 848, 852-3 & n.2 (Utah 1992); Chris & Dick's Lumber & Hardware v. Tax Comm'n, 791 P.2d 511, 514 (Utah 1990).

IV. Did the Agency err in ruling that the one-year statute of limitation in Utah Code Ann. § 78-12-29(3) (1992 & Supp. 1996) did not preclude the Agency's enforcement action and are the Agency's findings of fact not supported by substantial evidence? (R. 664-65.)

Standard of Review: An agency's interpretation of general law is reviewed under a correction of error standard. See Utah Code Ann. § 63-46b-16(4)(d); Zissi v. Tax Comm'n, 842 P.2d 848, 852-3 & n. 2 (Utah 1992). An agency's findings of fact will not be sustained where they are not supported by substantial evidence when viewing the record as a whole. See Utah Code Ann. § 63-46b-16(4)(g)(1993); Kennecott, 858 P.2d at 1385.

DETERMINATIVE LAW

The following constitutional provisions, statutes and regulations are set forth in MagCorp's Addendum to this Brief:

U.S. Const. amend. V.

U.S. Const. amend. XIV.

Utah Const. art. I, § 7.

Utah Code Ann. § 78-12-29(3) (1992 & Supp. 1996).

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

Utah Admin. R307-1-2.3 (1996).

STATEMENT OF THE CASE

I. Nature of the Case.

MagCorp seeks review of the Order of the Board adjudicating an alleged violation of the following chlorine emission limit on MagCorp's Melt/Reactor stack imposed by the Division under an Approval Order¹ (B2, R. 105.) issued April 12, 1992, to MagCorp (the "1992 Approval Order"):

... conversion of no less than 80% of the chlorine gas to HCl in any 12-month period....In no case shall the chlorine gas emissions exceed 4,800 tons per 12-month period and any subsequent 12-month period of operation.

(B2, R. 107.) The case centers on a dispute between the Agency and MagCorp over whether excess emissions from unavoidable breakdown of pollution control equipment are to be included or excluded in determining compliance with the emission limit. Fundamentally, the case involves the authority of the Agency to single out MagCorp by depriving it of the enforcement protection provided to all regulated air emission sources in a Utah Air Conservation Regulation, commonly referred to as the "Unavoidable Breakdown Rule," which states that "excess emissions from unavoidable breakdown will not be deemed a violation of these regulations." Utah Admin. R307-1-4.7 (1996).

¹ An approval order is in the nature of a permit issued by the Division under the Utah Air Conservation Act, Utah Code Ann. §§ 19-2-101--127 (1995 & Supp. 1996) and Utah Air Conservation Rules, Utah Admin. R307 (1996). An approval order authorizes the construction and operation of a source of air emissions and imposes limits on those emissions.

II. Course of Proceedings and Agency Disposition.

On September 29, 1994, the Agency issued to MagCorp Notice of Violation and Order for Compliance No. 94090021 (the "NOV"), alleging six violations of the Utah Air Conservation Regulations and certain conditions of the 1992 Approval Order. (B1, R. 100.) MagCorp responded to the NOV and reserved its right to an administrative hearing. (C1, R. 132.) The Agency and MagCorp entered a Partial Settlement Agreement, settling all of the alleged violations except Violation No. 5, which alleged that MagCorp violated the 1992 Approval Order by exceeding the emission limit on MagCorp's Melt/Reactor stack of 4,800 tons of chlorine gas per rolling 12-month period² for the months of June 1992 through April 1994. (R. 379) MagCorp denied the violation because the excess emissions occurred during periods of unavoidable breakdown, and emissions from unavoidable breakdown are not counted. (C1, R. 134.)

The Division requested the Board to appoint a hearing officer to adjudicate whether the emission limit included or excluded emissions during unavoidable breakdown. (C5, R. 154.) MagCorp filed an objection after learning that the Board's Chair, Dr. Richard E. Kanner, would serve as the Hearing Officer and would be represented by the Attorney General's office. (R. 580-84, 589-91.) The objection was denied by Fred G. Nelson, an assistant attorney general. (R. 585.)

Prior to the hearing, the Agency stipulated that the reported breakdowns were unavoidable. (R. 38-47, 378-82.) The parties submitted pre-hearing briefs. (R. 1-17, 18-37.)

² This means the limit is computed monthly based on the emissions over the 12 month period, including that month and the preceding 11 months.

On February 14, 1996, Dr. Kanner conducted an evidentiary hearing. (R. 373.) Following the hearing, the parties submitted post-hearing briefs. (R. 597-621, 622-67.)

On April 3, 1996, Dr. Kanner issued Recommendations upholding Violation No. 5 and ruling, inter alia, that MagCorp's emission limit allows "no exceptions" and, therefore, includes all excess emissions even if they result from unavoidable breakdown. (R. 668-73.) On April 15, 1996, the Board, with Dr. Kanner again presiding, convened to consider Dr. Kanner's Recommendations and the parties' comments and objections. (R. 694-767.) MagCorp submitted oral and written objections to the Recommendations. (R. 678-93, 699-720.) The Board passed a motion to accept Dr. Kanner's Recommendations with certain modifications (R. 760-65), and on May 1, 1996, issued Findings of Facts, Conclusions of Law and Order (the "Order") (R. 793-802), from which MagCorp now takes these appeals.

MagCorp filed a Petition for Writ of Review in Case No. 960354-CA seeking review of the Order. On June 5, 1996, the Board, on its own motion, changed certain language in the Order, and on June 12, 1996, issued a Notice of Correction (R. 804). On July 2, 1996, MagCorp filed a second Petition for Writ of Review in Case No. 960433-CA, for review of the Order as changed. The two appeals were consolidated by Order of this Court dated July 23, 1996.

On June 6, 1996, the Agency filed an action in Third District Court against MagCorp seeking imposition of civil penalties against MagCorp based on the Agency's Order. The action has been stayed pursuant to an order of the Third Judicial District Court dated July 11, 1996, based on a stipulation of the parties.

STATEMENT OF FACTS

I. MagCorp's Production Process.

MagCorp produces primary magnesium metal from magnesium chloride powder derived from concentrated brine solutions drawn from the Great Salt Lake. (R. 513-18.) Magnesium chloride powder is melted in a Melt/Reactor and then fed in batches to electrolytic cells that separate chlorine from magnesium metal. (R. 513-18.) The electrolytic cells cannot be turned on and off, but must be continuously operated and continuously fed batches of molten magnesium chloride from the Melt/Reactor. (R. 513-18.) Chlorine gas from the Melt/Reactor process reports to a Chlorine Reduction Burner which thermally converts chlorine to hydrogen chloride (HCl). (R. 513-18.) The emission stream then passes through a series of pollution control devices known as scrubbers which remove most of the HCl before the emission stream passes through the Melt/Reactor stack into the atmosphere. (R. 513-18.)

The Chlorine Reduction Burner is a high temperature, natural gas burner approximately 100 feet in height, containing a synthetic liner separating refractory brick on the inside from a steel shell on the outside. (R. 518-23.) The burner was specially designed for MagCorp's facility and was considered by the Agency to be experimental control technology. (R. 518-23.) The Agency reviewed and approved the design. (D7, D8, D9, D10, D11, D12, D13, D14; R. 206-88.)

II. The Approval Order Conditions.

Prior to 1990, MagCorp's chlorine and other emissions were governed by a Memorandum of Understanding dated May 11, 1984 (D2, R. 161), which remains in effect, and a series of Approval Orders. (D2, D3, D4, D6; R. 161-205.) At that time, the chlorine limits on the Melt/Reactor stack and Cathode stack³ were as follows:

- **Melt/Reactor stack**

986 tons per 30-day period based on a rolling sum of successive operating days - 12,000 tons/year.

- **Cathode stack**

3,350 tons per 30-day period based on a rolling sum of successive operating days - 31,950 tons/yr. These limits are for all emissions from the cathode stack including emissions from unavoidable breakdowns.

(D6, R. 198.)

In 1990, the Agency changed these limits in connection with its review and approval of the Notice of Intent (D7, R. 206) submitted by MagCorp in 1989 for installation and operation of the new Chlorine Reduction Burner. These new limits⁴ were drafted by the Agency and were initially proposed in plan reviews (D10, D11; R. 228, 240) prepared by the Agency. These plan reviews specifically stated that the Unavoidable Breakdown Rule applies

³ This stack collects emissions from MagCorp's electrolytic cell process.

⁴ The new limits were not mandated by state or federal regulation. The federal Clean Air Act Amendments of 1990 were enacted November 15, 1990. Although Section 112 (42 U.S.C.A. § 7412) lists chlorine and HCl among the 189 hazardous air pollutants, no emission standards have been established by EPA for those pollutants.

to MagCorp.⁵ (R. 227 ¶14, 239 ¶14.) The new limits and other changes were incorporated into the 1990 Approval Orders (D13, D14; R. 265, 278) and later into the 1992 Approval Order (B2, R. 107).

Condition 24 of the 1992 Approval Order specifically referenced the Unavoidable Breakdown Rule and stated that MagCorp must comply with the Rule and that the Rule "addresses unavoidable breakdown reporting requirements." (B2, R. 116 emphasis added.)

The Agency drafted the new limit for the Melt/Reactor in Condition 1.B.(3) (hereinafter, the "Melt/Reactor Limit") to read as follows:

Cl₂ - The emissions shall be determined as follows:

- a) The short term Cl₂ limit in the M/R stack during the operation of the CRB shall not exceed 400 lb/hr as determined by appropriate stack testing procedures submitted by Magcorp on May 9, 1990 or as specified by the Executive Secretary.
- b) The first 12 months of operation - conversion of no less than 50% of the chlorine gas to HCl for the 12-month period, in accordance with the chlorine balance procedure required in Condition 16.D - In no case shall the chlorine gas emissions exceed 12,000 tons for the first 12 months of operation of the chlorine burner. [Underlining in original.]
- 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

⁵ Both plan review documents contained a section IV. entitled "Applicable Utah Air Conservation Regulations (UACR)", and containing a paragraph 14 stating : "Section 4.7, UACR -- Unavoidable breakdown reporting requirements. This regulation applies." (R. 227 ¶ 14, 239 ¶ 14.)

tons per 12-month period and any subsequent 12-month period of operation. [Underlining in original.]

d) If the data obtained after one year of operation of the Chlorine Reduction Burner (CRB) indicate that the 4,800 ton per year limitation can be reduced due to the capabilities of the CRB, the Executive Secretary shall establish a new limitation as a modification to this AO.

(B2, R. 106-07.)

The Agency also drafted a new limit for the Cathode Stack in Condition

1.C.(3) (hereinafter the "Cathode Stack Limit"). The new limit read:

(3) CL_2 - 3,100 tons per 30-day period based on a rolling sum of successive operating days - 28,950 tons per 12-month period. The Cl_2 limits shall be increased by 8.3 ton per day for the number of days during 30-day period the Melt/Reactor chlorine burner is out of service. These limits are for all emissions from the cathode stack including emissions from unavoidable breakdowns.

(B2, R. 107.)

Tom Tripp and Ron Thayer of MagCorp, and Carl Broadhead and Dave Kopta of the Agency participated in the negotiation of the new limits. (R. 535, 554.) Neither Mr. Kopta nor Mr. Broadhead testified at the Hearing. The Agency never advised MagCorp's representatives that the Melt/Reactor Limit included emissions from unavoidable breakdowns. (R. 537, 553; R. 587-88 (Mr. Kopta, whose testimony was proffered (R. 587.)), was responsible for negotiating the limit, but did not recall any negotiation discussions about breakdowns or why the language ("In no case") was written the way it was).⁶

⁶ The Agency presented four witnesses at the hearing, none of whom participated in the negotiation with MagCorp concerning the language of the Melt/Reactor and Cathode Limits. None provided any documentation to support either their interpretation that the "In no case"

MagCorp understood the "In no case" language of the Melt/Reactor Limit as simply imposing an annual tonnage restriction on the 80% conversion limit consistent with the amount of chlorine produced by the Melt/Reactor. (R. 536.) The Melt/Reactor produced approximately 24,000 tons of chlorine per year. (R. 536.) The 4,800 ton Melt/Reactor Limit was based on converting 80% of the 24,000 tons. (R. 536.)

An Agency witness testified that the Unavoidable Breakdown Rule always applies to approval orders, unless specified otherwise in the order. (R. 457.) And, there are no approval orders for any company other than MagCorp in which the Agency claims it has suspended the application of the Unavoidable Breakdown Rule. (R. 442, 457.)

III. Operation of the Chlorine Reduction Burner.

MagCorp constructed the new Chlorine Reduction Burner technology in 1990 at a cost of over \$5,000,000, pursuant to a Notice of Intent submitted by MagCorp on June 12, 1989 (D7, R. 206), and an approval order issued June 30, 1990 by the Agency (D13, R. 263).

language meant emissions from unavoidable breakdowns were included in the Melt/Reactor Limit or that this interpretation was ever communicated to MagCorp. As to why the Agency used the "In no case" language rather than the express language previously used in the Cathode Stack Limit, the Agency's witness Monte Keller testified "I don't know exactly why the words were changed." (R. 441-42.) Agency witness Don Robinson claimed he drafted the "In no case" language and intended it to include all emissions. (R. 468.) However, when questioned why he did not simply adopt the clear language used for so many years in the Cathode Stack Limit regarding inclusion of breakdown emissions (i.e., "These limits are for all emissions from the cathode stack including emissions from unavoidable breakdowns"), he testified "that language formed something I did not use routinely in my permits," (R. 469), it was "not the way I would have phrased it," (R. 470), and "was not the language that I typically used" (R. 476). Finally, he testified "I believe at the time that each engineer had their own language style and it wasn't as uniform as it is today." (R. 476 (emphasis added).) Mr. Robinson left the Bureau's permit section before the Agency issued the final Plan Review which proposed the Melt/Reactor and Cathode Limits to MagCorp. (R. 473; D11, R. 231.)

The 1990 approval order was amended and reissued July 30, 1990 (D14, R. 276), and was later superseded by the 1992 Approval Order (B2, R. 105).

The Chlorine Reduction Burner went on line in June 1990. (R. 406.) As reflected in quarterly emission reports (F4, R. 318), filed by MagCorp with the Agency, total chlorine emissions from the Melt/Reactor Stack did not total more than the 12-month rolling limits specified in the Melt/Reactor Limit until June of 1992. (R. 571.) At that time, the company began to experience unavoidable breakdowns of the synthetic liner in the Chlorine Reduction Burner. (R. 38-47, 378-82, 524.) It was necessary to shut down the Chlorine Reduction Burner immediately to avoid catastrophic failure and make the necessary repairs. (R. 525.) Excess emissions resulted. (R. 525; F4, R. 318.) Repairs of the synthetic liner typically required a minimum of three weeks working around the clock. (R. 526.) MagCorp promptly reported these shutdowns to the Agency as required by the Unavoidable Breakdown Rule. (R. 526.) The original synthetic liner was replaced in its entirety following the liner failure in May 1993. (R. 527.)

Since 1993, the Chlorine Reduction Burner has performed well. (R. 527.) MagCorp has decreased its chlorine emissions by nearly 50% between 1989 and 1995, due largely to the Chlorine Reduction Burner. (R. 527-28.)

MagCorp submitted to the Agency quarterly emission reports and excess emission reports required by its approval orders. Beginning with the first quarter of 1990, the quarterly emission reports filed by MagCorp provided monthly totals and quarterly average totals of chlorine emissions, including total chlorine emissions from the Melt/Reactor stack. (F4, R. 318; 483-84, 486, 556, 559, 561, 566.) The monthly totals for the chlorine emissions

from the Melt/Reactor stack were computed on the basis of a rolling 30-day sum in accordance with Condition 17B of the 1992 Approval Order. (R. 571.) The rolling 12-month sum of the monthly totals reported in the quarterly emission reports (F4) began totalling more than 4,800 tons in June 1992. (R. 571.) MagCorp also filed annual excess emissions reports with the Agency in January 1993 for the calendar year 1992 and in 1994 for the calendar year 1993. (R. 557.)

MagCorp's quarterly emission reports reported total emissions (i.e. all emissions, including excess emissions from unavoidable breakdown) from the Melt/Reactor stack. (F4, R. 318; 483-484, 486, 556, 559, 561, 566.) In December 1992, an Agency inspector summed the monthly totals in the quarterly reports and discovered that beginning in June 1992, the 12-month rolling amount of total chlorine emissions from the Melt/Reactor stack began totalling more than the 4,800 ton limit. (R. 484.) The inspector understood that the quarterly values submitted by MagCorp included breakdown emissions, but at that point in time, he "was going with MagCorp's interpretation that [the Melt/Reactor Limit] did not include breakdown emissions." (R. 486.) It was not until some time in 1993, that the Agency had "come to an agreement for the 4,800 ton [Melt/Reactor Limit]." (R. 492.) Nevertheless, the Agency never notified MagCorp that the quarterly emission reports showed any violation of the 4,800 ton limit. (R. 187.) In January 1993, MagCorp filed an excess emissions report (H1, R. 369), reporting excess emissions from the Melt/Reactor for calendar year 1992. (R. 510.)

The Agency wrote MagCorp on February 22, 1994 (A1, R. 53) requesting information on excess emissions and further stating:

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

(A1, R. 55 (emphasis added).) The Agency drafted this request because it wanted to determine what amount of MagCorp's chlorine emissions were attributable to unavoidable breakdown emissions. (R. 135.) Nothing in the letter stated that the Agency considered emissions from unavoidable breakdown to be countable towards the chlorine limit for the Melt/Reactor stack.

IV. The NOV.

On September 29, 1994, over two years after MagCorp's quarterly reports began showing that total chlorine emissions exceeded the 4,800 Limit, the Agency issued the NOV to MagCorp. (B1, R. 100.) Violation No. 5 alleged MagCorp violated Utah Admin. R307-1-3.1 and Condition 1.B.(3)(c) of the 1992 Approval Order by exceeding the Melt/Reactor Limit of 4,800 tons of chlorine gas per 12-month period from June 1992 through April 1994. (B1, R. 103.) MagCorp denied the violation because the Melt/Reactor Limit was not exceeded if emissions from unavoidable breakdowns were not counted. (R. 134.) MagCorp contended that under the Unavoidable Breakdown Rule, excess emissions from unavoidable breakdowns of the Chlorine Reduction Burner were not countable toward

the Melt/Reactor Limit. (C1, R. 134.) MagCorp further contended that Violation No. 5 was time-barred by Utah Code Ann. § 78-12-29(3) (1992 & Supp. 1996) to the extent it asserted emission exceedances that occurred more than one year prior to the issuance of the NOV. (R. 35.) The Agency contended the exemption in the Unavoidable Breakdown Rule did not apply by virtue of the "In no case" language in the Melt/Reactor Limit and that, therefore, emissions from unavoidable breakdown must be included in determining MagCorp's compliance with the Limit. (R. 1-17.)

V. Scope of the Proceedings.

The Division expressly requested resolution of the following issue:

The meaning and intent of the approval order verbiage "In no case shall the Chlorine gas emission exceed 4,800 tons per 12-month period in any subsequent 12-month period of operation." If this would include emissions during unavoidable breakdowns or if these emissions would be exempt.

(C5, R. 153 (emphasis in original).) Prior to the hearing, the Division stipulated that for purposes of the hearing, the reported breakdowns were unavoidable. (R. 38-47, 378-82.) The parties further stipulated to the total amount of chlorine emissions and the amount of such emissions exclusive of those from the unavoidable breakdowns for the period from June 1992 through April 1994. (R. 38-47, 378-82.) The stipulated emission totals showed that chlorine emissions from the Melt/Reactor stack for the relevant period did not exceed the 4,800 ton limit if chlorine emissions from unavoidable breakdown were excluded. (R. 38-47.)

At the hearing, the stipulation was confirmed with the Hearing Officer, and he expressly acknowledged that the breakdowns were unavoidable and met the definition in the Unavoidable Breakdown Rule. (R. 378-82.) In notifying MagCorp (and the public) of the

special meeting of the Board to be held on April 15, 1996, regarding the NOV, the Executive Secretary of the Board again expressly advised MagCorp: "The only issue still unresolved is if all emissions including breakdowns are included in the 4,800 ton limit set on the melt reactor stack." (R. 675.)

VI. The Agency's Order.

After the hearing, the Agency ruled that MagCorp was not entitled to the benefit of the enforcement exemption in the Unavoidable Breakdown Rule because the "In no case" language meant "no exceptions" and imposed an absolute emission limit on MagCorp. (R. 796-97.) The Agency also ruled that the variance procedure in Utah Admin. R307-1-2.3 was an "integral part" of the Unavoidable Breakdown Rule and that MagCorp was not entitled to rely on the Rule because it had not obtained a variance. (R. 797-98.) The Agency stated that the excess emissions were "predictable because the Chlorine Reduction Burner had to be shut down." (R. 798.) The Agency did not reference the parties' stipulation that these excess emissions occurred during unavoidable breakdowns. (R. 38-47, 378-82.)⁷ Finally, the Agency also determined not to bar the NOV under the one-year statute of limitation in Utah Code Ann. § 78-12-29(3) (1992 & Supp. 1996), apparently on the ground that the Agency issued the NOV within one year after it discovered the alleged noncompliance. (R. 799-800.)

⁷ In the original version of the Order, the Agency referred to the events as "periods of predictable unavoidable breakdowns." (R. 798.) After MagCorp filed its appeal, the Agency, in apparent response to outside pressure, reviewed the Order and on its own motion, voted to change the language of the Order. (R. 806-16.) The Agency then issued a Notice of Correction changing that language to "periods of predictable excess emissions." (R. 804.) MagCorp questioned the authority and jurisdiction of the Agency to change the Order after it had been appealed and without giving formal notice of the change and opportunity for briefing. (R. 806-16.)

As a result of the Order, MagCorp has been substantially prejudiced and is under threat of imposition of substantial penalties in the Agency's pending civil action against it.

SUMMARY OF ARGUMENTS

The Agency erred as a matter of law in refusing to apply the enforcement protection of the Unavoidable Breakdown Rule to MagCorp. The Agency must follow its own rules and has no authority to suspend a rule of general application without formal rulemaking proceedings.

The Agency violated MagCorp's rights to due process by failing to provide MagCorp fair notice of its interpretations of the Unavoidable Breakdown Rule and the 1992 Approval Order. The Agency's failure to provide fair notice precludes it from taking enforcement action against MagCorp. Moreover, the Agency's interpretations are not entitled to any deference because penal sanctions are at issue and the Agency did not provide fair notice of the conduct it wants to prohibit or require.

The Agency's interpretations of the 1992 Approval Order and the Unavoidable Breakdown Rule are unreasonable, arbitrary and capricious. The Agency failed to apply existing law and misapplied the "plain language" rule of construction by refusing to read the 1992 Approval Order as a whole and reconcile and harmonize all of its provisions. The 1992 Approval Order must be construed against the Agency because it is penal in nature and was drafted by the Agency. The Agency's interpretation that a variance must be obtained under the Unavoidable Breakdown Rule was first announced in the Agency's Order and was beyond

the scope of the proceedings.⁸ Moreover, the interpretation is unreasonable and inconsistent with the intent and language of the Agency's existing regulations.

The NOV is time barred, in part, as to all violations that allegedly occurred prior to September 29, 1993, under the one-year statute of limitations in Utah Code Ann. § 78-12-29(3) (1992 & Supp. 1996). The Agency erroneously concluded that the running of the statute was tolled until April 26, 1994 when it claims it first discovered MagCorp had exceeded the Melt/Reactor Limit. The findings on which this conclusion is based are not supported by substantial evidence. The evidence is overwhelming that the Agency knew or could have reasonably discovered the facts underlying its claim in time to commence an action within the limitations period.

⁸ The Agency lacks procedural regulations governing the conduct of formal adjudicative proceedings, leaving the parties to make procedure as they go. The administrative proceedings in this case clearly suffered from a lack of established procedure. Of particular concern to MagCorp was the denial of its request (R. 580-84, 589-91) that the Board appoint a legally or judicially trained hearing officer, independent of the Board, who would not require separate legal representation. Instead, the Board's Chairman served as Hearing Officer and later resumed his role as Chairman to preside over the Board's consideration of his Recommendations following the evidentiary hearing. Throughout the proceedings below, the Hearing Officer and the Board were represented by an attorney from the Attorney General's office, while the Division was represented by another attorney from that office. MagCorp objected to this arrangement as impairing the impartiality of the proceedings in light of this Court's decision in V-1 Oil Co. v. Department of Env'tl Quality, 893 P.2d 1093, 1097 (Utah Ct. App. 1995). (R. 580-84.) To avoid this concern, MagCorp requested the appointment of an independent Hearing Officer. (R. 580-84.) The request was denied by the Attorney General's office. (R. 585-86.)

ARGUMENT

I. THE AGENCY IS COMPELLED TO APPLY THE UNAVOIDABLE BREAKDOWN RULE TO MAGCORP.

The Agency erred as a matter of law in refusing to apply the enforcement protection of the Unavoidable Breakdown Rule to MagCorp. The Agency is bound by its own rules. The Agency is compelled to apply the Unavoidable Breakdown Rule to MagCorp and has no authority to suspend its general application without formal rulemaking proceedings to change its applicability to all operators. See State v. Utah Merit Sys. Council, 614 P.2d 1259, 1263 (Utah 1980) (agency is compelled to follow its rule that appropriate agency representative have access to proceedings); Holland v. Career Serv. Review Board, 856 P.2d 678, 684 (Utah Ct. App. 1993) (Bench, J., concurring); Clean Ocean Action v. York, 57 F.3d 328, 333 (3rd Cir. 1995) (agency is bound by express terms of its regulation until it amends or revokes them after completing formal rulemaking procedures); Schering Corp. v. Shalala, 995 F.2d 1103, 1105 (D.C. Cir. 1993) (no matter what agency said in the past, or what it did not say, after agency issues final rules, it must abide by them); see also United States v. Nixon, 418 U.S. 683, 694-696 (1974) (executive branch of government is bound by existing regulation under which attorney general delegated to special prosecutor authority to contest executive privilege).

The Unavoidable Breakdown Rule expressly provides protection against enforcement for emissions resulting from unavoidable breakdowns:

This [section] applies to all regulated pollutants Except as otherwise provided in this subsection 4.7, emissions resulting from an unavoidable breakdown will not be deemed a violation of these regulations.

Utah Admin. R307-1-4.7 (1996) (emphasis added). The Unavoidable Breakdown Rule is universally applicable. It applies to any emission limit under any approval order and applies to MagCorp, as to any other operator. Nothing in the Rule states or suggests that its enforcement protection may be suspended. The Agency, therefore, has no authority to single out MagCorp and suspend the application of the Rule's enforcement protection.

Exempting excess emissions from unavoidable breakdowns is well-recognized under the pollution-by-permit system of regulation. Pollution control equipment cannot be expected to work without breakdowns 100% of the time, and operators should not be punished for emissions resulting from malfunctions beyond their control. This principle has long been recognized by the federal courts and the United States Environmental Protection Agency ("EPA"). See Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 432-33 (D.C. Cir. 1973) (holding that clean air permit issued by EPA containing an emission limit that was "never to be exceeded" must still allow protection from unavoidable breakdowns) (emphasis added), cert. denied sub nom, Appalachian Power Co. v. E.P.A., 416 U.S. 969 (1974); Marathon Oil Co. v. E.P.A., 564 F.2d 1253, 1272-73 (9th Cir. 1977) (ordering EPA to insert unavoidable breakdown provisions into permits); FMC Corp. v. Train, 539 F.2d 973, 986 (4th Cir. 1976) (holding that EPA must provide protection to operators for unavoidable breakdowns); American Petroleum Inst. v. E.P.A., 787 F.2d 965, 984 (5th Cir. 1986) (holding in part that unavoidable breakdown permit provisions "safeguard against unwarranted penalties"); American Petro. Inst. v. E.P.A., 661 F.2d 340, 351, 353 (5th Cir. 1981) (recognizing that EPA must provide "some means" of unavoidable breakdown protection and

holding that EPA need not include the protection in its guidelines if it is already in EPA's general regulations).

The Agency claims the "In no case" language in Condition 1.B.(3)c) of the 1992 Approval Order removes the enforcement protection of the Unavoidable Breakdown Rule, notwithstanding the general applicability of the Rule and the language of Condition 24 of the same Approval Order, which unequivocally states that MagCorp is subject to the Unavoidable Breakdown Rule.⁹ The Agency's "In no case" language is no different from EPA's "never to be exceeded language" at issue in Essex Chemical -- "In no case" does not and cannot suspend established regulatory enforcement protection for excess emissions from unavoidable breakdowns. There is absolutely no legal justification for the Agency to remove this important and universally applicable regulatory protection from MagCorp, even if the Agency had communicated its intent to do so, which it did not.

II. THE AGENCY'S FAILURE TO PROVIDE FAIR NOTICE OF ITS INTERPRETATIONS VIOLATES MAGCORP'S RIGHTS TO DUE PROCESS AND PRECLUDES ENFORCEMENT.

The Agency never gave prior notice to MagCorp that the protection of the Unavoidable Breakdown Rule did not extend to MagCorp or that a variance was required after an unavoidable breakdown had occurred. The Agency's failure to provide MagCorp fair notice of its interpretations violated MagCorp's rights to due process and precludes the Agency from taking enforcement action against MagCorp.

⁹ Condition 1.B.(3)(c) of the 1992 Approval Order states: "The owner/operator shall comply with R307-1-3.5 and 4.7 UAC R307-1-4.7 addresses unavoidable breakdowns reporting requirements."

Due process¹⁰ requires that parties receive fair notice before being deprived of property. See Provo River Water Users' Ass'n v. Morgan, 857 P.2d 927, 934 (Utah 1993) (citing Mullane v. Central Hanover Bank & Trust Co., 70 S. Ct. 652, 657 (1950) and holding that agency must provide parties notice of changes in scope of water rights general adjudication); General Elec. Co. v. E.P.A., 53 F.3d 1324, 1328-9 (D.C. Cir. 1995).¹¹ Due process precludes an agency from enforcing rule violations and seeking penalties without first providing adequate notice of the substance of the rule. See United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (D.C. Cir. 1995);¹² Satellite Broadcasting Co. v. F.C.C., 824 F.2d 1, 3 (D.C. Cir. 1987); Rollins Env't'l Servs. (NJ), Inc. v. E.P.A., 937 F.2d 649, 655 (D.C. Cir. 1991). Further, the agency bears the burden of promulgating clear and unambiguous standards. See Marshall v. Anaconda, 596 F.2d 370, 377 n. 6 (9th Cir. 1979).

Intent alone is not enough to support an enforcement action for penalties. Regulatory language cannot be construed to mean what an agency intended but did not adequately express. See Phelps Dodge Corp. v. Federal Mine Safety and Health Review Comm'n, 681 F.2d 1189, 1193 (9th Cir. 1982). Moreover, an agency's interpretations are not

¹⁰ U.S. Const. amends. V, XIV; Utah Const. art. I, § 7.

¹¹ In General Electric, the United States Court of Appeals for the District of Columbia vacated EPA's finding of liability and penalties for alleged violations of disposal requirements for decommissioned electrical transformers because EPA failed to provide adequate notice of its interpretation of the cited regulatory requirements. 53 F.3d at 1328-29.

¹² In Trident, the United States Court of Appeals for the District of Columbia reversed a lower court decision that failure to provide notice of asbestos removal operations constituted a continuous violation of EPA's Clean Air Act regulations, because neither the Act nor EPA's regulations clearly stated that there was a continuing duty to notify or that a failure to notify would give rise to a penalty. 60 F.3d at 559.

entitled to any deference where, as here, the imposition of penal sanctions is at issue, and the agency did not provide fair warning of the conduct it wants to prohibit or require. See Gates & Fox Co. v. Occupational Safety and Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986).

The Agency's enforcement action against MagCorp and the imposition of civil monetary sanctions offends due process because the regulatory language was not sufficiently clear to warn MagCorp about what the Agency now says it expected. The Agency had both the opportunity and the obligation to state clearly in its regulations and in the 1992 Approval Order what it required, and it failed to do so. Moreover, the Agency had the obligation to communicate its interpretations to MagCorp and to provide fair warning of the conduct it now seeks to require (i.e., inclusion of unavoidable breakdown emissions in the Melt/Reactor Limit and a variance for excess emissions from unavoidable breakdowns).

A. The Agency Never Communicated Its Interpretation That the Melt/Reactor Limit Was Not Subject to the Unavoidable Breakdown Rule.

Over four years after negotiating the "In no case" language, the Agency issued the NOV, based on a regulatory interpretation that was never communicated to MagCorp at the time of the original negotiations or in response to MagCorp's breakdown reports or emission reports. The Agency drafted the "In no case" language but never communicated to MagCorp that it would interpret the 1992 Approval Order to include emissions from unavoidable breakdowns and that the protection of the Unavoidable Breakdown Rule was

suspended.¹³ The Agency admits that the Unavoidable Breakdown Rule applies to all approval orders, unless expressly stated otherwise in the order. (R. 457.) The 1992 Approval does not so state.

The Agency never communicated to MagCorp its interpretation that excess emissions from unavoidable breakdown were not exempt until long after the occurrence of the events for which it now takes enforcement action. It did not communicate its interpretation during the negotiation of the 1992 Approval Order. (R. 473.) It did not do so when MagCorp filed reports on the breakdowns of the Chlorine Reduction Burner in accordance with the Unavoidable Breakdown Rule. It did not do so when MagCorp's quarterly emission reports filed in 1992 began showing total chlorine emissions from the Melt/Reactor stack in excess of the 4,800-ton limit. (R. 559.) It did not do so when MagCorp, in January 1993, filed an annual report of excess emissions for 1992.

The evidence is overwhelming that the Agency did not even develop its current interpretation until after the occurrence of the events for which it now takes enforcement action. Agency witness and inspector, Steven Arbaugh, testified that neither he nor the Agency staff had a uniform interpretation concerning the "In no case" language until the Fall of 1993, when he met with other staff, and they came to an "agreement" on the meaning of the Melt/Reactor Limit. (R. 492, 511.) Up to that point, the inspector was "going with MagCorp's interpretation."¹⁴ (R. 486.)

¹³ See supra Statement of Facts, at 10-11.

¹⁴ See supra Statement of Facts, at 12-14.

As late as February 1994, however, the Agency had still not clearly communicated to MagCorp the interpretation that the Unavoidable Breakdown Rule did not apply to MagCorp's Melt/Reactor stack. In fact, the Agency advised MagCorp to the contrary in its February 22, 1994 letter (A1) by requesting information differentiating normal emissions from emissions due to unavoidable breakdown on the Melt/Reactor stack (A1; R. 55). The letter advised MagCorp that the Agency would "like to clarify the definition of unavoidable breakdowns so MagCorp may understand what constitutes excess emissions" but never stated that excess emissions from unavoidable breakdowns were a violation or were subject to the variance procedure. (A1, R. 55.) If, in fact, the Agency considered the Melt/Reactor Limit to include all emissions, then there was absolutely no need to distinguish between normal and excess emissions or to "clarify" the nature of unavoidable breakdowns. The letter clearly demonstrates that MagCorp is subject to the Unavoidable Breakdown Rule and contains nothing to even suggest that it is not.

The Agency cannot suspend the enforcement protection of the Unavoidable Breakdown Rule based on an interpretation never communicated to MagCorp. See Trident Seafoods Corp., 60 F.3d at 559. Without prior notice of the Agency's interpretation, MagCorp could not make an informed business decision which weighed the benefits of continued operation against the risk of enforcement from excess emissions from any number of events, ranging from acts of God to equipment failure, all of which could be cast as unavoidable breakdowns. MagCorp reasonably relied on the language in the 1992 Approval Order and the Unavoidable Breakdown Rule and installed and began operating uniquely designed, unproven, multi-million dollar pollution control equipment.

Nothing in the 1992 Approval Order states that the Unavoidable Breakdown Rule and its enforcement protection do not apply to emissions from MagCorp's Melt/Reactor stack. And MagCorp reasonably understood that the "In no case" language simply placed an annual tonnage limit on the 80% conversion requirement. Moreover, Condition 24 of MagCorp's 1992 Approval Order expressly put MagCorp on notice that it was subject to the Unavoidable Breakdown Rule. Implicit in any operator's decision to make the commitment to install new, unproven control technology is the understanding that the operator will not be subject to enforcement for the unavoidable breakdown of that equipment. Without the protection of the Unavoidable Breakdown Rule, no operator would accept the risk.

B. The Agency Never Communicated its Interpretation that a Variance is Required Under the Unavoidable Breakdown Rule.

The Agency never provided any prior notice to MagCorp of its extraordinary interpretation that the variance procedure is "an integral part" of the Unavoidable Breakdown Rule and that operators must file a variance for the "predictable" emissions resulting from an unavoidable breakdown. (R. 798.) The Agency's interpretation is entitled to no deference because it is purely a litigation position developed for the first time in this proceeding without fair notice to MagCorp and other operators. "No deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position." United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (D.C. Cir. 1995).

The surprising interpretation that the variance procedure "is an integral part" of the Unavoidable Breakdown Rule was first announced in the Hearing Officer's Recommendations in which he coined the novel, though oxymoronic, phrase "predictable

unavoidable breakdowns." (R. 671.) The issue was never presented to him or the Board for consideration, and the Agency never cited MagCorp for violating the variance procedure. The parties' stipulation that the breakdowns were unavoidable was made abundantly clear to the Hearing Examiner, who expressly acknowledged that the breakdowns met the definition of the Unavoidable Breakdown Rule. (R. 38-47, 378-82.) The Agency repeatedly stated in its hearing notices that the only issue for decision was whether the Melt/Reactor Limit included or excluded excess emissions from unavoidable breakdown. (C5, R. 155, 675.) The interpretation that the variance procedure is an integral part of the Unavoidable Breakdown Rule was not presented for adjudication and was never communicated to MagCorp until the Hearing Officer issued his Recommendations. Accordingly, this contradictory regulatory interpretation cannot be used as a basis for imposing penalties against MagCorp for events that occurred prior to this proceeding. See Trident Seafoods, 60 F.3d at 559.

III. THE AGENCY'S INTERPRETATIONS OF THE 1992 APPROVAL ORDER AND UNAVOIDABLE BREAKDOWN RULE ARE UNREASONABLE, ARBITRARY AND CAPRICIOUS.

In construing the 1992 Approval Order, the Agency purported to apply the "plain language" rule of construction to interpret the "In no case" language of the Melt/Reactor Limit. The Agency ruled "In no case" meant "no exceptions." The Agency ignored other conflicting provisions of the 1992 Approval Order, as well as the extensive testimony of the witnesses.¹⁵ The Agency's interpretation is unreasonable, arbitrary, and

¹⁵ Even though the Division opened the door to extensive extrinsic evidence concerning the intended meaning of the "In no case" language, the final Order contained no reference to the extensive documentation or the testimony of Division and MagCorp witnesses. References to testimony on this point in the Hearing Officer's Recommendations (R. 778-79) were

capricious and cannot be reconciled with the other provisions of the 1992 Approval Order and the established enforcement protection in the Unavoidable Breakdown Rule.

The same well-established rules for construing disputed language in contracts are applicable to the disputed language of MagCorp's 1992 Approval Order. See Park City Utah Corp. v. Ensign Co., 586 P.2d 446, 450 (Utah 1978); Moon Lake Water Users Ass'n v. Hanson, 535 P.2d 1262, 1264 (Utah 1975). Moreover, a "consent decree or order is to be construed for enforcement purposes basically as a contract; reliance upon certain aids to construction is proper, as with any other contract." United States v. ITT Continental Baking Co., 95 S. Ct. 926, 935 (1975).

A. The Agency Failed to Apply Existing Law.

The Agency failed to apply or even recognize the well-settled rule of construction that existing law applies, unless it is unequivocally excluded in the document. See Beehive Medical Elec., Inc. v. Industrial Comm'n, 583 P.2d 53, 60 (Utah 1978); Wagner v. Wagner, 621 P.2d 1279, 1282 (Wash. 1980). The Agency itself admits that the Unavoidable Breakdown Rule applies, unless expressly stated otherwise in the approval order. (R. 457.) The Unavoidable Breakdown Rule, therefore, must apply, unless unequivocal language states that it does not. The language "In no case" does not unequivocally state that the Unavoidable Breakdown Rule does not apply or that emissions from unavoidable breakdown are not excluded. The Agency's interpretation is, therefore, unreasonable, because it is inconsistent with an established regulation issued by the Agency. See Merit Sys Council,

deleted by the Board.

614 P.2d at 1263; Holland v. Career Serv. Rev. Bd., 856 P.2d 678, 684-85 (Utah Ct. App. 1993) (Bench, J., concurring).

B. The Agency Misapplied the Plain Language Rule.

The Agency misapplied the "plain language" rule by refusing to read the 1992 Approval Order as a whole and reconcile and harmonize all of its provisions. The "plain language rule" simply requires that documents be construed and applied according to their plain language. See CIG Exploration, Inc. v. Utah State Tax Comm'n, 897 P.2d 1214, 1216 (Utah 1995), cert. denied, 116 S. Ct. 699 (1996); Archer v. Board of State Lands & Forestry, 907 P.2d 1142, 1145 (Utah 1995); McKnight v. State Land Board, 381 P.2d 726, 731 (Utah 1963). However, the document must be read in its entirety, Hal Taylor Associates v. Unionamerica, Inc., 657 P.2d 743, 749 (Utah 1982), so as to harmonize all of its provisions, and all of its provisions must be given effect. See Larrabee v. Royal Dairy Products Co., 614 P.2d 160 (Utah 1980); Jones v. Hinkle, 611 P.2d 733 (Utah 1980). The Agency, however, ignored the other provisions of the 1992 Approval Order, which are clearly inconsistent with its interpretation of the "In no case" language..

The Agency failed to consider the compelling language of Condition 24 of the 1992 Approval Order, which unequivocally states that MagCorp is subject to the Unavoidable Breakdown Rule:

The owner/operator shall comply with R307-1-3.5 and 4.7 UAC
. . . . [R307-1-4.7] addresses unavoidable breakdowns reporting requirements.

(B2, R. 116.) This alone renders the Agency's interpretation unreasonable. Having expressly subjected MagCorp to the Unavoidable Breakdown Rule, the Agency cannot now suggest the

Rule does not apply and that MagCorp, unlike any other operator, is subject to enforcement and penalties for excess emissions that are otherwise exempt under the Rule.

The Agency failed to consider the language in subparagraph (d) of the Melt/Reactor Limit, which expressly authorizes the Agency to modify the Melt/Reactor Limit if "the data obtained after one year of operation of the Chlorine Reduction Burner (CRB) indicate that the 4,800 ton per year limitation can be reduced due to the capabilities of the CRB." (B2, R. 107.) Subparagraph (d) makes it clear that the Melt/Reactor Limit was never intended as an absolute limit because it allowed the limit to be reduced by the Agency based on the operating performance of the burner. If, in fact, the limit absolutely covered emissions from all avoidable and unavoidable eventualities, including those from natural disasters and acts of God, as well as unavoidable mechanical failure, then there could never be any basis to conclude that the limit could be reduced. The provision cannot be reconciled with the Agency's interpretation that the Melt/Reactor Limit is absolute and includes emissions from unavoidable breakdown.

Finally, the Agency failed to reconcile the Agency's interpretation of the Melt/Reactor Limit with the following language used in the Cathode Stack Limit:

These limits are for all emissions from the cathode stack,
including emissions from unavoidable breakdowns.

(B2, R. 107 (emphasis added).) In 1990, when the Melt/Reactor Limit was developed, the numerical limits for the Cathode Stack were also changed, and the following sentence was added expressly addressing the Chlorine Reduction Burner:

The Cl₂ limit shall be increased by 8.3 ton per day for the number of days during a 30-day period **the Melt/Reactor chlorine burner is out of service.**

(B2, R. 107 (emphasis added).) Obviously, the Agency focused on both the Cathode Limit and the Melt/Reactor Limit in 1990 when it issued the final Plan Review and subsequent approval orders, but chose not to incorporate into the Melt/Reactor Limit the explicit language in the Cathode Limit regarding inclusion of emissions from unavoidable breakdowns. Clearly, if the Agency intended that emissions from unavoidable breakdowns be included in the Melt/Reactor Limit, it would have used explicit language similar to that long used for the Cathode Stack.

The maxim "expressio unius est exclusio alterius," meaning where one is expressed others are excluded, directly applies. See Cannon v. Gardner, 611 P.2d 1207, 1209 (Utah 1980); Orderville Irr. Co. v. Glendale Irr. Co., 409 P.2d 616, 619 (Utah 1965). By expressly stating that the Cathode Stack Limit covers "all emissions from the Cathode Stack, including emissions from unavoidable breakdowns," the Agency precluded any implication that the more general "In no case" language used in the Melt/Reactor Limit was intended to include emissions from unavoidable breakdowns.

The "In no case" language in the Melt/Reactor limit must be read in light of the existing regulatory exemption in the Unavoidable Breakdown Rule and then reconciled with the other provisions of the 1992 Approval Order. It must be reconciled with the language in Condition 24 that MagCorp is subject to the Unavoidable Breakdown Rule, the language in Condition 1.B.(3)(d) reserving authority to the Agency to reduce the Melt/Reactor Limit based on operating performance of the Chlorine Reduction Burner, and finally, the language in the

Cathode Stack Limit that expressly incorporates unavoidable breakdown emissions into that limit. The only reasonable way the existing regulatory exemption and the provisions in the 1992 Approval Order can be reconciled and harmonized is to conclude that the Unavoidable Breakdown Rule applies to emissions from the Melt/Reactor Stack and that emissions from unavoidable breakdowns are exempted from the Melt/Reactor Limit. The Agency's interpretation is unreasonable and entitled to no deference, because the Agency failed to read the 1992 Approval Order as a whole and harmonize all of its provisions. See Hal Taylor Assocs. v. Unionamerica, Inc., 657 P.2d 743, 749 (Utah 1982) (questions regarding written document must be decided by considering document "in its entirety").

C. The Agency's Reliance on the Short Term Limit is Erroneous.

The Agency points to the short term limit in the Melt/Reactor Limit to support its interpretation, reasoning that there is a margin between the 4,800 ton annual limit and the annualized sum of the 400 lb./hr. short term limit, which "is considered by the [Agency] to allow for periods of unavoidable breakdown." This statement clearly indicates a departure from the "plain language" rule by resorting to extrinsic evidence of what the Agency considered. See, e.g., Homer v. Smith, 866 P.2d 622, 629 (Utah Ct. App. 1993) (plain language analysis excludes extrinsic evidence), cert. denied, 878 P.2d 1154 (Utah 1994). If some extrinsic evidence is to be considered, then all of the considerable documentary and testimonial evidence regarding what was considered and what was intended by the parties should have been evaluated in construing the 1992 Approval Order. Cf. Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990) (finding error in failure to resolve intent from proffered extrinsic evidence). The Agency, however, chose to

use the "plain language" rule and not consider all the extrinsic evidence. It cannot have it both ways.

The Agency's reliance on the short term limit is erroneous. The short term limit has nothing to do with the annual limit or the meaning of the "In no case" language. The short term limit only provided a limit for stack testing the Chlorine Reduction Burner. (R. 549.) It was not enforceable, except during stack testing. This is clearly stated in the Agency's 1994 inspection memorandum: **"Therefore, there is no enforceable short term limit (meaning less than a 12-month period) applicable to the melt/reactor stack during operations excluding stack testing periods."** (A8, R. 88 (emphasis in original).) Thus, there is no basis for the Agency to annualize the short term limit and compare it to the annual limit. Moreover, a stack testing limit does not contain any factor for on-line performance of pollution control equipment and, therefore, does not take into account shutdowns for planned maintenance or repair or for unavoidable breakdowns.

D. The 1992 Approval Order Must be Construed Against the Agency.

The 1992 Approval Order must be construed against the Agency because it is penal in nature and was drafted by the Agency. Administrative regulations and orders which form the basis for the assessment of civil penalties are penal in nature and must be construed against the government and in favor of the alleged violator. See Higginson v. Westergard, 604 P.2d 51, 55 (Idaho 1979) (construing disputed language in a stream alteration permit against the regulatory agency that issued it); People v. Mobil Oil Corp., 192 Cal. Rptr. 155, 164 (Cal. Ct. App. 1983) (construing gasoline regulation against California agency); Matter of Woodrow Wilson Constr. Co., 563 So.2d 385, 391 (La. Ct. App. 1990) (construing asbestos

disposal regulation against agency); American Lung Ass'n v. Kean, 670 F. Supp. 1285, 1289-91 (D.N.J. 1987) (construing state implementation plan for ozone pollution control against the state), aff'd 871 F.2d 319 (3rd Cir. 1989). Cf. State v. Jones, 407 P.2d 571 (Utah 1965) (applying same principle to criminal statute). The Utah Supreme Court regularly applies the foregoing principle in construing tax statutes against the government agency. See, e.g., Salt Lake County v. State Tax Comm'n, 779 P.2d 1131 (Utah 1989); Belnoth Petroleum Corp. v. State Tax Comm'n, 845 P.2d 266 (Utah Ct. App. 1993), cert. denied sub nom, Tax Comm'n v. Enron Oil & Gas, 859 P.2d 585 (Utah 1993).

In Cole v. Young, 351 U.S. 536, 76 S. Ct. 861 (1956), the United States Supreme Court construed disputed language in an Executive Order against the government and in favor of a discharged employee. The Court stated "whatever the practical reasons that may have dictated the awkward form of the Order, its failure to state explicitly what was meant is the fault of the Government. Any ambiguities should therefore be resolved against the Government." Id. at 873.

Without question, MagCorp's Approval Order is penal in nature--the Agency is using the Approval Order as the basis for the assessment of substantial monetary penalties against MagCorp. See Higginson, 604 P.2d at 55. The language of the Melt/Reactor Limit could have been drafted precisely to avoid any question about enforcement. The Agency, however, did not define "In no case" and did not unequivocally state that the Unavoidable Breakdown Rule did not apply. The language "In no case" must, therefore, be construed against the Agency and in favor of MagCorp.

The 1992 Approval Order must also be construed against the Agency as the drafter. Under the established rules of construction, any ambiguity must be construed against the drafting agency. This principle is well-recognized in Utah. See, e.g., Trolley Square Assocs. v. Nielson, 886 P.2d 61, 63-64 (Utah Ct. App. 1994). In Fallini v. Hodel, 725 F. Supp. 1113, 1116-17 (D. Nev. 1989), aff'd 963 F.2d 275 (9th Cir. 1992), the court construed disputed language in a permit against the issuing agency, stating "ambiguities are to be construed against the party (in this case the agency) who drafted the agreement or selected the language used." Id. at 1117; see also Kennewick Irr. Dist. v. United States, 880 F.2d 1018, 1033 (9th Cir. 1989) (construing contract ambiguity against federal government).

The Agency, as drafter, bore the burden of using clear and unequivocal language to avoid having the Approval Order construed against it. It did not do so. The "In no case" language must, therefore, be construed against the Agency and in favor of MagCorp.

E. The Agency's Interpretation that a Variance Must be Obtained is Unreasonable, Arbitrary and Capricious.

In holding that the variance procedure is an integral part of the Unavoidable Breakdown Rule, the Agency hangs its hat on the language in the Unavoidable Breakdown Rule stating: "If excess emissions are predictable, they must be authorized under the variance procedure in Section 2.3."¹⁶ The only reasonable interpretation of this language is that it

¹⁶ This sentence was added to the Unavoidable Breakdown Rule in 1991 to replace the sentence: "If such emissions are predictable, they are covered by the variance procedure." Utah Admin. R446-1-4.7.1 (1991) (emphasis added). By deleting the word "such" from the current language, the Agency clarified the distinction between excess emissions from unavoidable breakdowns and excess emissions from planned events. Only the latter are subject to the variance procedure.

merely serves to emphasize that excess emissions from predictable or avoidable events are not covered by the Unavoidable Breakdown Rule and must be authorized under the variance procedure in Utah Admin. R307-1-2.3 (the "Variance Rule"). It does not mean that a variance is required for excess emissions from an unavoidable breakdown.

The Variance Rule in Utah Admin. R307-1-2.3 and the Unavoidable Breakdown Rule in Utah Admin. R307-1-4.7 are mutually exclusive procedures -- one is not an integral part of the other. The Unavoidable Breakdown Rule addresses excess emissions from unavoidable breakdown and specifies the reporting and other procedures that must be taken to receive its protection. It does not require the operator to file for a variance. The Variance Rule, on the other hand, addresses excess emissions from predictable events. The Agency, however, adopted the interpretation that once a pollution control device breaks down, the resulting emissions become predictable and, therefore, must be authorized by a variance to avoid enforcement. The Agency referred to these events as periods of "predictable unavoidable breakdowns" -- an oxymoron and wholly unworkable interpretation. It also flies right in the face of the parties' stipulation that the breakdowns were unavoidable.

After MagCorp filed its appeal, however, the Agency reviewed the Order at a regular monthly meeting, without formal notice to MagCorp of what action it intended to take.¹⁷ On its own motion, the Agency, apparently in response to outside pressure over the impact of its Order on other operators, decided to change the language to "periods of

¹⁷ MagCorp questioned the Agency's authority to take such action without adequate prior notice and its jurisdiction to change an order after it had been appealed (R. 806-16).

predictable excess emissions."¹⁸ The Agency offered no explanation as to how this changed its interpretation of the Unavoidable Breakdown Rule. Clearly, it didn't change it all -- the Order still requires operators to obtain a variance after an unavoidable breakdown occurs and the resulting emissions become predictable. This is an unreasonable and unworkable interpretation.

Once a pollution control device has broken down, the excess emissions can be predicted. The Unavoidable Breakdown Rule recognizes this obvious fact by expressly requiring operators to report the excess emissions resulting from an unavoidable breakdown. Just because excess emissions can be predicted once a pollution control device has experienced an unavoidable breakdown, is no reason to override the protection of the Unavoidable Breakdown Rule by requiring a variance for the emissions resulting from the very circumstances covered by the Rule.

Subjecting unavoidable breakdowns to the variance procedure would create confusing and duplicative filing requirements and gut the express purpose and protection of the Unavoidable Breakdown Rule. Operators who experience an unavoidable breakdown are now left in an uncertain and untenable enforcement posture, wondering whether they must

¹⁸ Dr. Kanner was not in attendance at this proceeding. Presiding Board member, Ms. Cordon Teuscher, explained the reason for the change: "I've received calls from a number of different people. Eight or nine people have called me concerned about a term we used in our decision The issue, as people have described it to me, and this is in some ways a legal issue, is there is no such thing as a predictable unavoidable breakdown. And people are concerned that using that term in this decision may set some sort of precedent for the Division to say, for example, such and such low NOX burner has failed on three previous occasions, and it should have been predictable to you that it would fail again, therefore it's a predictable unavoidable breakdown and you're not entitled to the protection of the unavoidable breakdown rule." (R. 806-16.)

now file a variance request with the Agency, whether it will be granted, and even if granted, whether it will exempt excess emissions occurring before the variance approval date. Nothing in the Variance Rule authorizes the Agency to grant variances for emissions or events that have already occurred.¹⁹ Moreover, nothing in the Variance Rule references the Unavoidable Breakdown Rule or authorizes any variance for unavoidable breakdowns or for the resulting excess emissions.

To avoid the risk of enforcement that would necessarily arise once an unavoidable breakdown occurs, operators, apparently, now need to have the variance already in hand -- a "prospective variance" for unavoidable breakdowns. Obviously, this is the very protection the Unavoidable Breakdown Rule was intended to provide.

The Agency's interpretation of the Unavoidable Breakdown Rule directly conflicts with its interpretation that the "In no case" language in MagCorp's Melt/Reactor Limit means "no exceptions." Obviously, if there are "no exceptions", then the variance procedure cannot apply. On the other hand, the Agency has no legal authority to deprive MagCorp of the Variance Rule.

IV. THE AGENCY ERRONEOUSLY CONCLUDED THAT THE NOV WAS NOT, IN PART, TIME-BARRED UNDER THE APPLICABLE ONE-YEAR STATUTE OF LIMITATIONS.

The NOV is time-barred, in part, as to all violations of the Melt/Reactor Limit that allegedly occurred prior to September 1993. Utah Code Ann. § 78-12-29(3) (1992 & Supp. 1996) requires that an action upon a statute for the assessment of a penalty must be

¹⁹ If, however, some form of after-the-fact variance procedure is found to apply, MagCorp reserves the right to seek such a variance.

commenced within one year. The NOV, by its express terms, is issued under threat of civil penalties of up to \$10,000 per day per violation under Utah Code Ann. § 19-2-115. As such, issuance of an NOV by the Agency is subject to the one-year statute of limitation in § 78-12-29(3).

The Agency contends that MagCorp exceeded the rolling 12-month Melt/Reactor Limit during the period from June 1992 to April 1994. Thus, the Agency alleges violations that occurred more than one year prior to the issuance of the NOV on September 29, 1994. As such, the NOV and Violation No. 5 thereof are time-barred as to any monthly exceedances of the Melt/Reactor Limit that occurred before September 29, 1993. The Agency's conclusion to the contrary is clearly erroneous and should be reversed.

The Agency erroneously concludes that the running of Section 78-12-29(3) was tolled until April 26, 1994, when the Agency claims it first discovered that MagCorp had exceeded the 4,800 ton limit. Without expressly stating, it is clear that the Agency is attempting to invoke the discovery rule to toll the running of Section 78-12-29(3).²⁰ Before the discovery rule can be applied there must be an initial showing "that the plaintiff did not know and could not reasonably have discovered the facts underlying the cause of action in time to commence an action within that period." Walker Drug Co. v. La Sal Oil Co., 902 P.2d 1229, 1231 (Utah 1995). The Agency has not made this showing.

²⁰ Whether the discovery rule applies is a conclusion of law which must be reviewed under a correction of error standard. See Klinger v. Kightly, 791 P.2d 868, 870 (Utah 1990); Sevy Security Title Co., 857 P.2d 958, 961 (Utah Ct. App. 1993), vacated in part on other grounds, 902 P.2d 629 (Utah 1995).

The Agency erroneously concluded that "it was impossible" for the Agency to know that the Melt/Reactor stack was not in compliance with the 1992 Approval Order, "and specifically" the Unavoidable Breakdown Rule, until April 26, 1994, when the Agency received MagCorp's April 23, 1994 letter. (R. 800.)²¹ The findings of fact²² on which the Agency based this conclusion are not supported by substantial evidence.

The Agency found that quarterly reports "did not include the excess emissions." (R. 799.) This finding is unclear. To the extent the Agency means that the quarterly reports did not separately report or list excess emissions over the 4,800 ton Melt/Reactor Limit, the finding is supported. (R. 114, 135.) However, to the extent the Agency means that the quarterly reports did not report excess emissions, the finding is unsupported by substantial evidence. The quarterly reports speak for themselves. Each report provided monthly totals and quarterly average totals of chlorine emissions from the Melt/Reactor stack. (R. F4, 302-360.) The rolling sum of the monthly totals of emissions over a 12-month period began exceeding 4,800 tons in June 1992. (R. 571.).

²¹ As an initial matter, whether MagCorp was in compliance with the Unavoidable Breakdown Rule is irrelevant as to whether the NOV is in part time-barred. MagCorp was not cited for violating the Unavoidable Breakdown Rule. MagCorp was cited for exceeding the Melt/Reactor Limit, which the Agency interpreted as counting emissions from unavoidable breakdowns. Therefore, even if it were impossible for the Agency to know whether MagCorp had complied with the Unavoidable Breakdown Rule, that conclusion is irrelevant.

²² The Agency "must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review." La Sal Oil Co. v. Department of Env't'l Quality, 843 P.2d 1045, 1047 (Utah Ct. App. 1992); see also Adams v. Board of Review, 821 P.2d 1, 4 (Utah Ct. App. 1991). The Board's findings of fact have virtually no detail. The Board's findings of fact are merely a rendition of the allegations, disputes and beliefs of the parties. (R. 794-95.) Findings of fact, if any, are buried inside the Board's conclusions of law. (R. 796-800.) To MagCorp's understanding, the evidence that supports these "findings" is marshalled herein.

Most importantly, all witnesses agreed that the quarterly reports reported total emissions and, thus, included excess emissions. (R. 483-84, 486, 556, 559, 561, 566.) Moreover, all witnesses agreed that excess emissions could be calculated by subtracting the 4,800 ton limit from the 12-month rolling amount of chlorine emissions set forth in the quarterly reports. (R. 484-86, 489, 499, 503, 505, 571-72.) Even Dr. Kanner agreed the calculation "can be done," but the Board deleted his conclusion. (R. 780.)

The Agency found that "MagCorp initially contended that because the excess emissions occurred during times of unavoidable breakdown, they did not have to be reported." (R. 799.) The Agency apparently says this to suggest MagCorp never reported excess emissions. As noted above, this is incorrect. To the extent this means MagCorp contended that Condition 17B of the 1992 Approval Order did not require excess emissions to be listed or reported separately in the quarterly reports, the statement is correct. There is overwhelming evidence that total emissions (including excess emissions) were reported in its quarterly reports, but no separate break out of excess emissions is necessary or required in those reports. Moreover, in January 1993, MagCorp reported to the Agency its total emissions exceeding the 4,800 ton Melt/Reactor Limit for the calendar year 1992. (G1; R. 557.)

The Agency states that the "total amount of chlorine emitted into the environment is not listed for the M/R Stack." (R. 800.). The letter dated March 25, 1994 (A3) speaks for itself. The Agency's witness claimed that the letter was deficient. (R. 491.) However, he admitted that the information he had requested was already available in the quarterly reports. (R. 492.) Moreover, the total chlorine emitted could easily be calculated

by adding columns 3 and 4a of the attachment to the letter (R. 62), as explained under paragraph 4 of the letter (A3; R. 60). Further, the Board found that the Agency did calculate the total chlorine emissions from monthly totals (R. 800) set forth in quarterly reports submitted by MagCorp beginning in January 1990 (R. F4, 303).

The foregoing "findings" of the Agency are unsupported by substantial evidence and should be ignored. Therefore, its conclusion that the Agency could not have discovered the violation until April 26, 1994, is erroneous. The evidence is overwhelming that the Agency knew or could have reasonably discovered the facts underlying the cause of action in time to commence an action within the limitations period. In fact, in 1992 the Agency did know that MagCorp exceeded the 4,800-ton limit by calculating total emissions set forth in quarterly reports. The Agency cannot make the showing necessary to invoke the discovery rule to toll the running of the one-year statute of limitations. The Agency's claims are time-barred for any alleged violations that occurred prior to September 29, 1993.

CONCLUSION

For the foregoing reasons, the Agency erred in upholding Violation No. 5 of the NOV. The Agency's Order should be reversed and vacated with directions that the Agency enter an Order determining that no violation occurred.

ADDENDUM

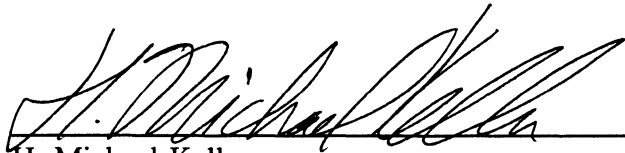
1. U.S. Const. amend. V.
2. U.S. Const. amend XIV.
3. U.S. Const. art. I, § 7.
4. Utah Code Ann. § 78-12-29(3) (1992 & Supp. 1996).

5. Utah Admin. R307-1-2.3 (1996).
6. Utah Admin. R307-1-4.7 (1996).
7. 1992 Approval Order (B2, R. 105.)
8. Stipulation (R. 38.)
9. Stipulation Discussion at Hearing (R. 378-82.)

DATED this 10th day of September, 1996.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By



H. Michael Keller
Attorneys for Petitioner

CERTIFICATE OF SERVICE

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

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

A handwritten signature in black ink, appearing to read "L. Michael Miller", is written over a horizontal line.

Tab 1

AMENDMENT I

[Religious and political freedom.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances

AMENDMENT II

[Right to bear arms.]

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed

AMENDMENT III

[Quartering soldiers.]

No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law

AMENDMENT IV

[Unreasonable searches and seizures.]

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

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation

AMENDMENT VI

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence

AMENDMENT VII

[Trial by jury in civil cases.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according

AMENDMENT VIII

[Bail — Punishment.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted

AMENDMENT IX

[Rights retained by people.]

The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people

AMENDMENT X

[Powers reserved to states or people.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people

AMENDMENT XI

[Suits against states — Restriction of judicial power.]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State

AMENDMENT XII

[Election of President and Vice-President.]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves, they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate.—The President of the Senate shall, in the presence of the Senate and House of Representatives open all the certificates and the votes shall then be counted.—The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of Electors appointed, and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by states, the representation from each state having one vote, a quorum for this purpose shall consist of a member or members from two-thirds of the states and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President, a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice

Tab 2

AMENDMENT XIII

Section

- 1 [Slavery prohibited]
- 2 [Power to enforce amendment]

Section 1. [Slavery prohibited.]

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction

Sec. 2. [Power to enforce amendment.]

Congress shall have power to enforce this article by appropriate legislation

AMENDMENT XIV

Section

- 1 [Citizenship — Due process of law — Equal protection]
- 2 [Representatives — Power to reduce appointment]
- 3 [Disqualification to hold office.]
- 4 [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid]
- 5 [Power to enforce amendment]

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws

Sec. 2. [Representatives — Power to reduce appointment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability

Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions

and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void

Sec. 5. [Power to enforce amendment.]

The Congress shall have power to enforce by appropriate legislation, the provisions of this article

AMENDMENT XV

Section

- 1 [Right of citizens to vote — Race or color not to disqualify]
- 2 [Power to enforce amendment]

Section 1. [Right of citizens to vote — Race or color not to disqualify.]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude

Sec. 2. [Power to enforce amendment.]

The Congress shall have power to enforce this article by appropriate legislation

AMENDMENT XVI

[Income tax.]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration

AMENDMENT XVII

[Election of senators.]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof for six years, and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies. Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution

AMENDMENT XVIII

[REPEALED DECEMBER 5 1933 SEE AMENDMENT XXI, SECTION 1]

Section

- 1 [National prohibition — Intoxicating liquors]
- 2 [Concurrent power to enforce amendment]
- 3 [Time limit for adoption]

Section 1. [National prohibition — Intoxicating liquors.]

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof

Tab 3

CONSTITUTION OF UTAH

PREAMBLE

Article

- I. Declaration of Rights
- II. State Boundaries
- III. Ordinance
- IV. Elections and Right of Suffrage
- V. Distribution of Powers
- VI. Legislative Department
- VII. Executive Department
- VIII. Judicial Department
- IX. Congressional and Legislative Apportionment
- X. Education
- XI. Counties, Cities and Towns
- XII. Corporations
- XIII. Revenue and Taxation
- XIV. Public Debt
- XV. Militia
- XVI. Labor
- XVII. Water Rights
- XVIII. Forestry
- XIX. Public Buildings and State Institutions
- XX. Public Lands
- XXI. Salaries
- XXII. Miscellaneous
- XXIII. Amendment and Revision
- XXIV. Schedule

PREAMBLE

Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this CONSTITUTION.

1896

ARTICLE I

DECLARATION OF RIGHTS

Section

1. [Inherent and inalienable rights.]
2. [All political power inherent in the people.]
3. [Utah inseparable from the Union.]
4. [Religious liberty — No property qualification to vote or hold office.]
5. [Habeas corpus.]
6. [Right to bear arms.]
7. [Due process of law.]
8. [Offenses bailable.]
9. [Excessive bail and fines — Cruel punishments.]
10. [Trial by jury.]
- [Trial by jury.] [Proposed.]
11. [Courts open — Redress of injuries.]
12. [Rights of accused persons.]
13. [Prosecution by information or indictment — Grand jury.]
14. [Unreasonable searches forbidden — Issuance of warrant.]
15. [Freedom of speech and of the press — Libel.]
16. [No imprisonment for debt — Exception.]
17. [Elections to be free — Soldiers voting.]
18. [Attainder — Ex post facto laws — Impairing contracts.]
19. [Treason defined — Proof.]
20. [Military subordinate to the civil power.]
21. [Slavery forbidden.]
22. [Private property for public use.]
23. [Irrevocable franchises forbidden.]
24. [Uniform operation of laws.]

Section

25. [Rights retained by people.]
26. [Provisions mandatory and prohibitory.]
27. [Fundamental rights.]
28. [Declaration of the rights of crime victims.]

Section 1. [Inherent and inalienable rights.]

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

1896

Sec. 2. [All political power inherent in the people.]

All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

1896

Sec. 3. [Utah inseparable from the Union.]

The State of Utah is an inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land.

1896

Sec. 4. [Religious liberty — No property qualification to vote or hold office.]

The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution.

1896

Sec. 5. [Habeas corpus.]

The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it.

1896

Sec. 6. [Right to bear arms.]

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

1984 (2nd S.S.)

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

1896

Sec. 8. [Offenses bailable.]

(1) All persons charged with a crime shall be bailable except:

- (a) persons charged with a capital offense when there is substantial evidence to support the charge; or
- (b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or

Tab 4

78-12-28. Within two years.

An action may be brought within two years

(1) against a marshal, sheriff, constable, or other officer upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this section does not apply to an action for an escape;

(2) for recovery of damages for the death of one caused by the wrongful act or neglect of another; or

(3) for injury to the personal rights of another as a civil rights suit under 42 U.S.C. 1983 1996

78-12-29. Within one year.

An action may be brought within one year

(1) for liability created by the statutes of a foreign state,

(2) upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation,

(3) upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state;

(4) for libel, slander, assault, battery, false imprisonment, or seduction;

(5) against a sheriff or other officer for the escape of a prisoner arrested or imprisoned upon either civil or criminal process;

(6) against a municipal corporation for damages or injuries to property caused by a mob or riot;

(7) on a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to four years, under Section 25-6-10; or

(b) Subsection 25-6-6(2). 1996

78-12-30. Actions on claims against county, city or town.

Actions on claims against a county, city or incorporated town, which have been rejected by the county executive, city commissioner, city council, or board of trustees, as the case may be, must be commenced within one year after the first rejection thereof by such board of county or city commissioners, city council, or board of trustees 1993

78-12-31. Within six months.

An action may be brought within six months against an officer, or an officer de facto

(1) to recover any goods, wares, merchandise or other property seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to, any goods, wares, merchandise or other personal property seized, or for damages done to any person or property in making any such seizure,

(2) for money paid to any such officer under protest, or seized by such officer in his official capacity, as a collector of taxes, and which, it is claimed, ought to be refunded 1996

78-12-31.1. Renumbered as § 78-35a-107.

1996

78-12-31.2. Post-conviction remedies — 30 days.

No post-conviction remedies may be applied for or entertained by any court within 30 days prior to the date set for execution of a capital sentence, unless the grounds therefor are based on facts or circumstances which developed or first became known within that period 1996

78-12-32. Action on mutual account — When deemed accrued.

In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side 1996

78-12-33. Actions by state or other governmental entity.

The limitations in this article apply to actions brought in the name of or for the benefit of the state or other governmental entity, the same as to actions by private parties, except under Section 78-12-33.5 1996

78-12-33.5. Statute of limitations — Asbestos damages — Action by state or governmental entity.

(1) (a) No statute of limitations or repose may bar an action by the state or other governmental entity to recover damages from any manufacturer of any construction materials containing asbestos, when the action arises out of the manufacturer's providing the materials, directly or through other persons, to the state or other governmental entity or to a contractor on behalf of the state or other governmental entity

(b) Subsection (a) provides for actions not yet barred, and also acts retroactively to permit actions under this section that are otherwise barred

(2) As used in this section, "asbestos" means asbestiform varieties of

(a) chrysotile (serpentine);

(b) crocidolite (riebeckite);

(c) amosite (cummingtonite-grunerite);

(d) anthophyllite;

(e) tremolite; or

(f) actinolite 1996

78-12-34. Repealed.

1981

ARTICLE 3

MISCELLANEOUS PROVISIONS

78-12-35. Effect of absence from state.

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action 1987

78-12-36. Effect of disability.

If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either under the age of majority or mentally incompetent and without a legal guardian, the time of the disability is not a part of the time limited for the commencement of the action 1987

78-12-37. Effect of death.

If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced against the representatives after the expiration of that time and within one year after the issue of letters testamentary or of administration

Tab 5

meters of a Class I area, and have an impact on such area equal to or greater than 1 ug/cubic meter, (24-hour average).

"Single Coat" means a single film of coating applied directly to the metal substrate omitting the primer application.

"Sole Source of Heat" means the residential solid fuel burning device is the only available source of heat for the entire residence, except for small portable heaters.

"Solid Fuel" means wood, coal, and other similar organic material or combination of these materials.

"Solvent" means organic materials which are liquid at standard conditions (Standard Temperature and Pressure) and which are used as solvers, viscosity reducers, or cleaning agents.

"Solvent Metal Cleaning" means the process of cleaning soils from metal surfaces by cold cleaning, open top vapor degreasers, or conveyORIZED degreasing.

"Source" means any structure, building, facility, or installation which emits or may emit any air pollutant subject to regulation under the Clean Air Act and which is located on one or more continuous or adjacent properties and which is under the control of the same person or persons under common control. A building, structure, facility, or installation means all of the pollutant-emitting activities which belong to the same industrial grouping. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e. which have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (US Government Printing Office stock numbers 4101-0065 and 003-005-00176-0, respectively).

"Specialty Printing Operations" means all gravure and flexographic operations which print a design or image, excluding publication gravure and packaging gravure printing. Specialty printing operations include, among other things, printing on paper cups and plates, patterned gift wrap, wallpaper, and floor coverings.

"Stack" means any point in a source designed to emit solids, liquids, or gases into the air, including a pipe or duct but not including flares.

"Stack in Existence" means that the owner or operator had

1. begun, or caused to begin, a continuous program of physical on-site construction of the stack, or

2. entered into binding agreements or contractual obligations, which could not be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the stack to be completed in a reasonable time.

"Stain" means a nonprotective flat wood coating which colors the wood surface without obscuring the grain.

"Standards of Performance for New Stationary Sources" means the Federally established requirements for performance and record keeping (Title 40 Code of Federal Regulations, Part 60).

"State" means Utah State.

"Submerged Fill Pipe" means any fill pipe with a discharge opening which is entirely submerged when the liquid level is 6 inches above the bottom of the tank and the pipe normally used to withdraw liquid from the tank can no longer withdraw any liquid.

"Synthesized Pharmaceutical Manufacturing" means the manufacture of pharmaceutical products by chemical synthesis.

"Temporary" means not more than 180 calendar days.

"Tile Board" means paneling that has a colored waterproof surface coating.

"Total Suspended Particulate (TSP)" means minute separate particles of matter, collected by high volume sampler.

"Trash" means solids not considered to be highly flammable or explosive including, but not limited to clothing, rags, leather, plastic, rubber, floor coverings, excelsior, tree leaves, yard trimmings and other similar materials.

"Unconfined Blasting" means any abrasive blasting which does not conform with definition 1.41.

"Vacuum Producing System" means any reciprocating, rotary, or centrifugal blower or compressor, or any jet ejector or device that takes suction from a pressure below atmospheric and discharges against atmospheric pressure.

"Vinyl Coating" means applying a decorative or protective top coat, or printing on vinyl coated fabric or vinyl sheets.

"Volatile Organic Compound (VOC)" as defined in 40 CFR Subsection 51.100(s)(1), as amended on March 8, 1996, and published at 61 Fed. Reg. 4588 (February 7, 1996), is hereby adopted and incorporated by reference.

"Waste" means all solid, liquid or gaseous material, including, but not limited to, garbage, trash, household refuse, construction or demolition debris, or other refuse including that resulting from the prosecution of any business, trade or industry.

"Waxy, Heavy Pour Crude Oil" means a crude oil with a pour point of 50 degrees F or higher as determined by the American Society for Testing and Materials Standard D97-66, "Test for pourpoint of petroleum oils."

"Wet Abrasive Blasting" means any abrasive blasting using compressed air as the propelling force and sufficient water to minimize the plume.

"Zero Drift" means the change in the instrument meter readout over a stated period of time of normal continuous operation when the VOC concentration at the time of measurement is zero.

R307-1-2. General Requirements.

2.1 Air Pollution Prohibited. Emission of air contaminants in sufficient quantities to cause air pollution as defined in subsection 1.11 of R307-1-1 is prohibited. The State statute provides for penalties up to \$50,000/day for violation of State statutes, regulations, rules or standards (See Section 19-2-115 for further details).

2.2 Periodic Reports of Emissions and Availability of Information. The owner or operator of any stationary air-contaminant source in Utah shall furnish to the Board the periodic reports required under Section 19-2-104(1)(c) and any other information as the Board may deem necessary to determine whether the source is in compliance with Utah and Federal regulations and standards. The information thus obtained will be correlated with applicable emission standards or limitations and will be available to the public during normal business hours at the Division of Air Quality.

2.3 Variances Authorized

2.3.1 Variance from these regulations may be granted by the Board as provided by law (See Section 19-2-113) unless prohibited by the Clean Air Act:

A. to permit operation of an air pollution source for the time period involved in installing or constructing air pollution control equipment in accordance with a compliance schedule negotiated by the Executive Secretary and approved by the Board.

B. to permit operation of an air pollution source where there is no practicable means known or available for adequate prevention, abatement or control of the air pollutants involved. Such a variance shall be only until the necessary means for prevention, abatement or control becomes known and available, subject to the use of substitute or alternate measures the Board may prescribe.

C. to permit operation of an air pollution source where the control measures, because of their extent or cost, must be spread over a considerable period of time.

2.3.2 Variance requests, as set forth in Section 19-2-113, may be submitted by the owner or operator who is in control of any plant, building, structure, establishment, process or equipment.

2.4 General Burning.

As provided in Section 19-2-114, the provisions of R307-1-2.4.1 through R307-1-2.4.5 below are not applicable to:

(1) burning incident to horticultural or agricultural operations of:

- (a) prunings from trees, bushes, and plants; or
- (b) dead or diseased trees, bushes, and plants, including stubble;

(2) burning of weed growth along ditch banks incident to clearing these ditches for irrigation purposes;

(3) controlled heating of orchards or other crops to lessen the chances of their being frozen so long as the emissions from this heating do not violate minimum standards set by the board; and

(4) the controlled burning of not more than two structures per year by an organized and operating fire department for the purpose of training fire service personnel when the United States Weather Service clearing index is above 500.

See also Section 11-7-1(2)(a).

2.4.1 Community Waste Disposal. No open burning shall be done at sites used for disposal of

community trash, garbage and other wastes except as authorized through a variance or as authorized for a specific period of time by the Board on the basis of justifiable circumstances reviewed and weighed in terms of pollution effects and other relevant considerations at an appropriate hearing following written application.

2.4.2 General Prohibitions. No person shall burn any trash, garbage or other wastes, or shall conduct any salvage operation by open burning except in conformity with the provisions of Subsections R307-1-2.4.3 and R307-1-2.4.4.

2.4.3 Permissible Burning - Without Permit. When not prohibited by other laws or by other officials having jurisdiction and provided that a nuisance as defined in Section 76-10-803 is not created, the following types of open burning are permissible without the necessity of securing a permit:

A. in devices for the primary purpose of preparing food such as outdoor grills and fireplaces;

B. campfires and fires used solely for recreational purposes where such fires are under control of a responsible person;

C. in indoor fireplaces and residential solid fuel burning devices except as provided in Subsection R307-17-3 of these regulations;

D. properly operated industrial flares for combustion of flammable gases; and

E. burning, on the premises, of combustible household wastes generated by occupants of dwellings of four family units or less in those areas only where no public or duly licensed disposal service is available.

2.4.4 Permissible Burning - With Permit. Open burning is authorized by the issuance of a permit as specified in R307-1-2.4.4.B when not prohibited by other laws or other officials having jurisdiction, and when a nuisance as defined in Section 76-10-803 is not created.

A. Individual permits for the types of burning listed in R307-1-2.4.4.B may be issued by an authorized local authority under the "clearing index" system approved and coordinated by the Department of Environmental Quality.

B. Types of burning for which a permit may be granted are:

(1) open burning of tree cuttings and slash in forest areas where the cuttings accrue from pulping, lumbering, and similar operations, but excluding waste from sawmill operations such as sawdust and scrap lumber;

(2) open burning of trees and brush within railroad rights-of-way provided that dirt is removed from stumps before burning, and that tires, oil more dense than #2 fuel oil or other materials which can cause severe air pollution are not used to start fires or keep fires burning;

(3) open burning of solid or liquid fuels or structures for removal of hazards or eyesores;

(4) open burning, in remote areas, of highly explosive or other hazardous materials, for which there is no other known practical method of disposal;

(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 marshal 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 marshal 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 marshal;

(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

Tab 6

section 3.9 may be filed by the owner or operator of said source with the Executive Secretary within 20 days of receipt. The Board shall consider the request for review and determine the appropriateness of the bill.

3.10 Visibility

1. The Executive Secretary shall review any new major source or major modification proposed in either an attainment area or area of nonattainment area for the impact of its emissions on visibility in any mandatory Class I area. As a condition of any approval order issued to a source under subsection 3.1 of these regulations, the Executive Secretary shall require the use of air pollution control equipment, technologies, methods or work practices deemed necessary to mitigate visibility impacts in Class I areas that would occur as a result of emissions from such source. The Executive Secretary shall take into consideration as a part of the review and control requirements:

- A. the costs of compliance;
- B. the time necessary for compliance;
- C. the energy usage and conservation;
- D. the non air quality environmental impacts of compliance;
- E. the useful life of the source; and
- F. the degree of visibility improvement which will be provided as a result of control.

In determining visibility impact by a major new source or major modification, the Executive Secretary shall use, the procedures identified in the EPA publication "Workbook For Estimating Visibility Impacts" (EPA 450-4-80-031) November 1980, or equivalent.

The Executive Secretary shall insure that source emissions will be consistent with making reasonable progress toward the national visibility goal referred to in 40 CFR, 51.300(a).

2. The Executive Secretary shall notify the Federal Land Manager having jurisdiction over any mandatory Class I area of any proposed new major source or major modification that may reasonably be expected to affect visibility in that mandatory Class I area. Such notification shall be in writing and shall include a copy of all information relevant to the Notice of Intent and visibility impact analysis submitted by the source. The notification shall be made within thirty (30) days of receipt of the completed Notice of Intent and at least sixty (60) days prior to any public hearing or the commencement of any public comment period, held in accordance with R307-1-3.1 of these regulations, on the proposal. The Executive Secretary shall consider, as a part of the new or modified source review required by this R307-1-3.10, any analysis performed by the Federal Land Manager that such proposed new major source or major modification may have an adverse impact on visibility in any mandatory Class I area, provided such analysis is submitted to the Executive Secretary within sixty (60) days of the notification to the Federal Land Manager as required by this paragraph. If the Executive Secretary determines that

the major source or major modification will have an adverse impact on visibility in any mandatory Class I area, the Executive Secretary shall not issue the approval order. Where the Executive Secretary determines that such analysis does not demonstrate that adverse impact on visibility will result in a mandatory Class I area, the Executive Secretary will, in the notice of any public hearing held on the new major source or major modification proposal, explain the decision or give notice where the explanation can be obtained.

Where the Executive Secretary receives advance notification or early consultation with a major new source or major modification which may affect visibility prior to the submission of a Notice of Intent to Construct for the major new source or major modification, the Executive Secretary will notify the affected Federal Land Manager within thirty (30) days of such advance notification.

3. If the analysis required by R307-1-3.10.1 predicts that an adverse impact on visibility may reasonably be expected to occur in a mandatory Class I area, the Executive Secretary may require a proposed new major source or major modification to perform pre-construction and/or post-construction visibility monitoring in any mandatory Class I area as deemed necessary and appropriate to assess the impact of the proposed source or modification on visibility. Such monitoring shall be conducted in accordance with a monitoring plan prepared by the owner or operator of the source or his representative and approved by the Executive Secretary.

4. The Executive Secretary will consider in review and permitting of a new major source or major modification to an existing source, any visibility monitoring data provided by the Federal Land Manager which may reasonably be expected to be impacted by the proposed new major source or major modification.

5. The Executive Secretary may perform oversight audits of any network collecting visibility data which may be used as a part of the permitting process as determined necessary.

R307-1-4. Emissions Standards.

Section R307-1-3 may require more stringent controls than listed herein, in which case the requirements of R307-1-3 must be met.

4.1 Visible Emissions. Opacity limitations in R307-1-4.1 shall not apply to any sources for which emission limitations are assigned pursuant to R307-1-3.2. The provisions of R307-1-4.1.7 through R307-1-4.1.9 shall apply to such sources except as otherwise provided in R307-1-3.2.

4.1.1 In PM10 Nonattainment Areas, visible emissions from existing installations except gasoline powered internal combustion engines, shall be of a shade or density no darker than 20% opacity. Installations in other areas of the State which were constructed before April 25, 1971, except internal combustion engines, shall be of a shade or density no darker than 40% opacity except as provided in these regulations.

4.1.2 Visible emissions from installations constructed after April 25, 1971, except internal combustion engines, or any incinerator shall be of a shade or density no darker than 20% opacity, except as otherwise provided in these regulations.

4.1.3 No owner or operator of a gasoline powered engine or vehicle shall allow, cause or permit the emissions of visible contaminants except for starting motion no farther than 100 yards, or for stationary operation not exceeding 3 minutes in any hour.

4.1.4 Emissions from diesel engines manufactured after January 1, 1973, shall be of a shade or density no darker than 20% opacity, except for starting motion no farther than 100 yards or for stationary operation not exceeding 3 minutes in any hour.

4.1.5 Emissions from diesel engines manufactured before January 1, 1973, shall be of a shade or density no darker than 40% opacity, except for starting motion no farther than 100 yards or for stationary operation not exceeding 3 minutes in any hour.

4.1.6 Upon application, exceptions to paragraphs 4.1.4 and 4.1.5 may be granted by the Board on a case by case basis for diesel locomotives operating above 6000 feet MSL.

4.1.7 Visible emissions exceeding the opacity standards for short time periods as the result of initial warm-up, soot blowing, cleaning of grates, building of boiler fires, cooling, etc., caused by start-up or shutdown of a facility, installation or operation, or unavoidable combustion irregularities which do not exceed three minutes in length (unavoidable combustion irregularities which exceed three minutes in length must be handled in accordance with R307-1-4.7), shall not be deemed in violation provided that the executive secretary finds that adequate control technology has been applied. The owner or operator shall minimize visible and non-visible emissions during start-up or shutdown of a facility, installation, or operation through the use of adequate control technology and proper procedures.

4.1.8 Compliance Method. Emissions shall be brought into compliance with these requirements by reduction of the total weight of contaminants discharged per unit of time rather than by dilution of emissions with clean air.

4.1.9 Opacity Observation. Opacity observations of emissions from stationary sources shall be conducted in accordance with EPA Method 9, "Visual Determination of Opacity of Emissions from Stationary Sources", 40 CFR Part 60, Appendix A. Opacity observers of mobile sources and intermittent sources shall use procedures similar to Method 9, but the requirement for observations to be made at 15 second intervals over a 6-minute period shall not apply.

4.2 Sulfur Content of Fuels.

4.2.1 Any coal, oil, or mixture thereof, burned in any fuel burning or process installation not covered by New Source Performance Standards for sulfur emissions shall contain no more than 1.0 pound sulfur per million gross BTU heat input for any mixture of coal nor .85 pounds sulfur per million gross BTU heat input for any oil.

A. In the case of fuel oil, it shall be sufficient to record the following specifications for each purchase of fuel oil from the vendor: 1) Weight Percent Sulfur 2) Gross Heating Value (btu per unit volume) and 3) Density. These parameters shall be ascertained in accordance with the methods of the American Society for Testing and Materials.

B. In the case of coal, it shall be necessary to obtain a representative grab sample for every 24 hours of operation and the sample shall be tested in accordance with the methods of the American Society for Testing and Materials.

C. All sources located in the SO₂ nonattainment area covered by Section IX, Part H of the Utah State Implementation Plan which are required to comply with specific fuel (oil or coal) sulfur content limitations must demonstrate compliance with their limitations in accordance with paragraphs A and B above.

D. Records of fuel sulfur content shall be kept for all periods when the plant is in operation and shall be made available to the executive secretary upon request, and shall include a period of two years ending with the date of the request.

E. If the owner/operator of the source can demonstrate to the executive secretary that the inherent variability of the coal they are receiving from the vendor is low enough such that the testing requirements outlined above may be deemed excessive, then an alternative testing plan may be approved for use with the same source of coal.

F. Any person may apply to the executive secretary for approval of an alternative test method, an alternative method of control, an alternative compliance period, an alternative emission limit, or an alternative monitoring schedule. The application must include a demonstration that the proposed alternative produces an equal or greater air quality benefit than that required by R307-1-4.2, or that the alternative test method is equivalent to that required by these rules. The executive secretary shall obtain concurrence from EPA when approving an alternative test method, an alternative method of control, an alternative compliance period, an alternative emission limit, or an alternative monitoring schedule.

4.2.2 Any person engaged in operating fuel burning equipment using coal or fuel oil, which is not covered by New Source Performance Standards for sulfur emissions, may apply for an exemption from the sulfur content restrictions of R307-1-4.2.1. The applicant shall furnish evidence, that the fuel burning equipment is operating in such a manner as to prevent the emission of sulfur dioxide in amounts greater than would be produced under the limitations of R307-1-4.2.1. Control apparatus to continuously prevent the emission of sulfur greater than provided by R307-1-4.2.1 must be specified in the application for an exemption.

4.2.3 In case an exemption is granted, the operator shall install continuous emission monitoring devices approved by the executive secretary. The

operator shall provide the executive secretary with a monthly summary of the data from such monitors. This summary shall be such as to show the degree of compliance with R307-1-4.2.1. It shall be submitted no later than the calendar month succeeding its recording. When exemptions from R307-1-4.2.1 are granted, the source's application for such exemption must specify the test method for determining sulfur emissions. The test method must agree with the NSPS test method for the same industrial category.

4.2.4 Methods for determining sulfur content of coal and fuel oil shall be those methods of the American Society for Testing and Materials.

A. For determining sulfur content in coal, ASTM Methods D3177-75 or D4239-85 are to be used.

B. For determining sulfur content in oil, ASTM Methods D2880-71 or D4294-89 are to be used.

C. For determining the gross calorific (or BTU) content of coal, ASTM Methods D2015-77 or D3286-85 are to be used.

4.4 Automobile Emission Control Devices. Any person owning or operating any motor vehicle or motor vehicle engine registered in the State of Utah on which is installed or incorporated a system or device for the control of crankcase emissions or exhaust emissions in compliance with the Federal motor vehicle rules, shall maintain the system or device in operable condition and shall use it at all times that the motor vehicle or motor vehicle engine is operated. No person shall remove or make inoperable within the State of Utah the system or device or any part thereof, except for the purpose of installing another system or device, or part thereof, which is equally or more effective in reducing emissions from the vehicle to the atmosphere.

4.5 Provisions for fugitive emissions and fugitive dust have been renumbered to R307-12.

4.6 Provisions for continuous emission monitoring systems have been renumbered to R307-13.

4.7 Unavoidable Breakdown. This applies to all regulated pollutants including those for which there are National Ambient Air Quality Standards. Except as otherwise provided in R307-1-4.7, emissions resulting from an unavoidable breakdown will not be deemed a violation of these regulations. If excess emissions are predictable, they must be authorized under the variance procedure in R307-1-2.3. Breakdowns that are caused entirely or in part by poor maintenance, careless operation, or any other preventable upset condition or preventable equipment breakdown shall not be considered unavoidable breakdown.

4.7.1 Reporting. A breakdown for any period longer than 2 hours must be reported to the executive secretary within 3 hours of the beginning of the breakdown if reasonable, but in no case longer than 18 hours after the beginning of the breakdown. During times other than normal office hours, breakdowns for any period longer than 2 hours shall be initially reported to the Environmental Health Emergency Response Coordinator, Telephone (801) 536-4123. Within 7 calendar days of the beginning of

any breakdown of longer than 2 hours, a written report shall be submitted to the executive secretary which shall include the cause and nature of the event, estimated quantity of pollutant (total and excess), time of emissions and steps taken to control the emissions and to prevent recurrence. The submittal of such information shall be used by the executive secretary in determining whether a violation has occurred and/or the need of further enforcement action.

4.7.2 Penalties. Failure to comply with the reporting procedures of R307-1-4.7.1. will constitute a violation of these regulations.

4.7.3 The owner or operator of an installation suffering an unavoidable breakdown shall assure that emission limitations and visible emission limitations are exceeded for only as short a period of time as reasonable. The owner or operator shall take all reasonable measures which may include but are not limited to the immediate curtailment of production, operations, or activities at all installations of the source if necessary to limit the total aggregate emissions from the source to no greater than the aggregate allowable emissions averaged over the periods provided in the source's approval orders or the UACR. In the event that production, operations or activities cannot be curtailed so as to so limit the total aggregate emissions without jeopardizing equipment or safety or measures taken would result in even greater excess emissions, the owner or operator of the source shall use the most rapid, reasonable procedure to reduce emissions. The owner or operator of any installation subject to a SIP emission limitation pursuant to these rules shall be deemed to have complied with the provisions of R307-1-4.7 if the emission limitation has not been exceeded.

4.7.4 Failure to comply with curtailment actions required by R307-1-4.7.3 will constitute a violation of these rules.

4.8 In accordance with paragraph 110(a)(6), Clean Air Act as amended August 1977, owners or operators may not temporarily reduce the pay of any employee by reason of the use of a supplemental or intermittent or other dispersion dependent control system for the purposes of meeting any air pollution requirement adopted pursuant to the Clean Air Act as amended August 1977.

4.9 Requirements for ozone nonattainment areas and Davis and Salt Lake Counties have been renumbered to R307-14.

4.10 Abrasive Blasting.

4.10.1 Visible Emission Standards.

A. No person shall, if he complies with performance standards outlined in R307-1-4.10.3 or if he is not located in an area of nonattainment for particulates, discharge into the atmosphere from any abrasive blasting any air contaminant for a period or periods aggregating more than three minutes in any one hour which is a shade or density darker than 40% opacity.

B. No person shall, if he is not complying with an applicable performance standard in R307-1-4.10.3

and is in an area of nonattainment, discharge into the atmosphere from any abrasive blasting any air contaminant for a period or periods aggregating more than three minutes in any one hour which is of a shade or density no darker than 20% opacity.

4.10.2 Visible Emission Evaluation Techniques. Visible emission evaluation of abrasive blasting operations shall be conducted in accordance with the following provisions:

A. Emissions from unconfined blasting shall be read at the densest point of the emission after a major portion of the spent abrasive has fallen out, at a point not less than five feet nor more than twenty-five feet from the impact surface from any single abrasive blasting nozzle.

B. Emissions from unconfined blasting employing multiple nozzles shall be judged as a single source unless it can be demonstrated by the owner or operator that each nozzle, evaluated separately, meets the emission and performance standards provided for in R307-1-4.10.

C. Emissions from confined blasting shall be read at the densest point after the air contaminant leaves the enclosure.

4.10.3 Performance Standards.

A. To satisfy the requirements of R307-1-4.10.1, any abrasive blasting operation may use at least one of the following performance standards:

- (1) Confined blasting;
- (2) Wet abrasive blasting;
- (3) Hydroblasting; or
- (4) Unconfined blasting using abrasives as defined in R307-1-4.10.3.B.

B. Abrasives. Abrasives used for dry unconfined blasting referenced in R307-1-4.10.3.A shall comply with the following performance standards:

- (1) Before blasting the abrasive shall not contain more than 1% by weight material passing a #70 U.S. Standard sieve.
- (2) After blasting the abrasive shall not contain more than 1.8% by weight material 5 micron or smaller.

Abrasives reused for dry unconfined blasting are exempt from R307-1-4.10.3.B(2), but must conform with R307-1-4.10.3.B(1).

C. Abrasive Certification. Sources using the performance standard of R307-1-4.10.3.A(4) to meet the requirements of R307-1-4.10.1 must demonstrate they have obtained abrasives from persons which have certified (submitted test results) to the executive secretary at least annually that such abrasives meet the requirements of R307-1-4.10.3.B.

4.11 Regulation for the Control of Fluorides From Existing Plants.

A. The owner or operator of the Chevron Chemical Company Phosphate Fertilizer Plant located in the Wasatch Front Air Quality Control Region shall not after July 1, 1983, discharge, or cause the discharge of fluoride into the atmosphere in excess of the following:

- (1) Wet Process Phosphoric Acid Plants. The fluoride emissions exclusive of tank farm emissions

shall not exceed 148 g/metric ton of equivalent P_2O_5 feed.

(2) Superphosphoric Acid Plants. Total fluoride emissions shall not exceed 5 g/metric ton of equivalent P_2O_5 feed.

(3) Ammonium Phosphate Plants. Total fluoride emissions shall not exceed 508 g/metric ton of equivalent total product.

B. Prior to the commencement of operation of any existing Triple Superphosphate Plant or Granular Triple Superphosphate Storage Facility located in the Wasatch Front Air Quality Control Region, Chevron shall submit a notice of intent to the executive secretary and obtain appropriate emission limitations.

C. Within 180 days following the effective date of this section, the owner or operator of the Chevron Phosphate Fertilizer Plant shall conduct testing to determine compliance with the emission limitations listed in subparagraphs A(1)-(3).

D. Compliance with the emission limitations shall be determined as follows:

(1) Emissions from all sources in the plant or process for which compliance is being demonstrated with potential emissions greater than 0.2 pounds per day fluoride shall be included in the demonstration of compliance.

(2) All tests shall be conducted while the source is operating at the maximum rate at which such source will be operated. During the tests, the source shall use raw materials and maintain process conditions representative of normal operations and such other relevant conditions as the executive secretary shall specify.

(3) Fluoride shall be measured according to Method 13A or 13B, Appendix A, Part 60, Title 40, of the Code of Federal Regulations.

(4) Flow rates shall be measured according to Method 1, Appendix A, Part 60, Title 40, of the Code of Federal Regulations.

(5) Fugitive emissions from the sources covered in R307-1-4.11 shall be estimated using methods and procedures which have been approved in advance by the executive secretary.

(6) The executive secretary will be notified at least 30 days prior to the testing of any source.

(7) Analysis, calculations, and preliminary results of all testing shall be made available to the executive secretary during any testing period.

(8) Reports of all compliance testing must be submitted within 30 days of the completion of such testing unless otherwise approved by the executive secretary.

(9) Records of all compliance testing shall be kept for a period of two years following such testing.

E. Subsequent emissions testing shall be conducted in accordance with R307-1-3.4.

4.12 Emission standards for residential solid fuel burning devices and fireplaces have been renumbered to R307-17.

R307-1-5. Emergency Controls.

5.1 Air Pollution Emergency Episodes.

Tab 7



STATE OF UTAH
DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF AIR QUALITY

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DAQE-388-92

April 16, 1992

G. Thomas Tripp, Manager
Environmental Affairs
Magnesium Corporation of America
238 North 2200 West
Salt Lake City, Utah 84116

Re: Approval Order for Emergency Offgas Stack Cathode Scrubbers,
Mist Eliminators for the Cathode Scrubbers,
Tooele County CDS Al ATT

Dear Mr. Tripp:

The above-referenced project has been evaluated and found to be consistent with the requirements of the Utah Air Conservation Rules (UACR) and the Utah Air Conservation Act. A 30-day public comment period was held and all comments received were evaluated. The conditions of this Approval Order (AO) reflect any changes to the proposed conditions which resulted from the evaluation of the comments received. This air quality AO authorizes the project with the following conditions and failure to comply with any of the conditions may constitute a violation of this order:

1. Emissions shall not exceed any of the values in AO BAQE-449-90 which are listed below.

A. Spray Dryers

- (1) Particulate - 144 lbs/hr per spray dryer;
- (2) HCl (spray dryer 01) - 500 lbs/hr;
- (3) HCl (spray dryer 02) - 400 lbs/hr;
- (4) HCl (spray dryer 03) - 400 lbs/hr.

B. Melt/Reactor Stack

- (1) Particulate - 13.1 lbs/hr - 52 tons per year (based on compliance stack test method referred to in condition number 9);
- (2) HCl - 7.2 lbs/hr - 31.5 tons per year (based on compliance stack test method referred to in condition number 11);
- (3) Cl₂ - The emissions shall be determined as follows:
 - a) The short term Cl₂ limit in the M/R stack during the operation of the CRB shall not exceed 400 lb/hr as determined by appropriate stack testing

procedures submitted by Magcorp on May 9, 1990 or as specified by the Executive Secretary.

- b) The first 12 months of operation - conversion of no less than 50% of the chlorine gas to HCl for the 12-month period, in accordance with the chlorine balance procedure required in Condition 16.D - In no case shall the chlorine gas emissions exceed 12,000 tons for the first 12 months of operation of the chlorine burner;
- 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.
- d) If the data obtained after one year of operation of the Chlorine Reduction Burner (CRB) indicate that the 4,800 ton per year limitation can be reduced due to the capabilities of the CRB, the Executive Secretary shall establish a new limitation as a modification to this AO.

C. Cathode Stack

- (1) Particulate - 34.1 lbs/hr - 74.9 tons per 12-month period (based on compliance stack test method referred to in condition number 9);
- (2) HCl - 17.6 lbs/hr - 61.8 tons per 12-month period (based on compliance stack test method referred to in condition number 11);
- (3) Cl₂ - 3,100 tons per 30-day period based on a rolling sum of successive operating days - 28,950 tons per 12-month period. The Cl₂ limits shall be increased by 8.3 ton per day for the number of days during 30-day period the Melt/Reactor chlorine burner is out of service. These limits are for all emissions from the cathode stack including emissions from unavoidable breakdowns.

D. Emergency Offgas Stack (E.O.G.)

- (1) Particulate - 37.5 lbs/hr - 63.5 tons per 12-month period (based on compliance stack test method referred to in condition number 9);
- (2) HCl - 46 lbs/hr - 65.7 tons per 12-month period (based on compliance stack test method referred to in condition number 11);
- (3) Cl₂ - 42 lbs/hr - 65.3 tons per 12-month period (based on compliance stack test method referred to in condition number 8).

2. This AO shall replace the AOs dated June 30, 1990 and July 30, 1990.
3. The opacity of the combined plumes of the spray dryer, cathode, melt/reactor, and E.O.G. stacks shall not exceed 40% opacity as determined by 40 CFR 60, Appendix A, Method 9. The opacity of each of the above stacks shall not exceed 20% opacity on an individual basis.
4. No more than 45,000 tons per 12-month period of virgin magnesium shall be cast in the foundry. This limit is exclusive of alloying metals added to the magnesium. "Virgin magnesium" shall be defined for purposes of this paragraph as that magnesium resulting directly from the electrolytic processing of brine at the Rowley, Utah facility. Magnesium derived from secondary materials, including but not limited to grosses and scrap, shall not be considered "virgin magnesium".

The cumulative hours of operation for the three spray dryers shall not exceed 25,034 hours per 12-month period. Production of total magnesium from the eleven furnaces installed and/or approved as of December 1, 1983, and January 25, 1985, shall not exceed 3,700 tons per 30-day period (based on a 30-day rolling average). Production of magnesium chloride shall not exceed 18,493 tons per 30-day period (based on a 30-day rolling average).

Compliance with the annual limitations shall be determined on a rolling 12-month total. Based on the first day of each month a new 12-month total shall be calculated using the previous 12 months. Records of production shall be kept for all periods when the plant is in operation. Records of production shall be made available to the Executive Secretary or his representative upon request and shall include a period of two years ending with the date of the request. Production shall be determined by examination of company production records and sales records. The records shall be kept on a daily basis. Hours of operation shall be determined by supervisor monitoring and maintaining of an operations log.

5. In order to achieve the emission limitations for HCl and Cl₂ from the Emergency Offgas stack (EOG), the owner/operator shall install a gas scrubber and mist eliminator in the duct work leading to the Emergency Offgas stack. The proposed scrubber shall consist of a rectangular shaped horizontal vessel containing a bed of random packing followed by a mist eliminator. The minimum measured liquid flow rate to the sprays in the scrubber shall be no less than 45 gallons/minute. The vessel shall be constructed with the following minimum dimensions:

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- A. Eleven feet long by nine feet wide
- B. The bed shall be three feet deep packed with Rauschert 50-2 high flow rings or equivalent.

The owner/operator shall install, calibrate, maintain, and operate a monitoring device for the continuous measurement of the scrubbing liquid flow rate to the scrubber. The monitoring device must be certified by the manufacturer to be accurate within plus or minus five percent of the design scrubbing liquid flow rate and

must be calibrated on an annual basis in accordance with the manufacturer's instructions. Continuous recording for the monitoring device is not required. However, daily records of readings shall be maintained.

This equipment shall be designed to bring the emissions to within the limits stated above in conditions 1.D 2,3. This equipment shall be operated according to the plans submitted in the Notice of Intent (NOI) dated January 3, 1991. Equivalency shall be determined by the Executive Secretary.

6. In order to achieve the emission limitations for particulates and HCl from the Cathode stack, the owner/operator shall install mist eliminators in each of the three cathode scrubbers. The mist eliminators shall be of the mesh type constructed of polypropylene, or equivalent, and be no less than six inches thick. They shall be located above the packing.

This equipment shall be designed to bring the emissions to within the limits stated above in conditions 1.C 1,2. This equipment shall be operated according to the plans and specifications submitted in the Notice of Intent (NOI) dated March 5, 1991.

7. In order to achieve the emission limitations for HCl from spray dryers No. 1 and No. 2, the owner/operator shall install sieve tray scrubbers and heat exchangers according to the plans and specifications submitted with the Notices of Intent (NOI) dated November 8, 1984 and March 18, 1986. The owner/operator shall operate the 01 and 02 sieve tray scrubbers according to the following temperature and acid concentration specifications:

| <u>AVG % HCl EQUIVALENT</u> | <u>MAXIMUM TEMP (°F) 01 SCRUBBERS</u> | <u>MAXIMUM TEMP (°F) 02 SCRUBBER</u> |
|---------------------------------|---|--|
| 5.0 - 5.9 | 176 | 184 |
| 6.0 - 6.9 | 168 | 176 |
| 7.0 - 7.9 | 160 | 168 |
| 8.0 - 8.9 | 152 | 160 |
| 9.0 - 9.9 | 144 | 152 |
| 10.0 - 10.9 | 136 | 144 |
| 11.0 - 11.9 | 128 | 136 |
| 12.0 - 12.9 | 120 | 128 |
| 13.0 - 13.9 | 112 | 120 |
| 14.0 - 14.9 | 104 | 112 |
| 15.0 - 15.9 | 96 | 104 |
| 16.0 - 16.9 | 88 | 96 |

- A. Percent HCl equivalent is defined as the percent of HCl in the scrubbing liquor plus 3.2 times the magnesium concentration in the scrubbing liquor.
- B. A percent HCl equivalent below 5.0% shall be considered in compliance, and a percent HCl equivalent greater than 16.9% shall be considered out of compliance.
- C. Provisions for measuring the temperature and concentration are in condition #15B.

Mr. Tripp
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In order to achieve the emission limitations for HCl from spray dryer No. 1, the owner/operator shall install the packed scrubber proposed in the Notice of Intent dated January 16, 1990.

Scrubber specifications shall include:

| | |
|--------------------------|--------------------------|
| Packing height/Volume | 7 ft/3800 cu ft |
| Gas velocity in vessel | 6.5 ft/sec maximum |
| Scrubber dimensions | 26' diameter, 40' height |
| Scrub liquor recirc rate | >2000 gpm |
| Mist eliminators | above packing |

8. In order to achieve the emissions limit for chlorine from the melt/reactor stack, the owner/operator shall install the CRB and associated equipment according to the specifications submitted with the Notice of Intent dated June 12, 1989. The melt/reactor scrubber system shall be operated at all times within the parameters to be included in this AO. The following parameters shall be followed for the CRB:
 - A. The owner/operator shall install the CRB between the particulate scrubbers and the HCl scrubbing circuit in the melt/reactor exhaust gas system according to the information submitted in the Notice of Intent dated June 12, 1989 and the additional information submitted to the Executive Secretary dated December 5, 1989. The burner shall react chlorine gas from the melt/reactor and the chlorine plant tail gas with the products of combustion of natural gas along with water vapor to form HCl. The necessary capture and delivery system shall be constructed to route the chlorine plant tail gas stream to the chlorine burner for incineration. The HCl shall then be routed to the HCl wet scrubbing system.
 - B. The approved installation shall consist of the following equipment:
 - (1) Chlorine reduction burner unit (1);
 - (2) Packed tower for HCl capture (1 new) to be added to the (2) two existing packed towers;
 - (3) High Energy Scrubber (venturi scrubber) for final particulate capture following the packed towers (HES scrubber already approved and existing)
 - C. The burner chamber temperature shall be no less than 1650°F or more than 2,000°F for more than 5 minutes in any 60-minute period. The temperature shall be monitored with equipment located such that an inspector can at any time safely read the output. The readings shall be accurate to within plus or minus 20°F. All instruments shall be calibrated against a primary standard at least once every 90 days. The primary standard shall be specified by the Executive Secretary.

The owner/operator shall use only natural gas as a fuel in the chlorine reduction burner. If any other fuel is to be

used, an AO shall be required in accordance with R307-1-3.1, UAC.

In order to demonstrate compliance with the emissions limit for chlorine from the E.O.G. stack, Magcorp shall use the test method, (EPA Method 5 sampling train), submitted on December 27, 1984.

9. To determine compliance with the particulate mass emission rate limitations of condition #1 above, the concentration of particulate in each stack shall be determined by 40 CFR 60, Appendix A, Method 5.

The filtration temperature shall be $248 \pm 25^{\circ}\text{F}$. The sample volume shall be no less than 30 dscf (68°F , 29.92 in. Hg.) per run, and the sample time shall be no less than 60 minutes per run. For the E.O.G. stack, the sample volume shall be no less than 60 dscf per run.

10. During any stack test to demonstrate compliance with the HCl emission limitation for the melt/reactor stack [condition #1 B(2)], the following conditions shall be maintained:
 - A. The melt/reactor system shall be operated at a minimum of 75% of production capacity.
 - B. The acid concentration measured at the Ducon scrubber shall be a minimum of 18% HCl as determined by "Standard Methods of Chemical Analysis" by F. J. Welcher, Volume 2, Part A, Page 260.
 - C. The exhaust of the Melt/Reactor Stack shall be maintained at a temperature of no greater than 125°F , with an acceptable positive variance of 10°F .
 - D. For the initial compliance stack testing after installation of the CRB, the owner/operator shall complete stack testing for particulate, HCl, and Cl_2 of the Melt/Reactor stack no later than thirty days after CRB start-up. Prior to testing, the owner/operator shall submit to the Executive Secretary for approval a full description of the proposed testing protocol and procedures.
11. To determine compliance with the HCl mass emission rate limitations of condition #1 above, the concentration of HCl shall be determined by the method described in the following letters to the Executive Secretary:
 - A. Determination of HCl concentrations in the melt/reactor, cathode, and E.O.G. stacks - 11/26/84;
 - B. HCl method revision - 12/27/85;
 - C. Standard conditions - 7/9/85.

In addition, 40 CFR 60, Appendix A, Method 1, shall be used.

12. To determine compliance with the mass emission rate for particulate and HCl in condition #1 above, 40 CFR 60, Appendix A,

Method 2 shall be used to measure the stack gas volumetric flow rate. The mass emission rate shall be determined as the product of the corrected volumetric flow rate and the concentration of pollutant as determined in condition #9 and #11 above. Compliance shall be determined based on the average of three consecutive runs.

13. During any stack tests to demonstrate compliance with the HCl emission limitation for the spray dryer #1 and #2, the scrubbing liquor temperature shall be within $\pm 19^{\circ}\text{F}$ of the maximum temperature stated in condition #7.
14. In order to achieve the emissions limit for chlorine from the emergency off gas stack, the owner/operator shall determine the chlorine limitation by the revised method submitted on December 27, 1984.
15. The Executive Secretary has determined that the continuous emission monitors for HCl and Cl_2 mentioned in condition #11 of the July 9, 1984 AO are not feasible for lack of appropriate technology. Also, the Executive Secretary has determined that the opacity monitors are not feasible for the spray dryer, melt/reactor, and cathode stacks due to liquid water drops in those stacks.

The Executive Secretary reserves the right to re-evaluate the feasibility of opacity and HCl monitors for spray dryers. As alternate methods to determine compliance, the owner/operator shall do the following:

- A. For condition 1B(3), the owner/operator shall perform the melt/reactor chlorine balance proposed on September 15, 1989. The chlorine balance procedure shall be revised as necessary no later than thirty days after the CRB start-up.
- B. For condition number 1C(3), the owner/operator shall perform the cathode chlorine balance proposed in document "Review of Continuous Monitors" dated November 1984 and submitted to the Executive Secretary. The chlorine balance procedure shall be revised as necessary no later than thirty days after the CRB start up.
- C. For condition number 7, the owner/operator shall draw one equal volume sample of the recirculating liquor at the discharge of the recirculating pump once every four (4) hours during all operational periods. The total sample shall be analyzed for HCl and Mg according to the method described in the quality assurance document of condition #16. The daily average of all the HCl concentrations shall be used to determine compliance.

The temperature of the cooled recirculating liquor shall be measured at the same time and at the same location as where the sample is drawn. The average of the eight temperature readings in one day shall be used to compare with the maximum acceptable temperature as stated in condition #7.

16. The owner/operator shall submit a quality assurance (QA) plan for monitoring of emissions and/or process parameters. The plan shall

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be submitted for approval as specified. The plan shall include detailed operator-oriented procedures for installation, operation, maintenance, and calibration of the monitoring equipment. The plan shall cover data recording, sampling analysis, and reporting for the following areas:

- A. Number 1 and number 2 spray dryers - the data necessary for condition number 13 by August 7, 1988;
 - B. Melt/reactor - the methodology requirements for measurement of parameters for condition number 8 within 30 days of the scheduled test;
 - C. Cathode stack chlorine balance by February 28, 1988;
 - D. Melt/reactor chlorine balance procedure by September 15, 1989. The melt reactor chlorine balance procedure shall be changed as necessary upon the approval of the Executive Secretary but no later than 30 days after CRB startup.
17. The owner/operator shall submit a quarterly emissions report to the Executive Secretary. The report shall include:
- A. Average quarterly values of O1, O2, and O3 scrubber acid concentrations, temperatures, and daily exceedances;
 - B. Average quarterly values of chlorine emissions and the daily exceedances of the 30-day period rolling sum of condition numbers 1B(3) and 1C(3);
 - C. Quarterly magnesium production within 30 calendar days after the end of the calendar quarter.

Records of the data necessary to calculate the above parameters shall be maintained for a period of at least two years and shall be made available to the Executive Secretary or his representative upon request.

18. Compliance schedules for installation of the equipment identified in conditions #7 & #8 and attainment of the emission rates in condition #1 are as follows:
- A. Submittal of Notice of Intent to Construct
June 1, 1990 - O3 spray dryer scrubber (submitted on January 16, 1990);
 - B. Installation of Equipment
 - (1) June 11, 1985 - O2 sieve tray and acid neutralization equipment;
 - (2) August 15, 1988 - O1 spray dryer scrubbing liquor cooling system;
 - (3) August 1, 1990 - O3 spray dryer scrubber;
 - (4) June 15, 1990 - Melt/reactor chlorine reduction burner

C. Compliance with New Emission Rates

- (1) October 11, 1984
O1 spray dryer - particulate
E.O.G. - particulate
 - (2) March 11, 1985
Cathode - particulate
Cathode - HCl
E.O.G. - HCl
 - (3) July 11, 1985
O2 spray dryer - particulate
O1 spray dryer - HCl
O2 spray dryer - HCl
Cathode - Cl₂
E.O.G. - Cl₂
 - (4) October 15, 1988
O1 spray dryer - HCl
 - (5) October 31, 1986
O2 spray dryer - HCl
 - (6) July 15, 1990
Melt/reactor - particulate
Melt/reactor - HCl
Melt/reactor - Cl₂
 - (7) November 1, 1990
O3 spray dryer - particulate
O3 spray dryer - HCl
19. Construction of a super concentrator to preheat and evaporate moisture from brine prior to spray drying may be necessary to attain the production rate of 45,000 tons per 12-month period of virgin magnesium allowed under condition #4. Should the super concentrator be required, the owner/operator shall submit a Notice of Intent to construct after sufficient engineering has been completed. The owner/operator shall vent emissions from the combustion source of the super concentrator to a new stack rather than one of the spray dryer stacks. The spray dryer emission limitations contained in condition #1 shall apply, provided the annual production of virgin magnesium remains at or below 45,000 tons per 12-month period.
20. The owner/operator shall investigate the following to determine if emissions can be reduced without significantly increasing production costs or reducing the production rate of the plant. If so, the owner/operator shall proceed with implementation of the technique to include submittal of a Notice of Intent to construct. A report of the results shall be submitted to the Executive Secretary by the dates indicated:

- A. November 11, 1988 - opening the spray dryer venturi throats completely during burner operation to see what effect this has on particulate emissions. Further, investigate complete removal of the venturi scrubbers and use of the pressure and operational cost savings for alternate pollution control;
 - B. January 11, 1989 - reducing the MgO level in the spray dried powder in order to reduce HCl emissions;
 - C. May 7, 1989 - reducing the pressure drop across the high energy scrubber to see what effect this might have on emissions. If the pressure drop can be reduced without increasing emissions, the savings in cost of operation of that scrubber shall be applied to reduction of emissions of some other portion of the plant;
 - D. October 1, 1989 - reducing the brine recirculation rate in the preheaters and concentrators in order to improve particulate emissions;
 - E. December 31, 1989 - implementing a system of sealing the conveying system for powder between the spray dryer area to the melt/reactor area in order to reduce oxide contamination;
 - F. October 1, 1990 - raising the carbon concentration in the melt/reactor system in order to produce a more efficient reaction. The anticipated results of this would be lower chlorine emissions.
 - G. October 1, 1990 - finding a more efficient reducing agent to substitute for carbon in the melt reactor system. It is proposed that carbon monoxide be tried in conjunction with chlorine direct feed.
 - H. October 1, 1990 - finalizing the cost and feasibility of deeper melt and reactor cells to increase the chlorine-MgO reaction. A report on the availability and/or steps taken to develop longer injection lances shall be included in this study.
- 21. The owner/operator shall submit for approval a plan for testing emissions of toxic chlorinated hydrocarbons from the melt/reactor stack. The plan shall be submitted within three months of the start-up of the chlorine reduction burner process of condition #8. Test results shall be submitted within one year of start-up. The tests may be waived by the Executive Secretary if the results of the toxic chlorinated hydrocarbon tests from the pilot burner operation are deemed comparable by the Executive Secretary.
 - 22. If the results of compliance testing and other information concerning the plant indicate that lower emission limits are achievable on a consistent basis, the emission limits specified in this AO shall be adjusted to reflect lower limitations.
 - 23. All records referenced in this AO or in an applicable NSPS or NESHAPS, which are required to be kept by the owner/operator, shall be made available to the Executive Secretary or his representative upon request.

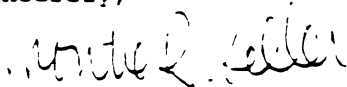
Mr. Tripp
April 16, 1992
Page 11

24. All installations and facilities authorized by this AO shall be adequately and properly maintained. The owner/operator shall comply with R307-1-3.5 and 4.7, UAC. R307-1-3.5, UAC addresses emission inventory reporting requirements. R307-1-4.7, UAC addresses unavoidable breakdown reporting requirements. The owner/operator shall calculate/estimate the excess emissions whenever a breakdown occurs. The sum total of excess emissions shall be reported to the Executive Secretary for each calendar year no later than January 31 of the following year.
25. The Executive Secretary shall be notified in writing upon start-up of the installation, as an initial compliance inspection is required. Eighteen months from the date of this AO the Executive Secretary shall be notified in writing of the status of construction/installation if construction/installation is not completed. At that time the Executive Secretary shall require documentation of the continuous construction/installation of the operation and may revoke the AO in accordance with R307-1-3.1.5, UAC.

Any future modifications to the equipment approved by this order must also be approved in accordance with R307-1-3.1.1, UAC.

This AO in no way releases the owner or operator from any liability for compliance with all other applicable federal, state, and local regulations including the Utah Air Conservation Rules.

Sincerely,



F. Burnell Cordner, Executive Secretary
Utah Air Quality Board

FBC:NM:cl

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

Tab 8

H. Michael Keller
VAN COTT BAGLEY CORNWALL & McCARTHY
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Salt Lake City, UT 84144
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Denise Chancellor (USB # 5452)
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BEFORE THE UTAH AIR QUALITY BOARD

| | |
|---|---------------------------------|
| In re Magnesium Corporation of America | STIPULATION No. 94090021 |
|---|---------------------------------|

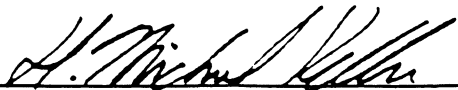
H. Michael Keller of Van Cott, Bagley, Cornwall & McCarthy, counsel for Magnesium Corporation of America (MagCorp), and Assistant Attorney General Denise Chancellor, counsel for the Executive Secretary and the Division of Air Quality, hereby stipulate to the following for purposes of the above captioned matter:


1. The question presented for administrative hearing on February 14, 1996 is as follows:

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?

exhibit 3 attached (last column) and also at F3 in the
Prehearing Administrative Record.

DATED this 7th day of February, 1996.


H. Michael Keller
VAN COTT BAGLEY, CORNWALL & MCCARTHY
Counsel for MagCorp


Denise Chancellor
Assistant Attorney General
Counsel for Executive Secretary and
Utah Division of Air Quality

[] 1

BEFORE THE UTAH AIR QUALITY BOARD

In re MAGNESIUM
CORPORATION OF AMERICA

PREHEARING ADMINISTRATIVE
RECORD

No. 94090021

- A. Information re Issuance of Notice of Violation**
1. Division of Air Quality (DAQ) information request to MagCorp dated February 22, 1994
 2. MagCorp (B. Cook) response to information request dated March 18, 1994
 3. MagCorp (B. Cook) response to information request dated March 29, 1995
 4. Order to Comply (information request) signed by Executive Secretary April 11, 1994
 5. MagCorp (T. Tripp) response to Order to Comply dated April 23, 1994 attaching breakdown emissions information
 6. MagCorp (B. Cook) letter dated May 24, 1994 updating breakdown emissions information
 7. MagCorp letter (B. Cook) dated September 7, 1994 re DAQ inspections
 8. DAQ inspection memorandum from Steven Arbaugh to Russell Roberts dated July 28, 1994 and updated September 7, 1994
- B. Notice of Violation, Approval Order and Breakdown Rule**
1. Notice of Violation dated September 29, 1994
 2. Approval Order dated April 16, 1992
 3. MagCorp revision to quality assurance plan for the Melt/Reactor Chlorine Balance dated July 10, 1990 (as required by Approval Order Condition 13.E)
 4. Melt/Reactor Stack 12 month rolling totals for Chlorine emissions July 1991 through June 1994 complied by DAQ (see A8) from data submitted by MagCorp April 23, 1994 see A5)
 5. Breakdown Rule (UAC R307-1-4.7)
- C. Correspondence relating to Notice of Violation and Hearing**
1. MagCorp (B. Cook) response to NOV and hearing request dated October 14, 1994
 2. DAQ acknowledgment of hearing request dated October 27, 1994
 3. Order to Submit issued by Executive Secretary on December 12, 1994
 4. Letter from M. Keller to D. Chancellor, Attorney General's Office, dated June 20, 1995 re Notice of Violation
 5. DAQ memorandum from J. Randolph to Russell Roberts dated November 30, 1995 re hearing officer

4. Quarterly Emission Reports for the following quarters with the date MagCorp transmitted the report to EAQ shown in parenthesis:

| | |
|---------------------|----------------------|
| Fourth Quarter 1989 | (January 16, 1990) |
| First Quarter 1990 | (April 23, 1990) |
| Second Quarter 1990 | (July 6, 1990) |
| Third Quarter 1990 | (October 23, 1990) |
| Fourth Quarter 1990 | (January 8, 1991) |
| First Quarter 1991 | (April 5, 1991) |
| Second Quarter 1991 | (July 11, 1991) |
| Third Quarter 1991 | (October 25, 1991) |
| Fourth Quarter 1991 | (January 23, 1992) |
| First Quarter 1992 | (April 3, 1992) |
| Second Quarter 1992 | (July 2, 1992) |
| Third Quarter 1992 | (October 8, 1992) |
| Fourth Quarter 1992 | (January 6, 1993) |
| First Quarter 1993 | (April 6, 1992[sic]) |
| Second Quarter 1993 | (July 7, 1992[sic]) |
| Third Quarter 1993 | (October 5, 1993) |
| Fourth Quarter 1993 | (January 4, 1994) |
| First Quarter 1994 | (April 4, 1994) |
| Second Quarter 1994 | (July 12, 1994) |
| Third Quarter 1994 | (October 4, 1994) |
| Fourth Quarter 1994 | (January 4, 1995) |

EXHIBIT 2

MELT REACTOR STACK - CHLORINE EMISSIONS (TONS)
 JULY, 1991, THROUGH JUNE, 1994
 12-MONTH ROLLING TOTALS

| <u>YEAR</u> | <u>MONTH</u> | <u>TOTAL</u> | <u>QUARTER</u> | <u>12-MONTH ROLLING TOTAL</u> |
|-------------|--------------|--------------|----------------|-----------------------------------|
| 1991 | July | 178 | | |
| | August | 398 | | |
| | September | 253 | 829 | |
| | October | 221 | | |
| | November | 165 | | |
| | December | 641 | 1027 | 1856 (6-month total) |
| 1992 | January | 245 | | |
| | February | 315 | | |
| | March | 419 | 979 | |
| | April | 310 | | |
| | May | 1656 | | |
| | June | 228 | 2194 | 5029 |
| | July | 349 | | 5200 |
| | August | 1387 | | 6189 |
| | September | 601 | 2337 | 6537 |
| | October | 1329 | | 7645 |
| | November | 424 | | 7904 |
| | December | 837 | 2590 | 8100 |
| 1993 | January | 454 | | 8309 |
| | February | 1152 | | 9146 |
| | March | 662 | 2268 | 9389 |
| | April | 265 | | 9344 |
| | May | 1228 | | 8916 |
| | June | 950 | 2443 | 9638 |
| | July | 103 | | 9392 |
| | August | 158 | | 8163 |
| | September | 701 | 962 | 8263 |
| | October | 770 | | 7704 |
| | November | 219 | | 7499 |
| | December | 566 | 1555 | 7228 |
| 1994 | January | 84 | | 6858 |
| | February | 74 | | 5780 |
| | March | 53 | 211 | 5171 |
| | April | 80 | | 4986 |
| | May | 259 | | 4017 |
| | June | 157 | 496 | 3224 |

Attachment I

| | Total Melt/ Reactor Emissions | CRB BrkDwn Emissions | Normal Melt/Reactor Emissions | Rolling 12 mo total Normal Emissions |
|-------|--|----------------------------|-------------------------------------|---|
| 7/91 | 227 | | 227 | 227 |
| 8/91 | 396 | 32 6 | 363 4 | 590 4 |
| 9/91 | 298 | 21 4 | 276 6 | 867 |
| 10/91 | 261 | 229 5 | 31 5 | 898 5 |
| 11/91 | 200 | | 200 | 1098 5 |
| 12/91 | 716 | 388 8 | 327 2 | 1425 7 |
| 1/92 | 214 | | 214 | 1639 7 |
| 2/92 | 304 | 17 1 | 286 9 | 1926 6 |
| 3/92 | 444 | | 444 | 2370 6 |
| 4/92 | 401 | | 401 | 2771 6 |
| 5/92 | 1639 | 1544 6 | 94 4 | 2866 |
| 6/92 | 321 | | 321 | 3187 |
| 7/92 | 281 | | 281 | 3241 |
| 8/92 | 1428 | 1285 5 | 142 5 | 3020 1 |
| 9/92 | 512 | 157 8 | 354 2 | 3097 7 |
| 10/92 | 1213 | 1062 8 | 150 2 | 3216 4 |
| 11/92 | 337 | 31 5 | 305 5 | 3321 9 |
| 12/92 | 662 | 160 | 502 | 3496 7 |
| 1/93 | 447 | 255 2 | 191 8 | 3474 5 |

EXHIBIT 3

Attachment I

| | Total Mel/ Reactor Emissions | CRB BrkDwn Emissions | Normal Mel/Reactor Emissions | Rolling 12 mo total Normal Emissions |
|-------|---------------------------------------|----------------------------|------------------------------------|---|
| 2/93 | 1145 | 1026 6 | 118 4 | 3306 |
| 3/93 | 733 | 481 6 | 251 4 | 3113 4 |
| 4/93 | 218 | 118 5 | 99 5 | 2811 9 |
| 5/93 | 1235 | 1235 | 0 | 2717 5 |
| 6/93 | 950 | 926 7 | 23 3 | 2419 8 |
| 7/93 | 99 | | 99 | 2237 8 |
| 8/93 | 159 | 59 2 | 99 8 | 2195 1 |
| 9/93 | 701 | 628 8 | 72 2 | 1913 1 |
| 10/93 | 791 | 694 7 | 96 3 | 1859 2 |
| 11/93 | 219 | 95 9 | 123 1 | 1676 8 |
| 12/93 | 657 | 500 6 | 156 4 | 1331 2 |
| 1/94 | 82 | | 82 | 1221 4 |
| 2/94 | 97 | 23 6 | 73 4 | 1176 4 |
| 3/94 | 53 | 9 | 44 | 969 |
| 4/94 | 88 | | 88 | 957 5 |
| 5/94 | 350 | 24 8 | 325 2 | 1282 7 |
| 6/94 | 100 | | 100 | 1359 4 |
| 7/94 | 87 | | 87 | 1347 4 |
| 8/94 | 66 | 9 | 57 | 1304 6 |

Attachment I

| | Total Mel/ Reactor Emissions | CRB BrkDwn Emissions | Normal Mel/Reactor Emissions | Rolling 12 mo total Normal Emissions |
|-------|---------------------------------------|----------------------------|------------------------------------|---|
| 9/94 | 125 | | 125 | 1357.4 |
| 10/94 | 69 | 39.8 | 29.2 | 1290.3 |
| 11/94 | 415 | 170.1 | 244.9 | 1412.1 |
| 12/94 | 132 | | 132 | 1387.7 |
| 1/95 | 152 | 96.8 | 55.2 | 1360.9 |
| 2/95 | 68 | | 68 | 1355.5 |
| 3/95 | 419 | | 419 | 1730.5 |
| 4/95 | 72 | | 72 | 1714.5 |
| 5/95 | 66 | | 66 | 1455.3 |
| 6/95 | 136 | 60.8 | 75.2 | 1430.5 |
| 7/95 | 128 | | 128 | 1471.5 |
| 8/95 | 133 | 36 | 97 | 1511.5 |

Tab 9

1 Division of Air Quality staff will present the
2 information that formed the basis for the executive
3 secretary to issue the notice of violation, and they
4 will be represented by Denise Chancellor.

5 MagCorp will then present the basis for the appeal
6 and finally any rebuttal evidence will be received.

7 After the receipt of the testimony, I'll prepare a
8 recommendation to the Air Quality Board, and we'll try
9 to summarize everything, and both sides will have a
10 chance to present, hopefully, an abbreviated version to
11 the Air Quality Board. I might add that I'd be willing
12 to receive additional information until the end of the
13 month, and that will give me roughly one week to prepare
14 something for the Air Quality Board. So feel free to
15 send me any additional material.

16 The Air Quality Board then will review and make a
17 decision and they can modify or rescind the executive
18 secretary's decision.

19 A written order will be issued pursuant to Utah code
20 Annotated Section 63-46 B-10. Are there any questions?
21 So I guess we'll start then with opening statements, and
22 the state will go first.

23 MS. CHANCELLOR: A couple of preliminary issues
24 first, Dr. Kanner.

25 Mr. Keller and myself have entered into some

1 stipulations which we have sent to you and we would like
2 those to be accepted in to the record. The first
3 stipulation deals with the question presented for
4 hearing; MagCorp and the State have both agreed that the
5 only question relevant to the notice of violation is
6 whether violation number 5 should be sustained or not.
7 We have entered into a partial settlement agreement for
8 the remainder of the notice of violation. Also, in that
9 stipulation, is an index as to the administrative
10 record.

11 And thirdly, there is a chart showing chlorine
12 emissions from the melt reactor stack, and it's broken
13 down into whether breakdown emissions are included, and
14 there is a separate chart showing the total emissions
15 and breakdown emissions are excluded.

16 Second stipulation deals with the proffer of
17 testimony from Mr. David Kopta who used to work here,
18 who's now unavailable, and we request that these two
19 stipulations be accepted in to the record.

20 DR. KANNER: And my assumption is then there is no
21 point between now and the Air Quality Board hearing to
22 have Mr. Kopta present the statement. Both sides agree
23 you'll exclude him completely?

24 MS. CHANCELLOR: That's correct. We'd also like
25 accepted into the record, accepted as the record, the

1 document that we submitted to you, which is numbered
2 Sections A through F, and if that could be accepted as
3 the record.

4 In terms of hard numbers of exhibits that both sides
5 introduce during the hearing, if the state could number
6 their exhibits as G, and MagCorp number their exhibits
7 as H.

8 Another preliminary issue is posthearing briefs.
9 Mr. Keller and myself have informally agreed to submit a
10 posthearing brief simultaneously to you by February the
11 21st. And if we need an extension on that date, we'll
12 contact you. That may be dependent on when the
13 transcript is available. We'll try to have something to
14 you by the 21st of February.

15 And the last preliminary issue is that one of the
16 state's witnesses, Don Robinson, no longer works for the
17 state and he had difficulty getting time off work, and
18 we will request that he be allowed to testify at 11:30
19 a.m., and Mr. Keller has agreed that that is fine with
20 him.

21 Is all of that satisfactory?

22 DR. KANNER: Fine.

23 MR. KELLER: Preliminarily, I'm wondering how we are
24 to refer to the hearing examiner, is it your Honor or
25 Doctor?

1 DR. KANNER: Doctor is fine, that's what I am.

2 MR. KELLER: Okay. I just want -- I agree with the
3 stipulations and the items enumerated by Ms. Chancellor
4 on the issue presented. I did want to be clear at this
5 point that it is violation number 5, the others have
6 been resolved. And the question to be resolved on
7 violation five is whether emissions from breakdown are
8 to be included or excluded in determining compliance
9 with the limit on the melt reactor stack, the chlorine
10 limit. We are not adjudicating the individual events of
11 the breakdown; that's my understanding of the
12 proceeding.

13 DR. KANNER: Okay. Now, my understanding as I read
14 it is that yes, it's the question of whether breakdowns
15 are included, but that goes into that 4.7 regulation and
16 what has to be done when there are unavoidable
17 breakdowns.

18 MR. KELLER: And the understanding we have reached is
19 we're not going into all that, that it is accepted that
20 the breakdowns occurred, that they were unavoidable.
21 The question is how the emissions should become
22 computed.

23 DR. KANNER: And the state agrees they were
24 unavoidable breakdowns?

25 MS. CHANCELLOR: But for purposes of the hearing,

1 Dr. Kanner, we agree that with the two charts that are
2 in the record showing the total emissions, whether
3 breakdowns are included or excluded. If breakdown
4 emissions are excluded from the 4800 ton cap, then there
5 are no violations.

6 MR. KELLER: There is no violation number 5.

7 MS. CHANCELLOR: Exactly. There is no violation
8 number 5. So, what we are focusing on is whether the
9 breakdown emissions are included.

10 DR. KANNER: Are you accepting the fact the
11 breakdowns are unavoidable and meets the definition that
12 it is an unavoidable breakdown since, as I read the
13 rules, it says, refers to unavoidable breakdowns, and
14 you're willing to agree they're unavoidable?

15 MS. CHANCELLOR: We're willing to agree that they're
16 unavoidable for purposes of the hearing, that's
17 correct.

18 DR. KANNER: Okay.

19 MR. KELLER: Thank you.

20 DR. KANNER: I'm told I have to ask if there are any
21 objections to my continuing as hearing officer since I
22 do have some conflicts?

23 MS. CHANCELLOR: Not from the state.

24 MR. KELLER: Dr. Kanner, we did raise an objection
25 with respect to the representation by the attorney