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No. 51451-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BROOKS MANUFACTURING CO.

Appellant,

vs.

NORTHWEST CLEAN AIR AGENCY

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This is an appeal of a Notice of Violation and Corrective Action Order issued by the Northwest Clean Air Agency against Brooks Manufacturing Co. (“Brooks”) in Bellingham, WA. Brooks engineers and manufactures wood products for telephone poles. Brooks generates a large amount of wood by-product—sawdust and shavings. It also needs steam to heat its dry kilns. That steam is generated by a boiler that burns the wood by-product.

The wood-fired boiler and the emission control equipment attached to it are regulated and permitted by the Northwest Clean Air Agency (“Air Agency”). One of those emission control devices is a “baghouse” – essentially a large filter. In 2008, and again in 2014, Brooks installed replacement parts on its baghouse due to corrosion from heat and moisture. Both times, the parts were replaced with exact replica parts manufactured to within 1/8 of an inch of the original.

In 2014, the Northwest Clean Air Agency cited Brooks for performing the 2014 work without filing for a Notice of Construction Application, ordering Brooks to submit one. RCW 70.94.153 requires anyone proposing to “substantially alter or replace emission control technology” to submit such an application. Brooks opposed submitting the application because of the potential for the Air Agency to impose new

permit conditions. Brooks maintains that the work performed neither “substantially altered” or “replaced” the control technology.

II. ASSIGNMENT OF ERROR

Did the Pollution Control Hearings Board (and Superior Court on appeal) err in affirming the Northwest Clean Air Agency’s Notice of Violation and Corrective Action Order requiring Appellant to submit a Notice of Construction Application?

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the baghouse at issue in this case falls within the definition of “Emission Control Technology” in RCW 70.94.153?
2. If the baghouse at issue in this case is “Emission Control Technology,” did the work on the baghouse in 2014 constitute “Replacement or Substantial Alteration” under RCW 70.94.153?
3. Whether the Northwest Clean Air Agency’s interpretation of RCW 70.94.153 is contrary to the legislative intent of the Clean Air Act?

IV. STATEMENT OF THE CASE¹

A. Procedural History.

The Northwest Clean Air Agency (“Air Agency”) issued a Notice of Violation and Corrective Action Order (“Order”) to Brooks

¹ In addition to the typical clerk’s papers and transcript from Superior Court, the record on appeal here consists of the Certified Record from the PCHB and the Transcript of the two-day hearing before the PCHB. The administrative Certified Record is indexed and paginated separately from the clerks papers and will be cited herein as (CR ____). The Transcript from the PCHB hearing will be cited as (RP ____). The Clerk’s Papers will be

Manufacturing Co. dated December 15, 2014. (CR 911; FOF 25).² The Order required Brooks to submit to the Air Agency a “Notice of Construction” application (“NOC”) by January 30, 2015 for work it had done on a baghouse. Brooks timely appealed the Order to the Pollution Control Hearings Board (“PCHB” or “Board”). (CR 1-6).

In December 2015, the Board ruled on a summary judgment motion filed by the Air Agency. (CR 914). The Board dismissed one issue and then held that the evidence submitted was insufficient to determine “whether the work done on the baghouse required a Notice of Construction.” (CR 914; CR 843). The Board ordered an evidentiary hearing be held.

That hearing was held on January 19-20, 2016 in Tumwater. On March 4, 2016, the PCHB issued its Findings of Fact, Conclusions of Law and Order affirming the Air Agency’s issuance of the Order in December 2014. (CR 900-924).³

Brooks appealed the PCHB’s decision to the Superior Court of Thurston County via Petition for Review pursuant to RCW Chapter 34.05

cited as (CP ____) and Superior Court VRP as (Sup. Ct. RP ____).

² Citing CR 1196 (Hrg Exhibit R-11). A copy of the Order is attached to this brief as Appendix A.

³ The Findings of Fact, Conclusions of Law and Order are found at CR 900-924 and will be referenced by CR page number as well as referencing specific numbered finding (FOF) or conclusion (COL).

et seq. (CP 6-11). A hearing was held on August 25, 2017 where the Hon. Judge Skinder affirmed the PCHB's Decision. (CP 162). His oral decision was formalized by entry of an Order on October 12, 2017. (CP 163-164). A Notice of Appeal to this Court was timely filed on October 30, 2017. (CP 165-167).

B. Facts.

1. Brooks's Wood-Fired Boiler System. The Brooks facility is located in Bellingham and manufactures engineered wood products for utilities. (CR 901, FOF 1). It manufactures virtually all wood parts of a telephone pole or the transmission structure, including crossarms and bracing, but not the poles themselves. (*Id.*; RP 220). This manufacturing process results in Brooks creating a significant amount of wood shavings by-product. (*Id.*, FOF 2).

Brooks uses steam to run the kilns for drying lumber. (*Id.*). This steam is generated by a boiler, which up until 1989, burned natural gas. (*Id.*). In 1989, the boiler was converted to burn the wood shavings Brooks was generating. (*Id.*). This conversion required Brooks to obtain approval from the Air Agency because burning wood shavings produces "combustion products" which is a contaminant regulated by the Air Agency. (CR 901, FOF 3). The 1989 application and permit file,

including the permit itself (“1989 Permit”), are part of the record on appeal. (CR 1072-1175).⁴

Converting the boiler from gas to wood burning required a complete system designed to control the emissions. (RP 256; CR 1125). “Pollutant reduction is accompanied [sic] in several ways. First, the burner design utilizes uniform wood particles at low moisture content...Secondly, the particle collectors in a series, a multi-clone and baghouse, are employed to remove the particulate matter remaining...” (CR 1125). The system starts with a structure that enabled Brooks to store the wood shavings. (RP 256).⁵ The wood shavings are ground into a fine particulate matter, the consistency of flour. (RP 256; RP 222). The wood fuel is not permitted to exceed 10% moisture content, to ensure complete combustion. (CP 1125). The powder is then blown into the “flash gasifier” and burned. (RP 256; CR 1085 -1092). The emissions from the boiler are controlled by a “multi-clone” and a “baghouse.”

John Mitchell, Brooks’s Technical Director, provided a comprehensive description of the system. (RP 220-227; CR 1016–1031(Exh. A15-A3 photos); also attached hereto as Appendix C. The

⁴ The 1989 Permit that was issued is found at CR 1122-1123, a copy of which is attached hereto as Appendix B. At that time, permits were issued in a letter form and not given a number.

shavings from the drills, planers, and other manufacturing equipment are deposited into a large silo. (RP 220; 222; CR 1016-1020 (photos)). The shavings are moved with air pressure from fans and placed into a grinder. (RP 222). The wood powder is then blown into the gasifier where it is burned. (RP 223-224).

The exhaust gases created by the combustion are directed up and then over a neighboring building, into a heat exchanger or “economizer.” (RP 224-225; CR 1021-1026 (photos)).⁶ The air is then pulled through an induction draft fan (“ID fan”) and sent to the multi-clone. (RP 226; CR 1025-1027 (photos)). After the multi-clone, the exhaust air is blown downstream to the baghouse. (RP 226-227).

A multi-clone consists of multiple cyclones which set the exhaust air into a spiral motion. (CR 903; FOF 7). This removes larger particles from the air, including those that are still burning/embers. (*Id.*). A collector and airlock are located at the bottom of the multi-clone to collect and empty the particles removed. (RP 226). The multi-clone serves to both clean the exhaust air, as well as foster fire prevention by keeping

⁵ A schematic of the entire system from the original permit file is found at CR 1077.

⁶ The heat exchanger was not part of Brooks’s original 1989 permit; it was added later by wood-fired boiler expert Dave Sharpe. (RP 325-326). The heat exchanger cools the exhaust air to reduce the chance of fire, and it pre-heats the water going into the boiler. (RP 225-226).

embers from the baghouse. (CR 903; FOF 7). Dave Sharpe, an industry expert on the design, manufacture, and installation wood-fired boilers and their exhaust systems (and who worked on Brooks's system in the past), testified a multi-clone is virtually required prior to a baghouse on a wood-fired boiler. (RP 323-326).

A baghouse is essentially a large filter. (CR 903; FOF 8). The baghouse at Brooks is a 121 bag pulse-jet baghouse (herein "Baghouse"). The Baghouse itself is a collector housing which holds the exhaust air around filter bags. *Id.* The bags are held in place by a "tube sheet" with cages that the bags are slipped over. (RP 83).⁷ The bags are the filters. (RP 86-87; CR 903, FOF 8). The Baghouse is called a "pulse jet" because pulses of compressed air knock particulate off of the bags. *Id.* Too much particulate on the bags will cause the Baghouse to not work as efficiently and cause back pressure. *Id.* The pressure differential between the top plenum (after the bags) and the collector housing (before the bags) is measured by a device called a "magnehelic." The particulate that is knocked off the bags falls into the hopper and is automatically removed

⁷ The Air Agency introduced a cut-away diagram that depicts the Baghouse and its components. (CR 1246). This diagram was identified as accurate, but-for the date, as the work on Brooks's Baghouse took place in 2014, and the fact that the outer skin of the Baghouse was replaced in 2007 as well. (RP 85 (objection); RP 269-271 (Doug Reynolds re: 2007 maintenance)).

from the Baghouse through the airlock. *Id.* The clean air then exits the top of the Baghouse.

2. Maintenance of the Boiler System including the Baghouse. Doug Reynolds has been in charge of maintenance for Brooks since 1999, working for Brooks for 30 years in varying capacities. (CR 905, FOF 13; RP 263). Maintenance of the entire system at issue here falls within his duties. *Id.* Reynolds explained that on a daily basis, the millwrights check and record the pressure readings on the magnehelic, the inlet temperature, and the air receiving tank. (*Id.*; RP 264). They also check the Baghouse pulse jets to see if they are pulsing correctly, check the bottom hopper to ensure ash is coming out of the Baghouse properly, and examine the ash to ensure it is the proper color. They then observe the exhaust gas emitting from the Baghouse to see if there is any observable particulate. *Id.*

On a monthly basis, millwrights review the logbook and all the daily magnehelic readings to ensure that the readings are not too low or too high. (CR 905, FOF 13; RP 265). An elevated magnehelic reading typically means the bags are not being pulsed or cleaned adequately. (RP 266). If this happens, Brooks employees would open the top of the Baghouse and make sure the pulses of air are properly cleaning particulate

off the bags. (RP 265). They would re-examine the ash, to ensure it is exiting the airlock correctly, and open the bottom of the hopper to see if ash is clinging to the sides. (RP 266). If, on the other hand, the magnehelic readings were too low they would shut the system down completely and do a detailed internal inspection. (RP 267).

The entire boiler system is completely shut down at least once a year. (CR 905, FOF 13). The boiler is opened up, and the combustion chamber is inspected and changed out if necessary. (RP 268). The Baghouse is opened and inspected in its entirety for corrosion, which is an ongoing maintenance consideration. (CR 905, FOF 13). Bags are removed and inspected and, if need be, cleaned or replaced. The bags and cages are replaced every two to four years. *Id.*

3. Details of the 2007 and 2014 Work on the Baghouse. In 2007, Brooks observed that the Baghouse was suffering from significant corrosion, and rust was causing deterioration in the Baghouse outer skin and the hopper. (CR 906, FOF 14). Doug Reynolds contacted Superior Systems, Inc. to evaluate the options for repairing the Baghouse. (RP 269). Superior Systems eventually submitted a written bid/proposal to repair the problems; that letter stated that they offered to “supply & install a replacement baghouse.” (CR 906, FOF 14, Exh. R-4 at CR 1176-77).

Mark Wolfe, part owner of Superior Systems and the man who wrote that bid letter, had no knowledge of the regulations and was not using the word “replace” in that context. (RP 300). He testified he could have easily written “a replacement of these parts on your baghouse.” (RP 316).

The work by Superior was done on the Baghouse in July 2008. (CR 906, FOF 15). The Baghouse/Boiler logbook that Brooks maintains pursuant to the 1989 Permit contains an entry on that date indicating the boiler was shut down and a “New Ash Baghouse” was installed. (*Id.*; CR 930 (Exh. A-1)). The work that was done replaced the walls and exterior skin of the Baghouse, due to rust. (RP 270). Many parts were re-used: the ladder and catwalk, the sprinkler system, some of the purge parts, the airlock, the magnehelic, the support structure, the receiver tank for compressed air, and the electronic controls for the pulse system. (RP 270-271). The repair work done on the Baghouse in 2007 allowed Brooks to re-use all of the piping and inlet configuration.

Superior Systems has designed, installed, and manufactured baghouses since 1980. (CR 298-299). The company is part owned by Mark Wolfe and was started by his father. (*Id.*).⁸ He testified that prior to doing the work, he and a co-worker spent the better part of a Saturday

⁸ Mark Wolfe’s qualifications as an expert are found at CR 1058, and his background

crawling around the Baghouse and measuring every component to within 1/8th of an inch.⁹ (RP 301-302). He made field drawings, which were then turned into detailed shop drawings. (RP 303). Superior's file and drawings are detailed in Exhibit A-31. (CR 1035-1055).

In 2013, Doug Reynolds again noticed that the Baghouse was experiencing extreme corrosion. (RP 272; CR 906, FOF 16). The top tube sheet and inner walls were rusting badly. (RP 272). Parts of the rust were dropping down and falling into the airlock, making it malfunction. (RP 272). He again reached out to Superior Systems, this time working with Trev Summerfelt. Summerfelt worked with Reynolds to figure out what parts needed to be re-manufactured and reinstalled again. (RP 273; RP 287). Summerfelt wrote a letter in 2013, which was basically copied from Mark Wolfe's 2007 letter. (RP 286-87). In using the word "replace," he too was not considering any regulations or statutes. (RP 286-87). Superior Systems suggested that to combat corrosion, this time, they use stainless steel rather than mild steel. (RP 272-273).

Trev Summerfelt used Mark Wolfe's drawings from 2007 to create his 2013 job file. (RP 288). They were the same shop drawings, just with

testimony at RP 298.

⁹ FOF 19 outlines the detail and exact replica nature of the parts manufactured and installed by Superior Systems.

new dates and a few new markings indicating “stainless steel.” (RP 289-90). The point of the 2013 job was to re-use as much of the existing parts as possible, to save on costs. (RP 287).

The work Superior Systems bid in 2013 was performed in August 2014, during the routine summer maintenance shutdown. (CR 907, FOF 17; RP 232). The installation took approximately three days of the annually scheduled two-week shutdown. (*Id.*). Summerfelt agrees with the Air Agency’s Exhibit R-31 (CR 1246) that the yellow highlighted portions represent what was replaced. (RP 291). He did note in testimony that while the 2013 bid indicated “bags and cages” were replaced, they were not. (RP 295).¹⁰ His boss, Mark Wolfe testified that in 2014, “We didn’t change anything that would affect the performance ... same bag[s], same cages, same cleaning cycle, same stand, everything bolted right back up to it. We just replaced the parts that needed to be replaced so that they could continue to operate the way it’s supposed to.” (RP 320).

4. November 2014 Inspection and Notice of Violation. The Air Agency conducted its standard annual compliance check/inspection of

¹⁰ Finding of Fact No. 19 by the Board appears to be accurate, but-for the statement: “all parts that come into contact with exhaust air were replaced...” (CR 908). It is undisputed that while the 2013 bid for the work done in 2014 listed that bags and cages were to be replaced, the bags and cages in fact were *not* replaced in 2014. (RP 295; RP 322).

Brooks on November 19, 2014, when inspector Bob Uhrich showed up at the facility. (CR 908, FOF 20). At the beginning of the inspection, Uhrich met with Brooks's Technical Director, John Mitchell, and reviewed the equipment the Agency had documented with details from the last inspection. (*Id.*). Uhrich asked Mitchell his standard questions about the facility, and Mitchell responded that there had been a "like-for-like" replacement of parts on the Baghouse. (*Id.*).¹¹ Mr. Uhrich proceeded with his inspection, and observed the Baghouse, noting it appeared that work had been done. (CR 909, FOF 21). He did not ask Mitchell what specific parts were repaired or replaced, and he does not recall if he asked him how much the work cost or what a new baghouse would cost. (RP 38-39; RP 229).

To prepare for his inspection, Mr. Uhrich used the Air Agency's "Source Information Sheet" which lists the Source's equipment. (RP 22; RP 45). Brooks is a minor "source" in Air Agency terminology. (RP 97). He then uses the previous year's inspection report as a template for how to conduct the current inspection. (RP 22; CR 1185 (Exh. R-8)). He

¹¹ The record reflects that Uhrich believes Mitchell said "replacement" because that is what appears in his report, but neither have a specific recollection of what was specifically said. (RP 37-38 (Uhrich)).

handwrites notes on this template, enters the information into the computer back at the office, and discards his notes. (RP 36).

Uhrich did not determine whether Brooks had violated any regulations or laws. Instead, he filled out a form entitled “NWCAA Case Investigation for NSR Determination.” (CR 909, Finding 22; RP 25-26; CR 1192 (Exh. R-9)). He forwarded the form to Dan Mahar, who is the “new source review lead” at the Air Agency. (*Id.*; RP 26; RP 125). Uhrich gave the form to Dan Mahar; the information Mr. Mahar had was very limited. (CR 909, FOF 22; RP 42-43; RP 137).

Dan Mahar reviewed the one-page NSR Determination form in which Uhrich had said that the facility (Brooks) told him it was a “like-for-like replacement for the Baghouse that was permitted March 10, 1989...” (CR 910, FOF 23). The NSR Determination form stated that it was the “same design and size, with the only difference being it was constructed of stainless steel.” (*Id.*). From this small bit of information, Mahar determined that Brooks needed to submit an NOC Application. (*Id.*). Mahar handwrote his determination at the bottom of the NSR Determination form “Replacement of existing control device is required by NWCAA 300.13.” (CR 1192). He noted that the Brooks Baghouse

“replacement” was similar to one recently done at Mt. Baker Products in Bellingham.

At hearing, Mahar admitted that the only similarity between Brooks and Mt. Baker Products was that they were both in Bellingham, they both have wood-fired boilers, and they both have a multi-clone followed by a baghouse. (RP 138-139). In actuality, the Mt. Baker Products baghouse replacement (where an NOC was submitted) clearly involved replacing or substantially altering emission control technology; three baghouses were replaced with two new and differently designed baghouses. (RP 109; CR 956-968 (Exh. A-9)). Superior Systems (who did the work) detailed how the work at Mt. Baker was nothing like that done at Brooks. (RP 305-308).

Based on Mahar’s determination, Uhrich prepared an enforcement report which was then reviewed by Uhrich’s supervisor, Air Agency Compliance Director and wife of Dan Mahar, Toby Mahar. (CR 910, FOF 24). Toby Mahar (having the same information Dan Mahar had) agreed with Dan Mahar’s determination, because a “significant portion of the baghouse had been replaced.” (*Id.*). The Order that is the subject of this appeal was issued shortly thereafter. (CR 911, FOF 25).

5. The Air Agency Inconsistently Applies the Law. Before the PCHB, the Air Agency argued that Brooks had an obligation to call the Air Agency to determine if a NOC was required. However, Brooks's history with the Air Agency, as well as a review of the Agency's historical application of the applicable law, demonstrates that Brooks was reasonable in not even considering an NOC Application would be required.

a. 2001 New Baghouse at Brooks. Brooks has more than one baghouse. Prior to 2001, Brooks had a wood bunker with four cyclones for controlling the sawdust from its planer. (RP 273-275). In 2001, Brooks replaced the three cyclone system with a baghouse that worked much better. (RP 275). The old cyclone system was one of the control devices at Brooks. (RP 45-46; CR 932-936 (Exh. A-3)). In 2001, Bob Uhrich, then a new employee at the agency, performed an inspection of Brooks. (RP 44; CR 932-936 (Exh. A-3)). During that inspection he discovered that Brooks had removed the cyclones and built a new baghouse. (RP 46). Uhrich explained that the Source Information Form on the left column shows the emission source, and on the right column the control device(s) associated with that source. (RP 46). The Source Information Sheet from 2001 shows the "Saw and Planing Area" used the

four cyclones; the form has handwritten marks and notations indicating “new baghouse 2001.” (CR 932).

In an email to Toby Mahar in July of 2015, Uhrich explained what he recalled from that situation. (CR 931; RP 47). The email states:

...I found they had installed a new baghouse (Superior Systems 416 bag w/ reverse pulse) on 3/5/02 during that year’s inspection. I remember talking to Lester about it and asking if they needed a permit. At that time he said that it was ok. That determination changed over the course of several months in the office. Review of NSR rules and discussions in-house made it clear that Like-for-Like replacements did require NSR. During my next annual inspection (4/29/03) at Brooks I discussed with them the change in determination and mailed them a NOC packet on 4/30/03. That is why there is a discrepancy in the amount of time it took between discovery and their submittal of the application. (CR 931)

Uhrich admitted that his use of the phrase “like-for-like” was incorrect. (RP 47).

Uhrich’s April 29, 2003 Source Information Sheet states “1/18/02 - Julie spoke with John Clark about submitting a packet for the baghouse that was installed without a permit so that our tech staff could review the project and determine if a permit was required.” (CR 942). “Julie” is Julie O’Shaughnessy, the Compliance Manager at the time, and Toby Mahar’s predecessor. (RP 48). This baghouse was ultimately permitted after the fact, and no violation or corrective orders were issued. (RP 48).

b. 2002 Demister Reconfigured. The Brooks facility pressure treats much of the wood it manufactures. Pressure treating requires placing that wood into a large pressure chamber, called a “retort.” (RP 48-49). One end of the retort opens, and the lumber is put inside for treatment, which uses diesel as a carrier oil. (RP 50). When the pressure is released from the retort, air containing those pollutants is released and must be cleaned. The demister is the control device used to clean that air. (CR 932; RP 277).

In 2002, the demister was reconfigured. The previous version was made up of wood and metal and had a water containment pit at the bottom. (RP 277). The demister would run heated water down all four sides of the cooling tower where the retort fumes would be pushed through by a fan. (*Id.*). The fumes passing through the cooling water would cause the contaminants to drop down into the containment area. The water would then be pumped back up and reheated. (RP 278). A fan at the top helped with the evaporation. (*Id.*)

The demister was reconfigured into a “fume condenser.” (RP 279). The exhaust gas is now pulled through a series of two-inch tubes, which are cooled with cooling fans and a water spray on the outside. (RP 279). The contaminated air, at about 180 degrees, is put through the tubes and

quickly cooled, which causes the contaminants to condense out and fall into the bottom, where they are collected and recycled for use in the retort. (RP 279).

Bob Uhrich again inspected Brooks's facility in April of 2003. In his compliance report from that inspection on (CR 944 (Exh. A-5)), he wrote:

Demister was moved from a horizontal to vertical tower configuration and now uses three cooling fans in a rebuilt plenum. System uses the same demister path and expansion chamber. The purpose of the modification was for maintenance reasons, though, efficiency has been increased according to Clark. Discussed the modification with Lynn Billington and she said that an NOC application would not be necessary since the modification was for maintenance and was not a substantial alteration of emission control technology as defined in WAC 173-400-114. (emphasis added).

Lynn Billington was the Director of Engineering at the Air Agency at the time of this inspection. (RP 51). No NOC was required for this "reconfiguration" of the demister, because it was deemed "maintenance" by the Air Agency. (RP 51).

c. Oeser Company Cyclone Replaced. Oeser Company pressure treats telephone poles in Bellingham. (RP 54-55). In March 2002, Bob Uhrich inspected their site, which at the time had a cyclone as the air pollution control device for a hog fuel hopper. (CR 1056; CR 1057); RP 55-57). Uhrich indicates in his report that the

cyclone was replaced for maintenance purposes during the previous year. (RP 55). No NOC was filed for this replacement cyclone, and no violations were issued. (RP 55; RP 57).

V. STANDARDS OF REVIEW

A. **Appellate Review of Superior Court.**

This Court stands in the shoes of the superior court, reviewing the underlying agency's order, not the superior court's decision. *Pal v. Washington State Dep't of Soc. & Health Servs.*, 185 Wn. App. 775, 780–81, 342 P.3d 1190 (2015).

B. **The Administrative Procedures Act.**

Judicial review of the Pollution Control Hearings Board is governed by the Administrative Procedure Act (“APA”). *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). Judicial review is confined to the administrative record below. *Id.*, and RCW 34.05.558. The burden of demonstrating invalidity of the agency action is on Brooks. RCW 34.05.570(1)(a). The agency action is subject to reversal if it meets one of the standards met in RCW 34.05.570(3). *Port of Seattle*, 151 Wn.2d at 587-89.

This appeal specifically raises errors under RCW 34.05.570(3)(d) “The agency has erroneously interpreted or applied the law” and RCW

34.05.570(3)(e) “The order is not supported by evidence that is substantial when viewed in a light of the whole record before the court, which includes the agency record for judicial review...”

Under the “error of law” standard, this Court engages in a *de novo* review of the agency’s legal conclusions. RCW 34.05.570(3)(c) and (d); *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998). When reviewing questions of law, the Court may substitute its determination for that of the agency. *Xenith Grp., Inc. v. Dep't of Labor & Indus.*, 167 Wn. App. 389, 349 P.3d 858, 860 (2012).

Findings of Fact are reviewed under the “substantial evidence” standard, which is established when the record contains a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the findings. *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 596, 13 P.3d 1076 (2000).

C. Burden of Proof Before the PCHB.

The Air Agency had the burden of proof before the PCHB, because the Order it issued was a “regulatory order.” WAC 371-08-485(3). The Air Agency had the burden to prove by a preponderance of evidence, that the alleged violation occurred. WAC 371-08-485(2). (CR 914, COL 1).

VI. ARGUMENT

The PCHB succinctly and accurately outlined the initial legal framework upon which this case hinges. That is, Brooks agrees with Conclusions of Law 1 through 5, and the first sentence in Conclusion 6. Brooks's Baghouse, and the work at issue performed on it in 2014, are governed by the Washington Clean Air Act, RCW Chapter 70.94 *et seq.* (the "Act"). This situation is governed specifically by RCW 70.94.153, which states in pertinent part:

"Any person proposing to replace or substantially alter the emission control technology installed on an existing stationary source emission unit shall file a notice of construction application with the jurisdictional permitting authority."

The terms "replace," "substantially alter," and "emission control technology" are not defined in the Act. (CR 915, COL 3).

Both the Department of Ecology ("DOE") and the Air Agency have adopted their own regulations implementing RCW 70.94.153. Both DOE's and the Air Agency's adopted regulations are virtually identical, both repeating the above statutory language, and then adding the following language:

“Replacement or substantial alteration of control technology does not include routine maintenance, repair, or similar parts replacement.”¹²

(CR 915-916, COL 4 and 5). Neither the DOE’s or the Air Agency’s regulations define the terms “replace,” “substantially alter,” “emission control technology,” “routine,” “maintenance,” “repair,” or “similar parts replacement.” (CR 915-916, COL 4 and 5; WAC 173-400 *et seq.* and *generally*, NWCAA Regulations.

Thus, as the PCHB concluded, “The sole question raised by this appeal is whether the 2014 work that Brooks contracted with Superior to perform on the Brooks Baghouse constitutes replacement or substantial alteration of emission control technology such that Brooks was required to file a notice of construction application.” (CR 916, COL 1, first sentence).

A. No Deference Should be Given to the Agency’s Interpretation.

It is unclear if the PCHB officially gave deference to the Air Agency’s interpretation of RCW 70.94.153. The PCHB’s analysis leads one to conclude some level of deference was given. This was inappropriate. The Air Agency is not entitled to any deference if the statute, rule or regulation being construed is not ambiguous. *Dot Foods, Inc. v. Dep’t of Revenue, State of Wash.*, 141 Wn. App. 874, 884-85, 173

¹² WAC 173-400-114; NWCAA Reg. 300.13

P.3d 314 (2007), *rev'd sub nom, Dot Foods, Inc. v. Washington Dep't of Revenue*, 166 Wn.2d 912, 215 P.3d 185 (2009). Even if ambiguous, the Air Agency's interpretation is not entitled to any deference in this appeal. Here, the Air Agency is implementing and enforcing a specific statute: RCW 70.94.153. The Agency adopted NWCAA Regulation 300.13(a) mirroring some of the language in RCW 70.94.153 and adding a clarification as to what does *not* constitute "replace or substantially alter the emission control technology." That is, "routine maintenance, repair or similar parts replacement."

In adopting 300.13(a), the Air Agency was acting under its authority to issue interpretive rules. *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 446–47, 120 P.3d 46 (2005). This type of rulemaking is distinctly different than when the Air Agency implements a legislative regulation. This Court need not give any deference to the Air Agency's rules interpreting state statute. *Id.* at 446. The "true difference" between a legislative rule and an interpretive rule is "its effect on the courts." *Id.* at 446. Interpretive rules are not binding on the courts at all. *Id.* at 447. Even if this Court finds an ambiguity in the statute, the Agency's interpretation is not binding on this Court and should receive no deference.

B. The Baghouse at the Brooks Facility is not “Emission Control Technology.”

If the Baghouse itself is not “Emission Control Technology,” then an NOC Application was not required. In rejecting this interpretation of RCW 70.94.153, the PCHB focused on the word “installed” contained in RCW 70.94.153, and it ignored multiple instances where the phrase “emission control technology” is used in a manner consistent with the interpretation advanced by Brooks. (COL 10 - 17).

This Court must interpret and apply the meaning of “Emission Control Technology” in RCW 70.94.153. An unambiguous statute is not subject to judicial construction. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). A statute is ambiguous if it can be reasonably interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable. *Id.* at 239-240. A court is not required to “discern any ambiguity by imagining a variety of alternative interpretations.” *Id.* at 240. In the absence of a statutory definition, courts will give a term its plain and ordinary meaning by reference to a standard dictionary. *Id.* at 239. Moreover, statutory provisions cannot be read in “isolation” and will be read so as to be in harmony with the entire statutory

scheme and context. *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005).

Here, the critical term at issue is “Control Technology” which is not defined in the statute. Turning to the plain meaning, “technology” is defined as:

1. The science or study of the practical or industrial arts, applied sciences, etc.
2. The terms used in a science, etc.; technical terminology;
3. Applied science;
4. A method, process, etc. for handling a specific technical problem;
5. The system by which a society provides its members with those things needed or desired¹³

Webster’s New World Collegiate Dictionary, Fourth Edition.

The dictionary definition of technology does not support the definition used by the Air Agency and the PCHB. Rather, the dictionary definition of “technology” leads to a more abstract application of things such as science, a method, study, or a process.

The Air Agency argued (and the PCHB agreed) that “emission control technology” effectively has two meanings, depending on where it appears in the statutory scheme. Toby Mahar states that “control technology” is “equipment, work practice standards, or design characteristics that achieve emission reduction.” (RP 74). Her colleagues

¹³ Webster’s New World Collegiate Dictionary, Fourth Edition.

agreed. She admits though that this definition is her “opinion,” and it has never been adopted by the Air Agency or any other air agency she is aware of. (RP 103-104). Under this broad definition of “emission control technology” falls the narrower terms “control device” or “control equipment.” Thus, under the Air Agency’s and PCHB’s interpretation, the Baghouse is both “emission control technology” and a “control device” or “equipment.”

A review of the definitions in the applicable authorities reveals that the word or phrase “emission control technology” and “emission control device” or “equipment” do indeed have different, distinct, and non-overlapping definitions in the Clean Air Act.

First, within RCW 70.94.153, the terms “control technology” and “control equipment” both appear in the same sentence:

Any person proposing to replace or substantially alter the **emission control technology** installed on an existing stationary source emission unit shall file a notice of construction application with the jurisdictional permitting authority. For projects not otherwise reviewable under RCW 70.94.152, the permitting authority may (1) require that the owner or operator employ **reasonably available control technology** for the affected emission unit and (2) may prescribe reasonable operation and maintenance conditions for the **control equipment**.

(emphasis added). This Court must give meaning to all of the terms in this statute, and that meaning must be consistent with the statutory scheme as well as where those words appear elsewhere.

Use of the phrase “control technology” in a manner consistent with the dictionary definition outlined above is found elsewhere. In RCW 70.94.030(6), “Best available control technology” (BACT) is defined as “an emission limitation...that the permitting authority...determines is achievable... through application of production processes and available methods, systems, and techniques...”

In RCW 70.94.030(6), “Reasonably available control technology” (RACT) “means the lowest emission limit that a particular source . . . is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility...”

In RCW 70.94.030(6), “Best available retrofit technology” (BART) is defined as “an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant that is emitted by an existing stationary facility. The emission limitation must be established...taking into consideration the technology available...”

The PCHB acknowledged the legislature's above use of the term "technology" in a manner consistent with Brooks's interpretation. (CR 921, COL 16). However, the Board dismissed these numerous instances due to one word contained in RCW 70.94.153: "installed." The PCHB cites the phrase "replace or substantially alter the emission control technology *installed*..." as tipping the scale in favor of the Agency's interpretation. (COL 15). This phrase is deemed sufficient evidence that "control technology" be given some special meaning as a technical term of art. (CR 920, COL 14).

The PCHB cites *Gorre v. City of Tacoma*, 184 Wn.2d 30, 37, 357 P.3d 625 (2015), and *Thurston Cty v. Cooper Point Ass'n*, 148 Wn.2d 1, 12, 57 P.3d 1156 (2002), to justify ignoring the dictionary definition of "technology" in order to apply the broader definition invented by the Air Agency. The Board held that legislative intent for a technical statutory term is determined "from all that the Legislature has said in the statute and related statutes which disclose the legislative intent about the provision in question." *See*, Conclusion of Law No. 14., *citing*, *Cooper Point*, 148 Wn.2d at 12.

But the Board ignored the portion of *Cooper Point* that held "Under this approach, we construe the act as a whole giving effect to all of

the language used.” *Id.* Had the PCHB actually followed this edict and given meaning to the use of the word technology or “control technology” as found in numerous other sections of the Clean Air Act, it never would have reached Conclusions of Law Nos. 17 and 18. (CR 922).¹⁴

During questioning by the Air Agency’s lawyer, Brooks’s Technical Director John Mitchell succinctly stated the plain meaning of “control technology”:

Q. Is it fair to say it's Brooks Manufacturing's interpretation of the regulation that it could replace every part of the subject baghouse with parts that were exactly the same and it would not be required to file a notice of construction application with Northwest Clean Air Agency for that work?

A. Yes. We don't believe we replaced the technology.

Q. So by replacing parts with identical parts, you're not replacing technology?

A. That's correct.

Q. Even if the parts on the object that you're replacing constitutes technology?

A. We don't believe the parts constitute technology.

Q. You don't believe the --

A. I don't believe the parts constitute technology.

Q. Do you think that the baghouse constitutes technology?

A. I believe the baghouse represents technology. I think the technology is the operating theory behind the baghouse.

Q. So to be clear, the baghouse in your interpretation is not air emission control technology?

¹⁴ In Conclusion of Law No. 18, the Board cites to *Mazdak International, Inc. v. Northwest Clean Air Agency*, PCHB No. 13-008, COL 12 (October 8, 2013) as supporting its interpretation of “emission control technology” in this case. The Board’s comparison flawed. In *Mazdak*, the Board referred generally to a baghouse as being the control technology; it did not refer specifically to the actual baghouse to be installed in the foundry at issue in that case. A baghouse in concept is emission control technology; the actual baghouse on site is an emission control device/equipment based on that emission control technology.

A. Correct. I believe it's air emission control equipment.

Q. So with regard to the exhaust system on the boiler, under your interpretation, when would your company be required to file a notice of construction application to perform work on it, if ever?

A. If we were to replace the baghouse with some form of, some other form of technology, say, we were going to direct it through a waterfall or water jet or some other form of technology to accomplish the same thing.

Q. So the regulation would only apply if you were going to replace a baghouse with a different type of control equipment?

A. Different type of technology or substantially alter the technology that we're using, yes. (RP 238-239)

The term “emission control technology” is unambiguous under the plain meaning. It is not a term of art. Even the Air Agency has interpreted the term inconsistently with how it now argues it should be interpreted. The definition Brooks advances here must be used.

C. Brooks Did not “Replace” Emission Control Technology.

If this Court disagrees with the above analysis and finds that the Baghouse is “control technology” under RCW 70.94.153, it must then determine whether the Baghouse was “replaced.” The PCHB concluded that it was. (CR 923, COL 20).¹⁵ The parts replaced on the Baghouse were *exact* replicas of what was originally designed and installed. The PCHB

¹⁵ Neither the Air Agency or the PCHB took the position that the 2014 work on the Baghouse was a “substantial alteration” of “control technology.”

thus erred in concluding that the 2014 work constituted a “replacement” of “emission control technology.”

The Board’s legal conclusion that the Baghouse was replaced is not supported by substantial evidence. The PCHB found that “90 percent” of the Baghouse was replaced. (CR 912, FOF 30). It then relied upon this erroneous finding numerous times in its legal conclusions, specifically Conclusions of Law No. 7 (CR 917), No. 11 (CR 919), and No. 20 (CR 923). Finding of Fact No. 30 is not supported by substantial evidence in the record, and it, along with the conclusions which rely upon it, were entered in error.

Finding of Fact No. 30 is based on a single statement by Dan Mahar. (RP 142). The record reflects that even the Air Agency’s own exhibit, R-31 (CR 1246) proved that less than 90 percent of the Baghouse was “replaced.” Mahar even outlined all of the parts that were re-used, including the structure, the ladder and catwalk, the airlock, the blow pipes, and even the bags and cages. (RP 141). The Baghouse was not “replaced.”

What the record does demonstrate is that many of the critical parts required for the Baghouse to function were re-used. (RP 308). Purge pipes, electronic controls, the structure of the Baghouse, and the bags and

cages were all re-used, and are all necessary for the Baghouse to function properly. (RP 308). The Air Agency's argument that the Baghouse was "replaced" relies on their arbitrary ranking of the value of some components over others.

If in fact the Baghouse constitutes "control technology," it was not "replaced" as intended in RCW 70.94.153. The statute is not met if the Baghouse is merely "substantially replaced," "partially replaced," or "almost replaced." Likewise, the statute is not satisfied, because the parts that were repaired and replaced with matching new parts are deemed arbitrarily "more important" than the parts that were re-used. Rather, the Baghouse and all of its components work together for it to function properly. The Baghouse was, simply, not replaced and as a result, an NOC was not required.

D. "Routine Maintenance, Repair or Similar Parts Replacement."

NWCAA Reg. 300.13(a) is an agency interpretation of a statute stating that "routine maintenance, repair or similar parts replacement" does not meet the threshold of "replacement or substantial alteration" under RCW 70.94.153. (CR 915, COL 4). This Court cannot apply the NWCAA

regulations in a manner that is more restrictive than and inconsistent with the statute.¹⁶

A gap exists between the language of RCW 70.94.153 and the language of Reg. 300.13(a). Work performed on “control technology” that may not constitute “routine maintenance, repair or similar parts replacement,” does not automatically fit within the meaning of “replacement or substantial alteration of control technology.” Thus, Reg. 300.13(a) cannot be read as an exclusive list of actions that may not constitute “replacement or substantial alteration,” and this Court need not hold that the work performed in 2014 constituted “routine maintenance, repair, or similar parts replacement” to reverse the PCHB.

1. The 2014 Baghouse Work Constituted “Routine Maintenance, Repair, or Similar Parts Replacement.” While it is not necessary to reach this conclusion to reverse the PCHB, the work performed in 2014 did in fact constitute “routine maintenance, repair, or similar parts replacement,” and a finding of such would be helpful for future guidance in applying the regulatory scheme. Mark Wolfe of Superior Systems has been building, installing, designing, and repairing

¹⁶ RCW 70.94.141(1) delegates authority to the NWCAA to adopt rules and regulations only if they are consistent with RCW Chapter 70.94; *see also*, *US West Communications*,

baghouses since 1980. In his experience, replacing and repairing the parts of a baghouse that were replaced at Brooks in 2014 is routine maintenance, repair, or similar parts replacement, as those words are commonly understood. (RP 314; 308-309).

The schedule of when such maintenance and repair takes place varies from case to case, but it is still routine. (RP 315-316). Dave Sharpe, an industry expert on wood fired boilers and their emission control devices agrees. These types of baghouses regularly have the skins replaced, as well as the tube sheet, the hopper, and other integral parts. (RP 328). In his experience in the industry, it is common to re-use the parts that are still good and only fix the deficient parts. (RP 329). In both Wolfe and Sharpe's experience, like-for-like parts manufacture and replacement, like that done in 2014 at Brooks, results in a baghouse that continues to perform as originally designed and specified. (RP 329; RP 302).

The Brooks Baghouse was not at the end of its useful life and did not need to be completely replaced. Mark Wolfe explained that baghouses can reach a point where they need to be fully replaced. (RP 306-307). It is

Inc. v. Util. & Transp. Comm'n, 134 Wn.2d 48, 56, 949 P.2d 1321 (1997) (courts do not defer to an agency the power to determine the scope of its own authority).

uncontroverted that the Baghouse at Brooks did not need to be fully replaced. (RP 308).

2. The PCHB Erred in Considering and Using the Four-Part Test to Determine if Work is “Routine.” At the hearing, Dan Mahar testified to using a four-part test to help determine whether work performed on “control technology” was routine maintenance, repair, or replacement. (RP 133). The Board stated: “The Board agrees with the Air Agency that the work performed in 2014 on the Brooks Baghouse constitutes replacement and therefore a notice of construction application was required.” (CR 916, COL 6). “In reaching this conclusion, the Board finds the factors suggested by Mr. Mahar provide a helpful framework for its analysis.” (CR 917, COL 7). The four factors cited by Mr. Mahar and the Board are inappropriately used in this context.

The four factors are derived from the Federal Clean Air Act rules not Washington law. (RP 135). Mahar said he used the federal rules because they have “similar” provisions about routine, maintenance, repair and replacement. (RP 135). Mahar testified that the “federal rules, Part 60, Title 40...they have a whole section entitled “modification.” (RP 152).

Mr. Mahar was referring to CFR Title 40, Part 60, Section 60.14, entitled “Modification.”¹⁷ “Maintenance, repair, and replacement which the Administrator determines to be routine for a source category” is exempt from being deemed a “modification.” The provision cites § 60.15 entitled “reconstruction.”¹⁸ Reconstruction references consideration of the capital cost and lifespan of the “facility.” It appears Mr. Mahar used these two sections to arrive at his “four-part test.”

A review of the federal regulatory scheme immediately demonstrates why using the “four-part test” in this case is improper. Federal law defines a “modification” as “any physical or operational

change to an existing facility *which results in an increase in the emission rate...*” *Id.* (Emphasis added). The “routine” “maintenance, repair, and replacement” language is an exemption to the term “modification.” Thus, if a source fits within the “routine maintenance” exception to the term “modification,” it is allowed to increase emissions but avoid new source review and permitting. Applying a strict and detailed test to determine when the exemption applies under federal law, makes sense.

¹⁷ A copy of CFR Title 40, Part 60, § 60.14 is attached hereto as Appendix D.

Here, however, the terms “replace” or “substantially alter” as found in RCW 70.94.153 could never include an action which increases emissions. Under the Washington Clean Air Act, *any* action that increases air emissions automatically falls outside of RCW 70.94.153 and NWCAA Regulation 300.13, requiring a new source review and new permitting. Dan Mahar unequivocally agreed with this critical distinguishing factor between the state and federal regulations, yet still maintained the “four-part” test was appropriate to use. (RP 152-154).

The Board erred when it relied on the “four-part test” to support its legal conclusions. The level of scrutiny for the exemption under federal law is much higher than under state law, because the federal statutory exemption applies to much more significant actions which increase emissions. Under the state statutory scheme at issue here, the “replacement” or “substantial alteration” exemption to requiring an NOC would never apply to an action that increased emissions. As a result, the consequence of applying the exemption in state law is vastly less significant than in the federal scheme. Thus, while the words used in the two statutes may be comparable, the similarities end there, and using the “four-part test” was wholly improper.

¹⁸ A copy of CFR Title 40, Part 60, § 60.15 is attached hereto as Appendix E.

E. Brooks is Entitled to Operate Under Its 1989 Permit.

If a Notice of Construction Application is filed, SEPA may be triggered (RP 163-164). Further, the Air Agency will conduct a review to see if “Reasonably Available Control Technology” requires an update of the permit and emissions standards. This means that the Air Agency would review the existing system and Baghouse to see “is it meeting RACT” and “what would be RACT.” (RP 92; 102). The RACT analysis can result in changing the conditions to a permit, such as Brooks’s 1989 Permit. (RP 116). According to the Air Agency, the purpose of NWCAA Reg. 300.13 is to “ensure reasonably available control technology standards are applied.” (RP 169).

Paul Mairose, Chief Engineer for the Southwest Clean Air Agency (SWCAA), testified about his understanding of the statutory and regulatory scheme of the Clean Air Act. (RP 174). He is familiar with the Oregon clean air act. He testified that in Oregon, permits are reviewed every five years. (RP 193). This gives Oregon regulators the opportunity to review their permits and the control technologies used at various sources every five years. (RP 193).

In stark contrast are Washington's law, which clearly establish that once a permit is issued, it is "good forever." (RP 192). Mairose testified:

It is my understanding that when the legislature put these rules in place for Washington, the industry lobbied to say we want more surety in our permitting. So the Washington permit program was not a renewable permit program, it was this concept of issued once, good forever, unless and until. (RP 193).

Where Mr. Mairose's understanding of the legislative intent came from is not clear, but what is clear, is that his understanding comports with the plain meaning of the words of the statute.

The Air Agency (and their cohorts around the state), as well as the PCHB, have strained their interpretation of the statute to reach the conclusions they have. Their motive for doing this is clear, and while it is understandable why regulators would want this interpretation, it is contrary to state law. The statutory language controls the rules at play here, not the agency's desires. The Air Agency's interpretation that was sustained by the Board is a clear shift in the Agency's historical application of RCW 70.94.153 and contrary to the plain language of the statute.

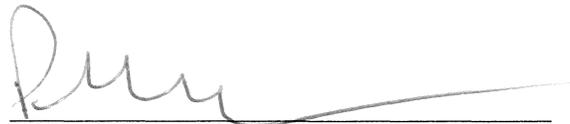
"As a general rule, where a statute has been left unchanged by the legislature for a significant period of time, the more appropriate method to change the interpretation or application of a statute is by amendment or revision to the statute, rather than a new agency interpretation." *Dot*

Foods, 166 Wn.2d at 921. Here, RCW 70.94.153 has not been changed since its adoption over 26 years ago. Neither the Air Agency nor the PCHB can rightly infuse such a strained interpretation in the face of the plain language of the statute. The PCHB must be reversed.

VII. CONCLUSION

The PCHB erred in entering its Findings, Conclusions and Order. The Air Agency's Notice of Violation and Corrective Action Order should not have been affirmed. This Court should REVERSE the Superior Court and PCHB and Remand the matter for entry of a Dismissal with Prejudice of the Notice of Violation and Corrective Action Order.

RESPECTFULLY SUBMITTED this 4th day of April 2018.



PETER R. DWORKIN, WSBA#30394
Attorney for Appellant



1600 South Second Street
 Mount Vernon, WA 98273-5202
 p. 360-428-1617
 f. 360-428-1670
 www.nwcleana.org

NOTICE OF VIOLATION & CORRECTIVE ACTION ORDER

This notice is provided under NWCAA Reg. 121 and 131 and RCW 70.94

Violator: Brooks Manufacturing Company

CASE NUMBER: 4117

YOU ARE REQUIRED TO TAKE THE FOLLOWING ACTIONS:

Submit a Notice of Construction Application by January 30th, 2015.

Failure to meet the requirements of this order may result in additional enforcement action, including civil penalties under NWCAA Regulation 133. In the event that you cannot meet the requirements of this order, you may contact NWCAA within 30 days of this notice to set up a meeting¹.

VIOLATION(S) DESCRIPTION:

Brooks Manufacturing Company constructed a baghouse in August 2014 without submitting Notice of Construction. The new baghouse replaced an existing baghouse that was installed and permitted in 1989.

REGULATIONS VIOLATED:

NWCAA Regulation
 Section 300.13(a)

Any person proposing to replace or substantially alter the emission control technology installed on an existing stationary source or emission unit shall file a Notice of Construction application with the Authority. Replacement or substantial alteration of control technology does not include routine maintenance, repair or similar parts replacement.

VIOLATOR

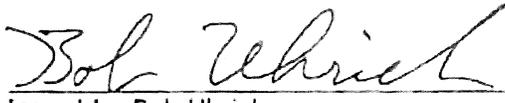
Brooks Manufacturing Company
 2120 Pacific Street
 Bellingham, WA 98229-5825

OWNER

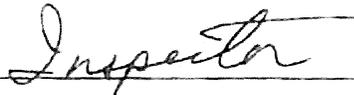
Brooks Manufacturing Company, Inc
 2120 Pacific Street
 Bellingham, WA 98229-5825

We are issuing this notice to the violator as named above. We provide property/corporate owners a copy of the notice because they may be held responsible should the violator fail to respond. We want you to have the opportunity to take action to prevent further unlawful activities.

You may contact NWCAA at 360-428-1617 to discuss this notice.



Issued by: Bob Uhrich



12/15/2014
 Date

¹ NWCAA Regulation 131.1 requires that every notice of violation offer to the alleged violator an opportunity to meet with the NWCAA prior to commencement of enforcement action.



207 Pioneer Building
Area Code 206 Mount Vernon 336 5705 Bellingham 676-2223 Scan 738-2223
Mount Vernon, Washington 98273

March 10, 1989

John Ferlin
Brooks Manufacturing Company
P.O. Box 7
Bellingham, Washington 98227

Dear Mr. Ferlin:

On January 27, 1989, you submitted a "Notice of Construction and Application for Approval" to install a multi-clone and baghouse at your business in Whatcom County. The required \$50.00 filing fee was received along with your application.

The information provided with your application was reviewed to determine that all known, available and reasonable methods of air pollution control will be utilized. A Determination of Non-Significance was issued by the City of Bellingham on February 13, 1989.

After considering my recommendation and the comments provided at a public hearing on this matter, the Board of Directors of NWAPA granted approval at their March 8, 1989, Board Meeting for you to install the baghouse to control particulate emissions. This approval is contingent upon your payment of the required \$100.00 plan examination and inspection fee and adherence to the following conditions:

1. The project shall be constructed and operated in accordance with the information submitted with the Notice of Construction application.
2. The opacity from the exhaust stack on the baghouse shall not exceed five percent as measured visually for more than three minutes in any one hour.
3. No visible emissions shall be noted from any other point in the system.
4. Particulate concentrations in the stack gas shall not exceed 0.01 gr/dscf corrected to seven percent oxygen.
5. A device to monitor pressure drop across the baghouse plenum shall be installed. Monthly records of the readings shall be kept in a log for inspection by the Authority staff.

Representing Island, Skagit and Whatcom Counties

004700

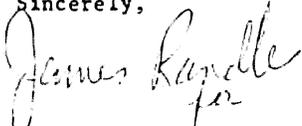
John Ferlin
Brooks Manufacturing Company
March 10, 1989
Page 2

6. An operation and maintenance document that demonstrates a knowledge of procedures to maintain the equipment to prevent excess air pollution shall be submitted prior to start-up.
7. State requirements for hazardous and dangerous waste shall be followed when soliciting wood fuels generated off site. Only clean untreated wood shall be burned in the unit.

Please notify me, in writing, when the installation is complete and provide the expected date that you propose to begin operating the baghouse. An on-site inspection may be required before startup and again after the process has operated for a period of time. A "Certificate of Approval to Operate" will be issued after we determine that the process was installed in accordance with the plans and specifications submitted with the application and can operate in compliance with the Regulations of this Authority and the conditions of approval.

Please call me if you have questions about the Board's approval of this project. A statement is enclosed for the plan examination and inspection fee and the legal publication costs in the amount of \$152.40

Sincerely,



Terry L. Nyman
Air Pollution Control Officer

:sd

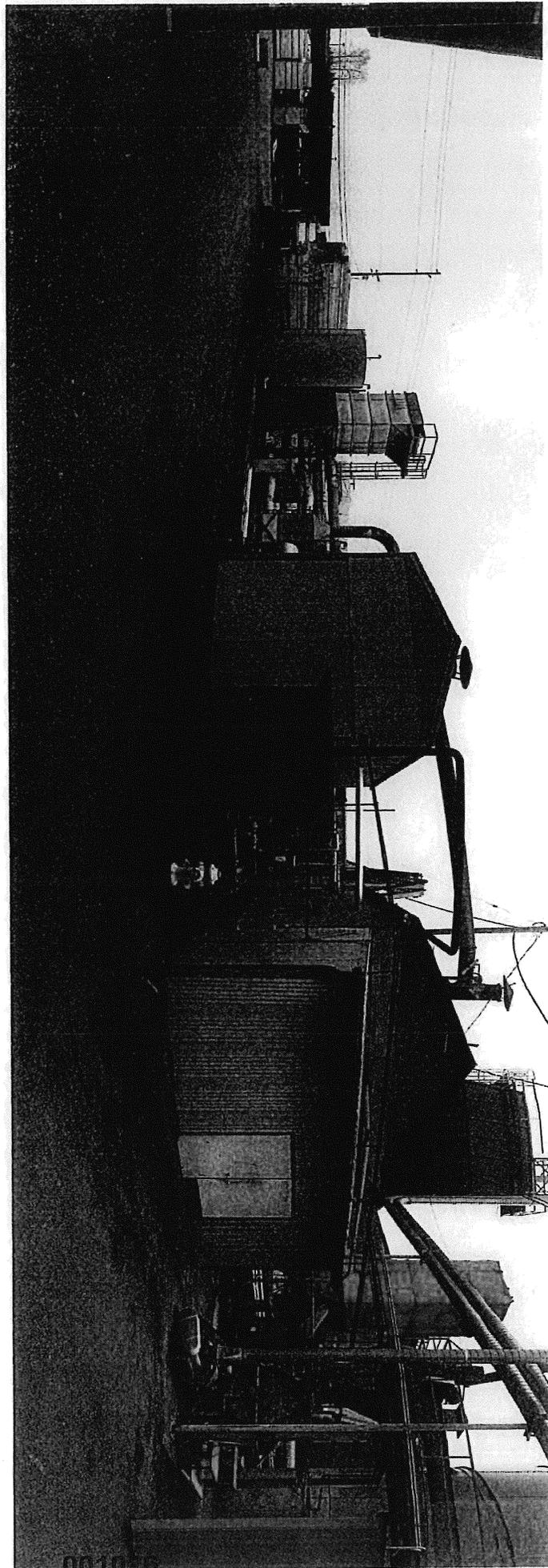
Enclosure

cc: Donald J. Bales, Environmental Review Section, DOE, Olympia

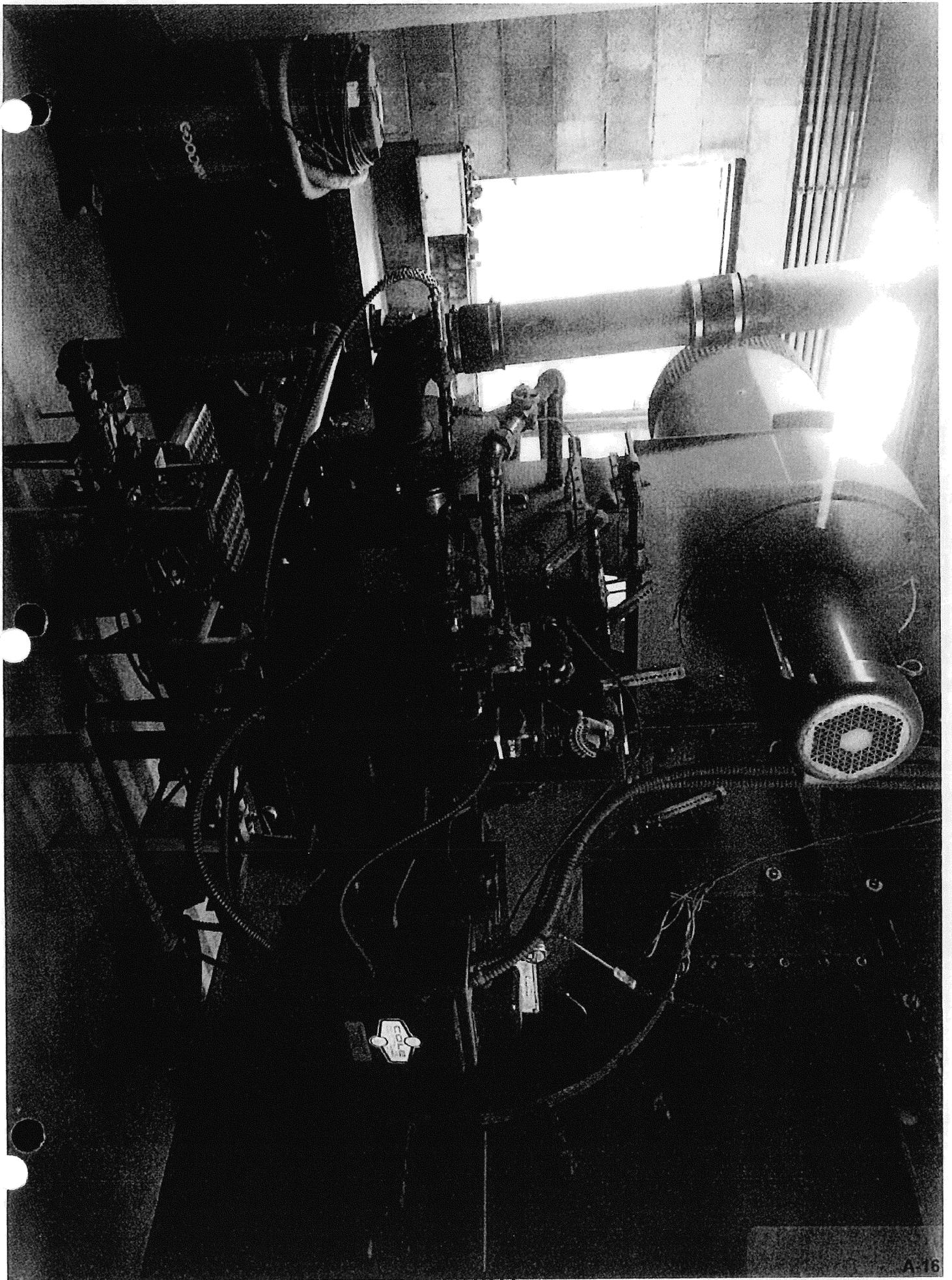
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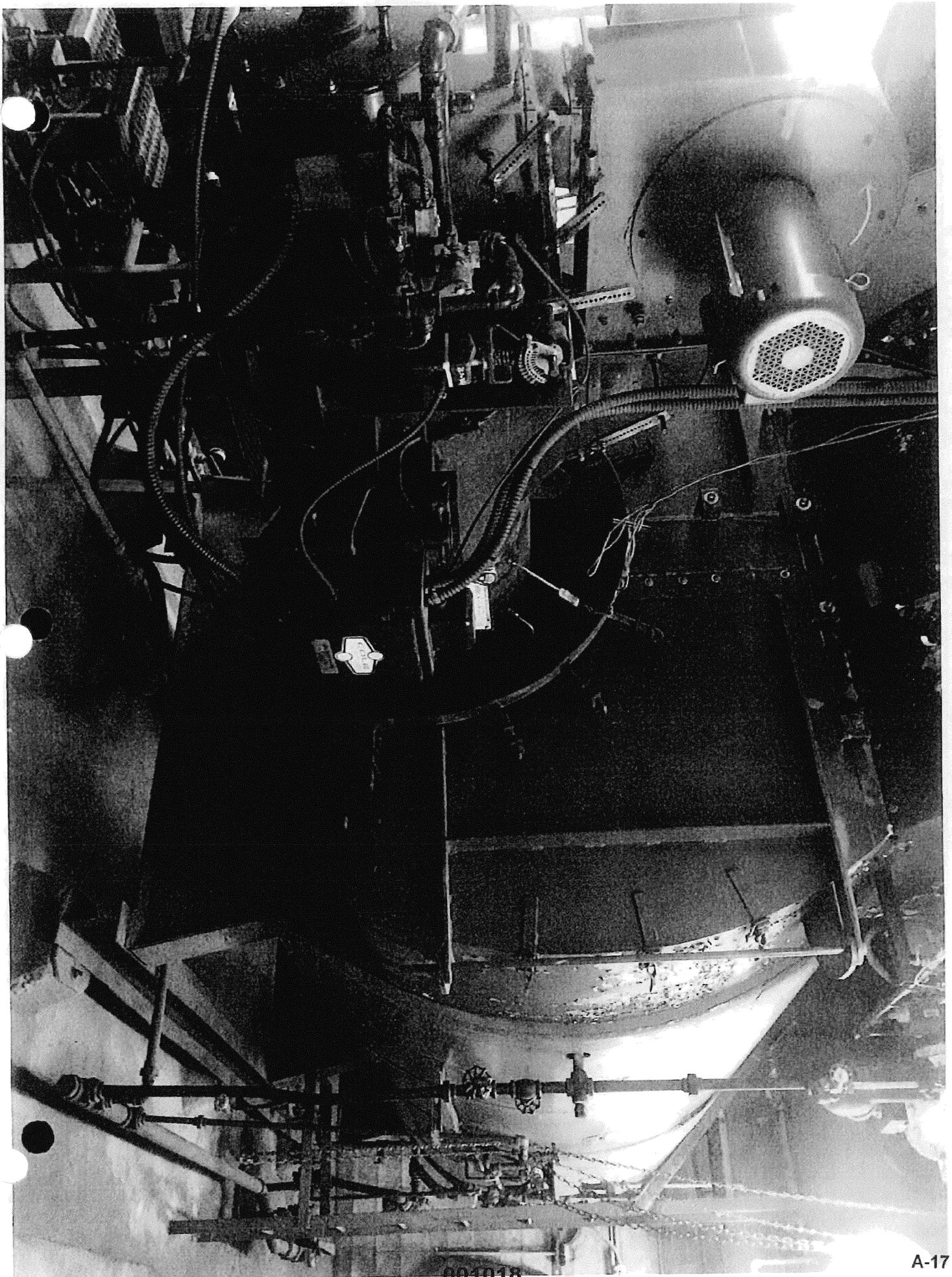
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APPENDIX B, Page 2 of 2

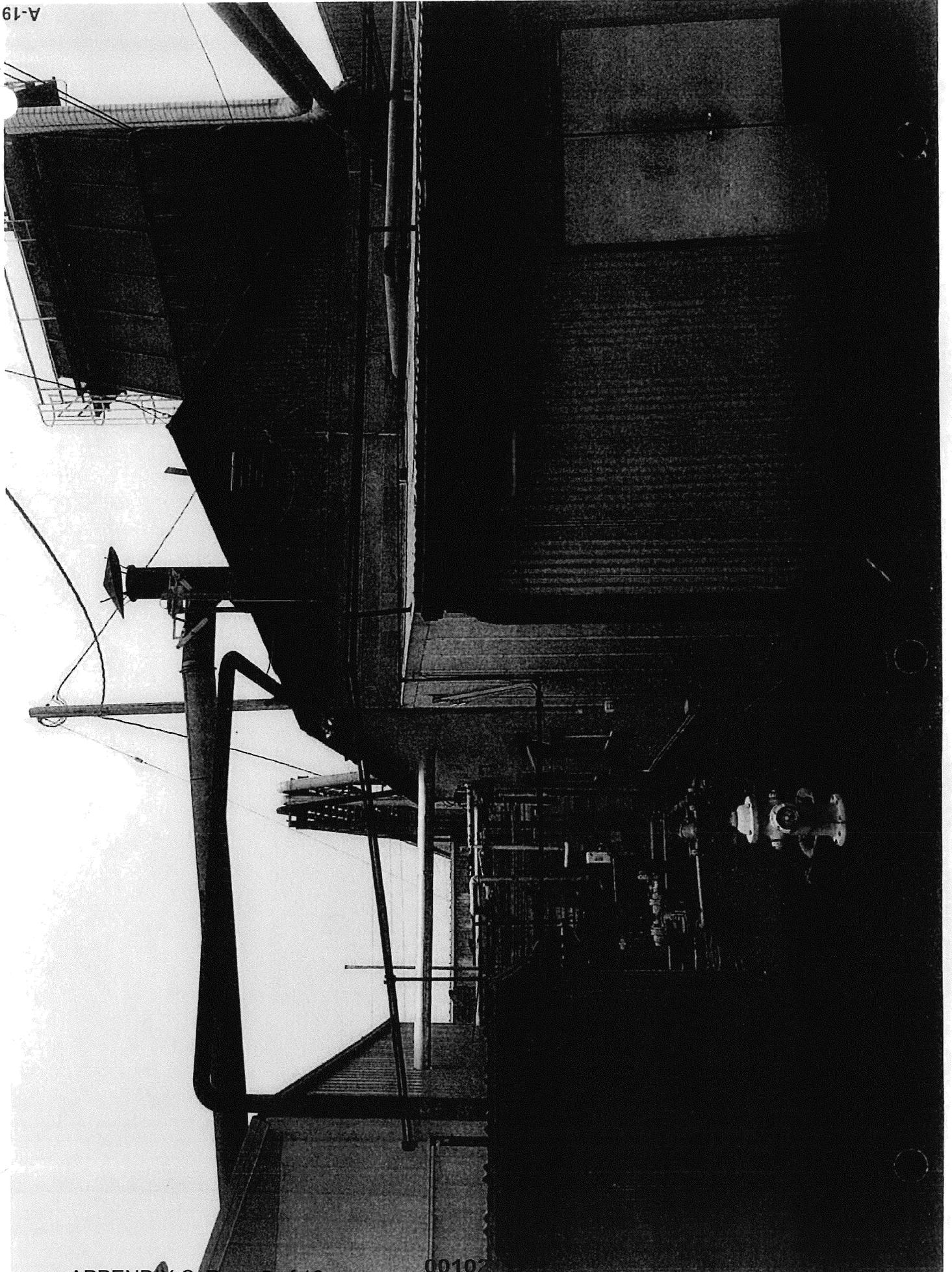


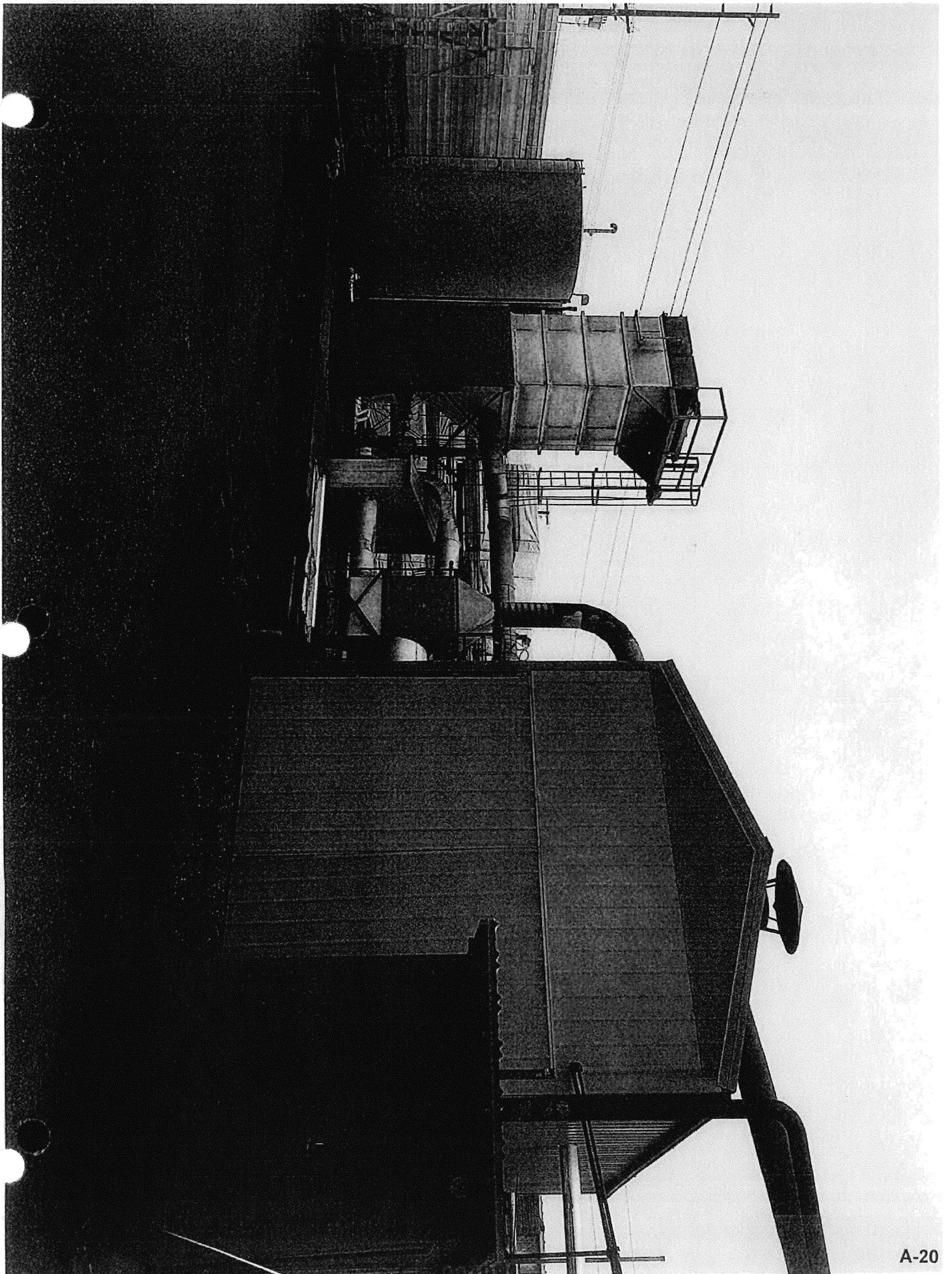
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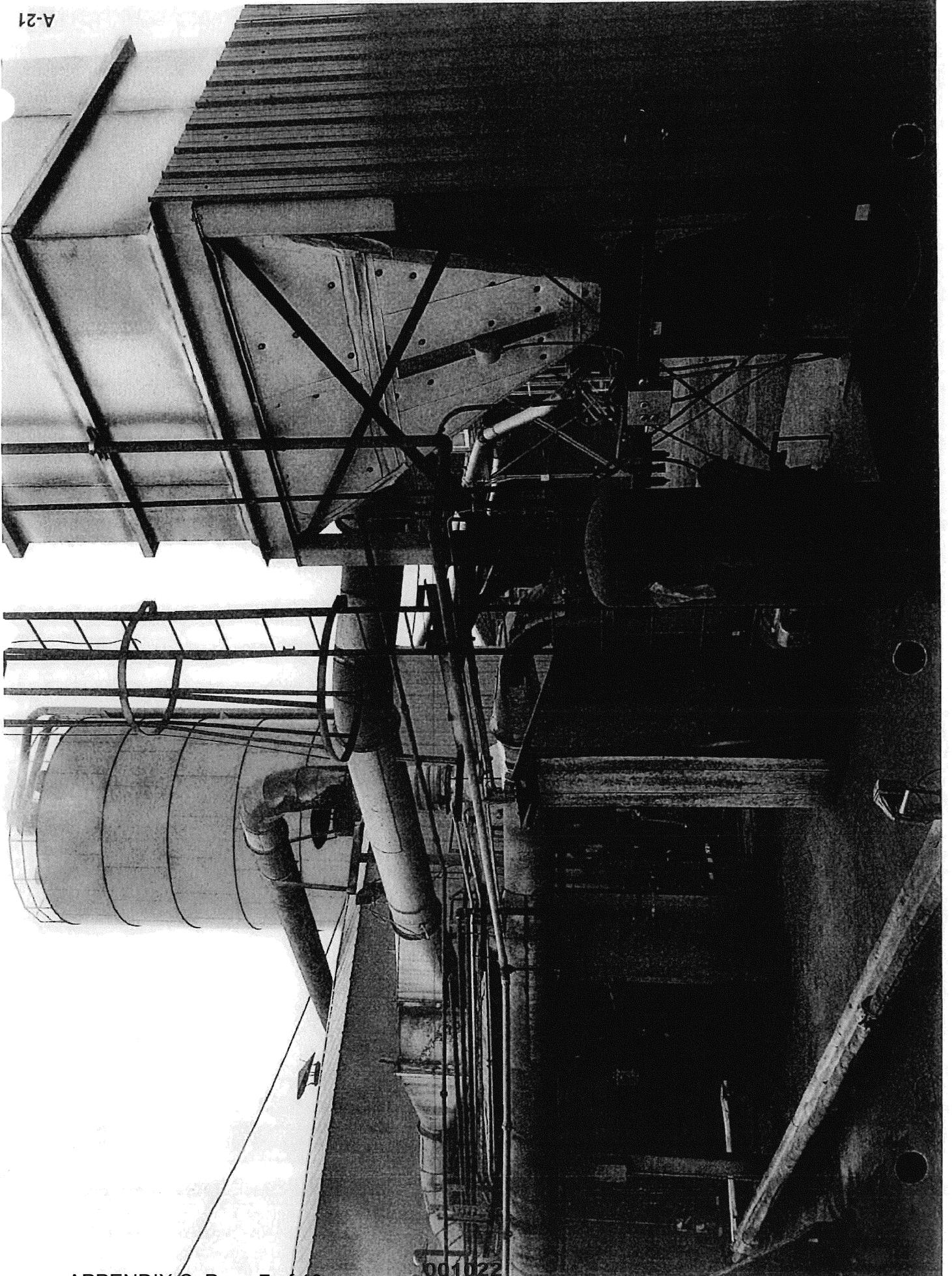




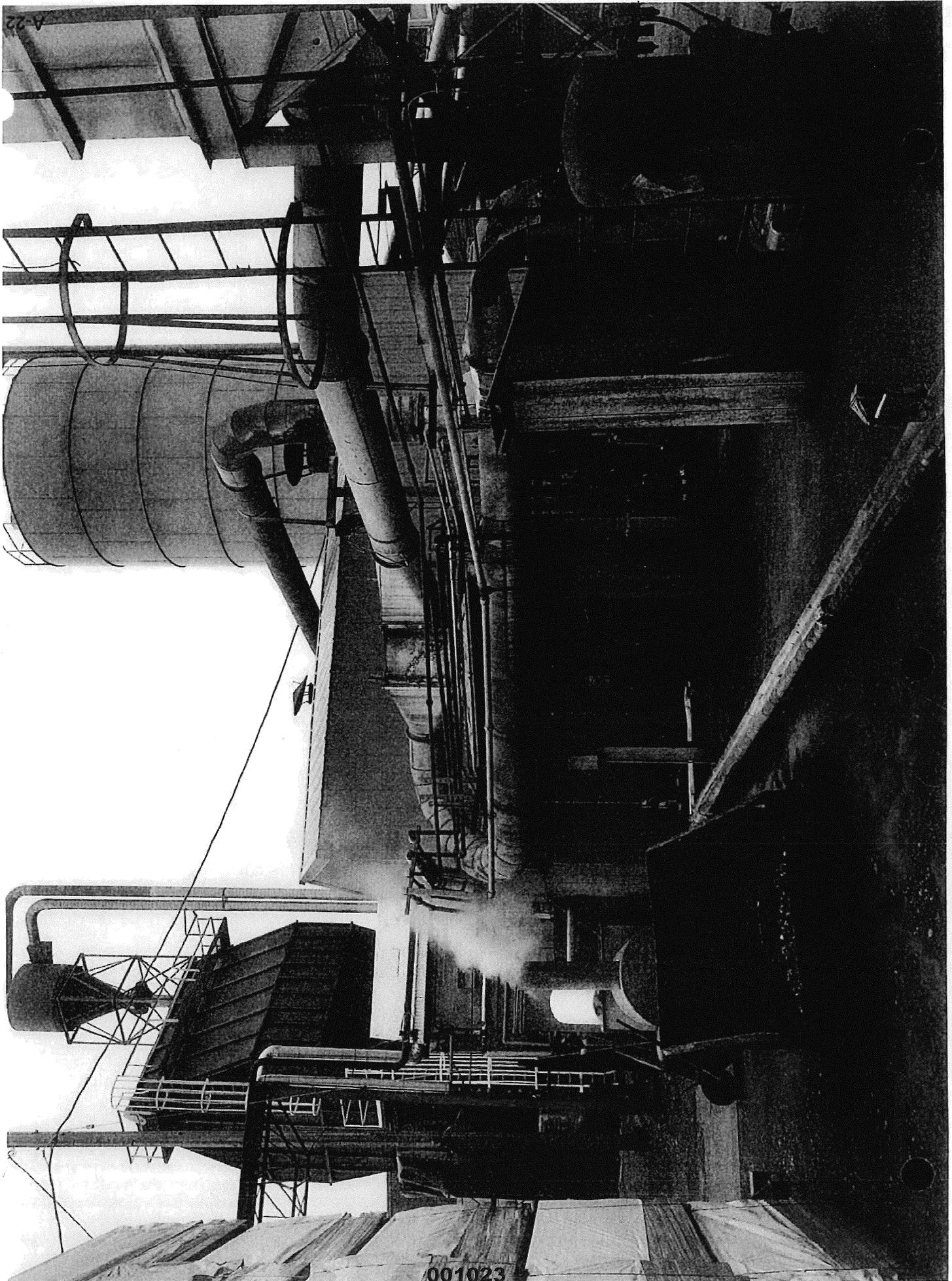






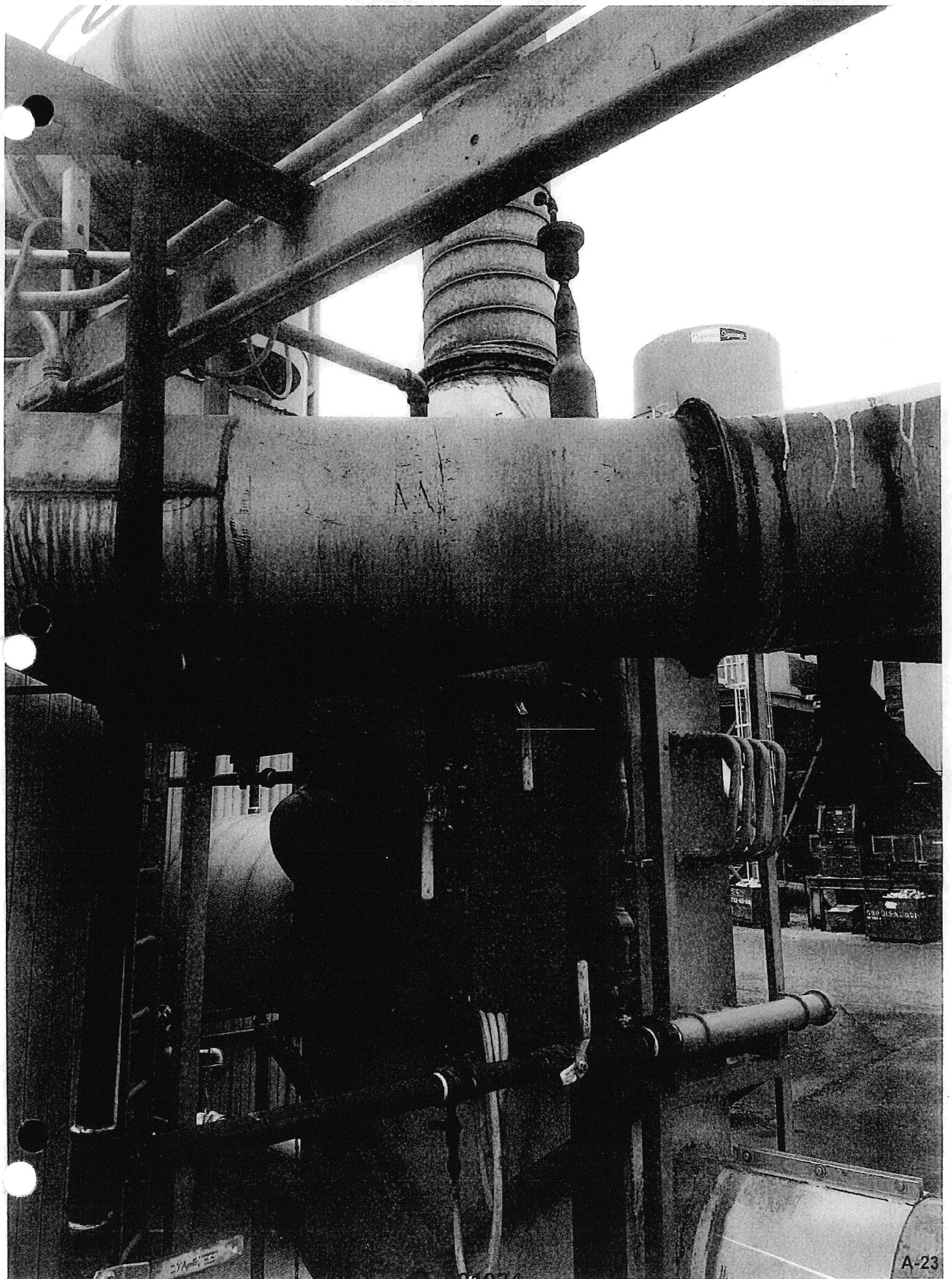


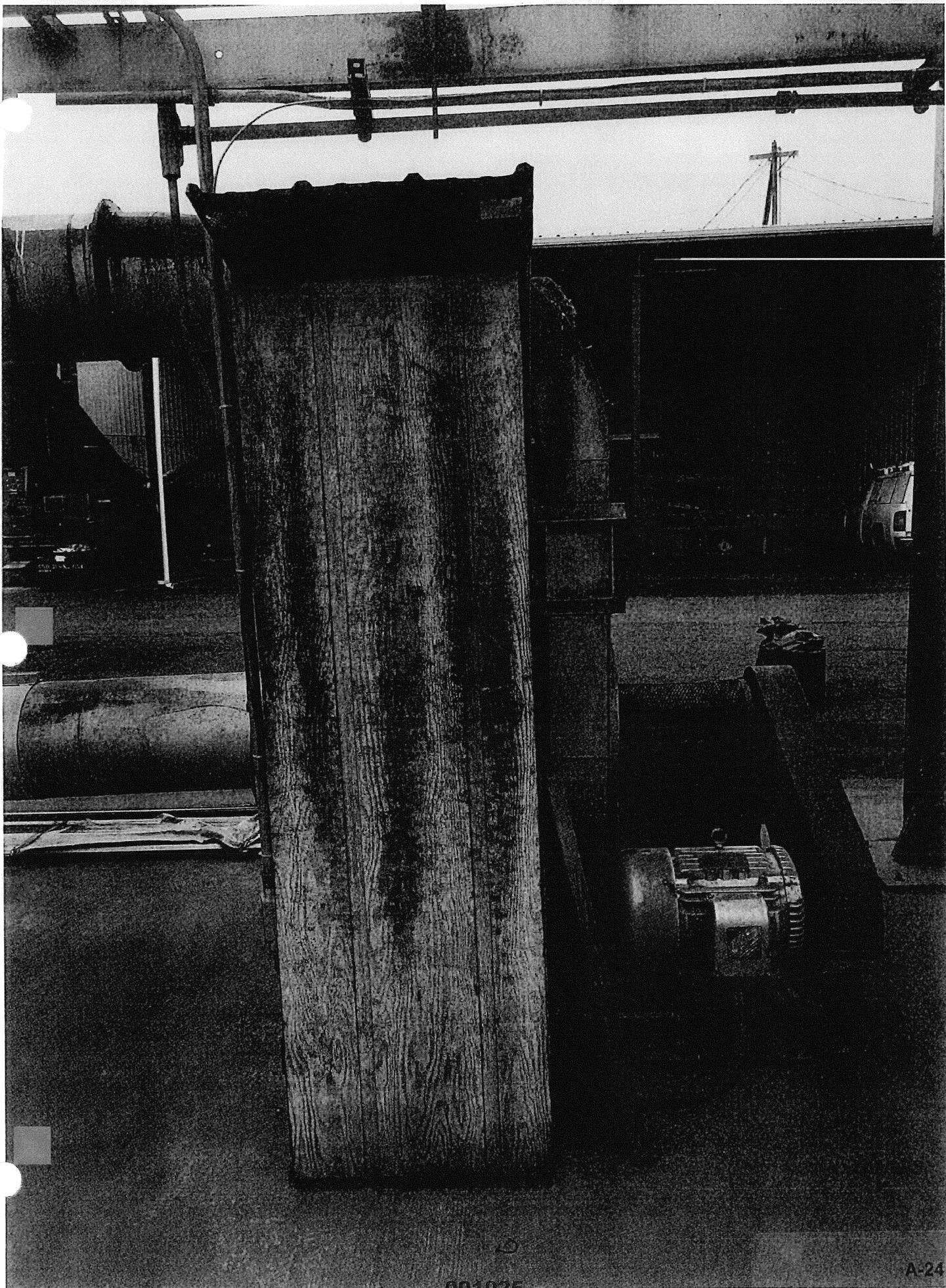
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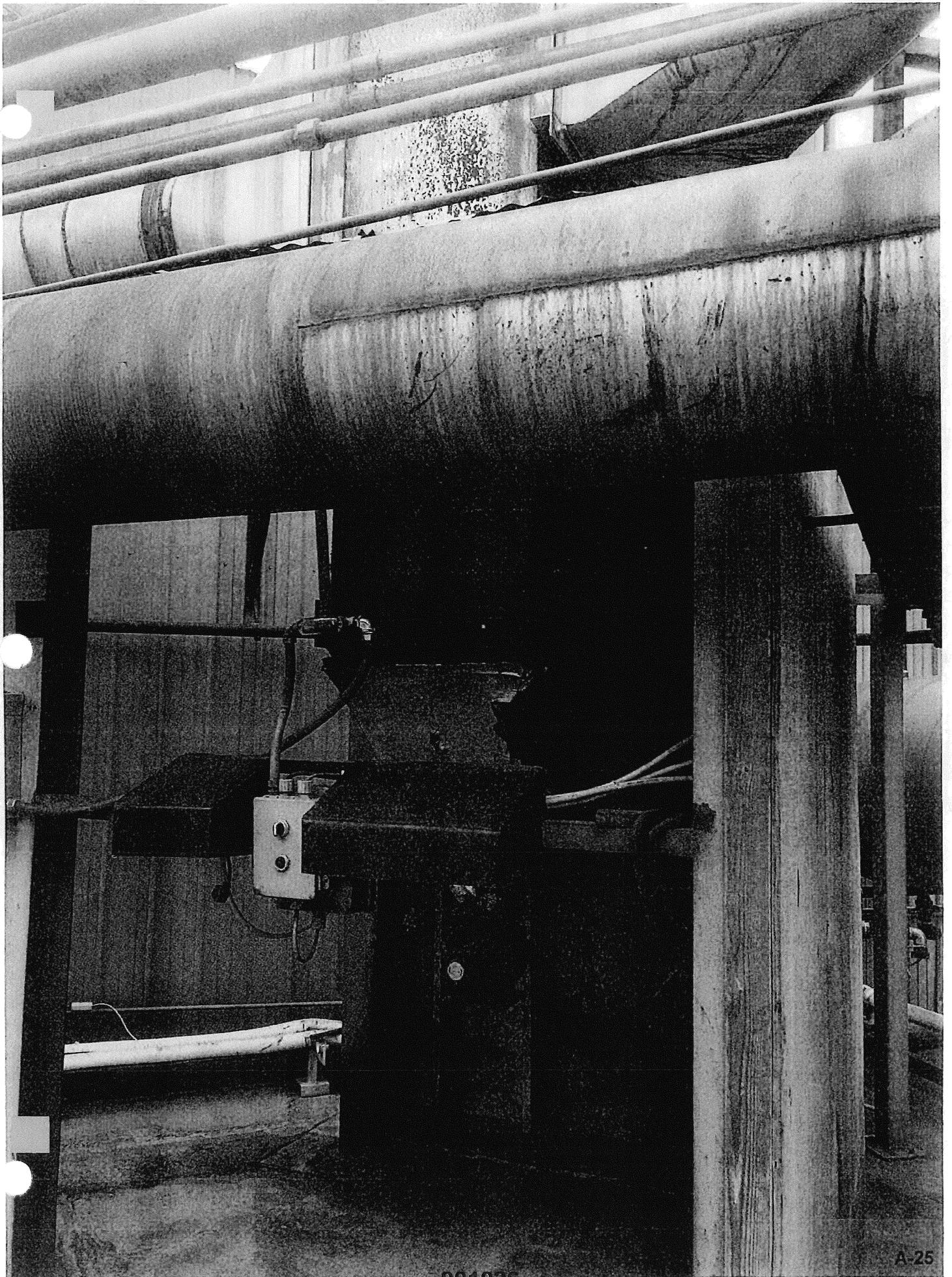


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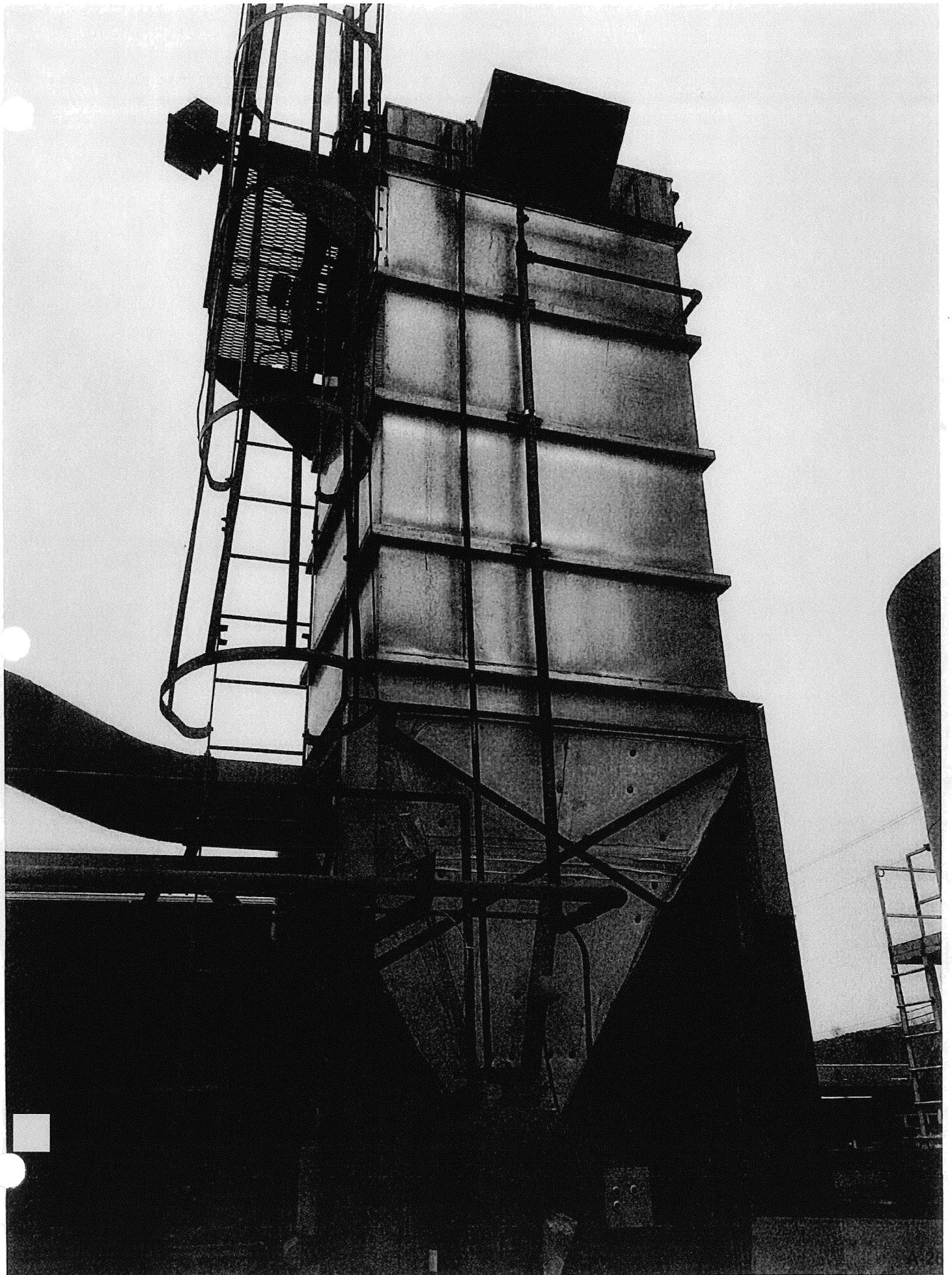


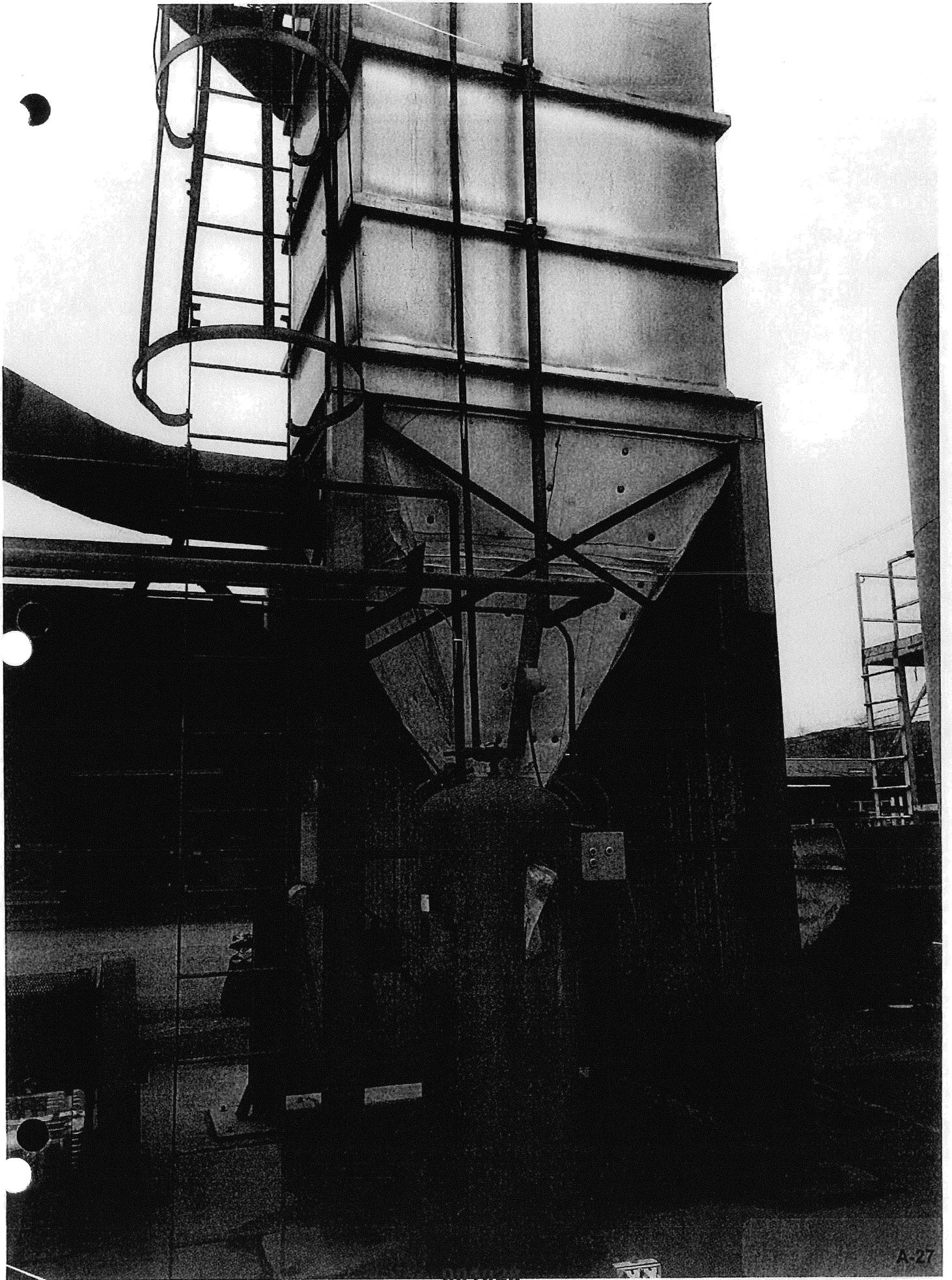


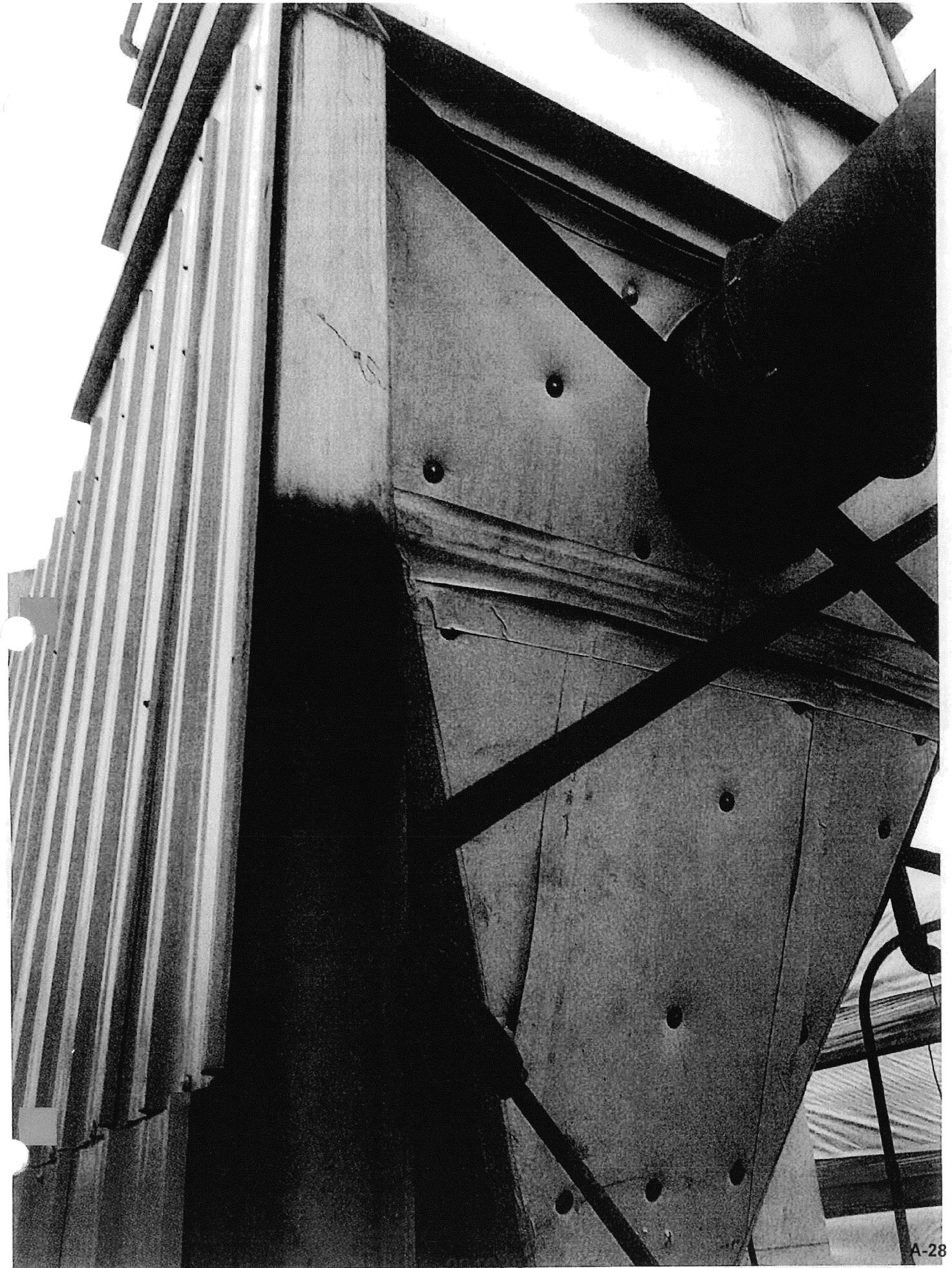


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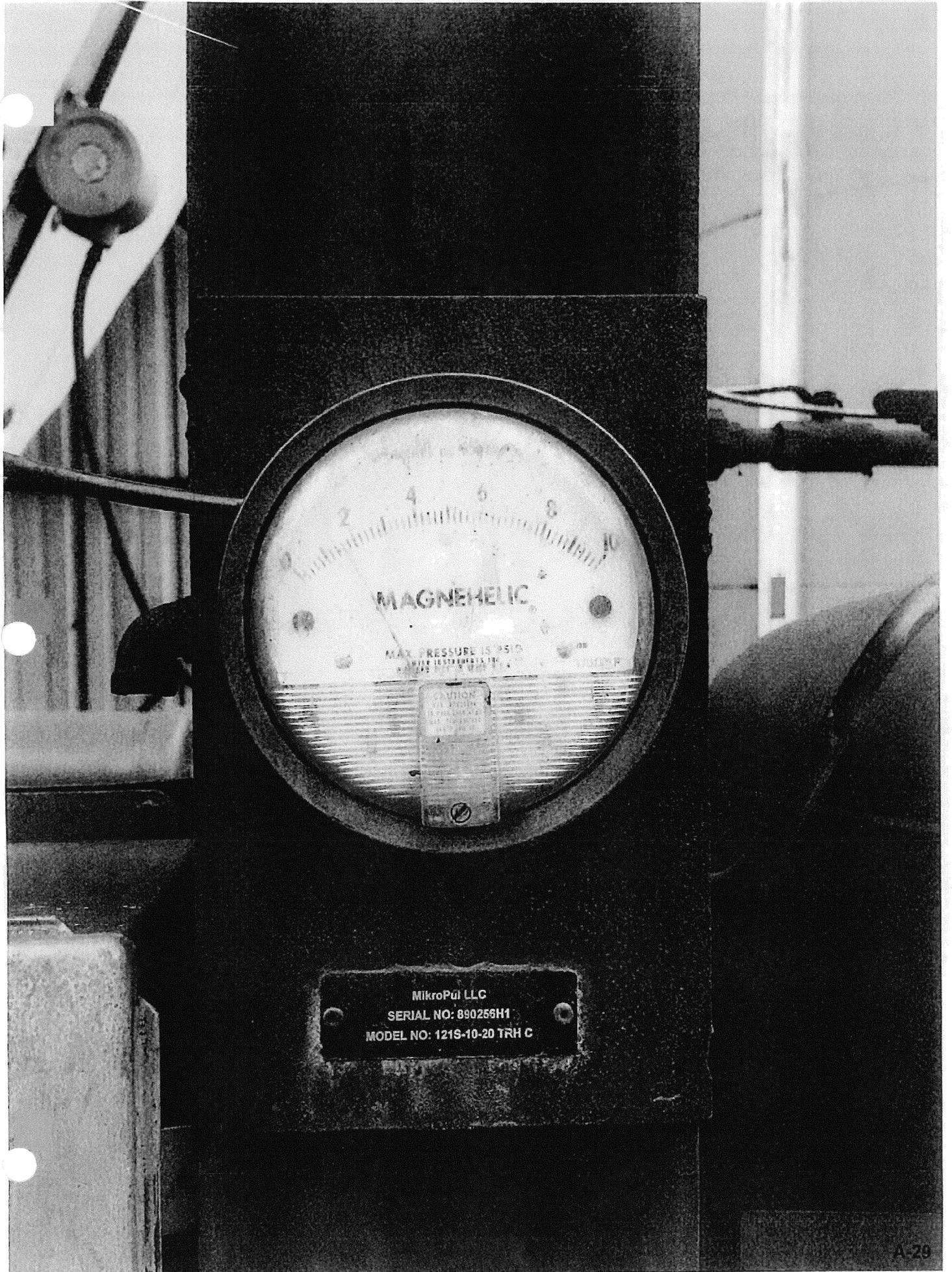
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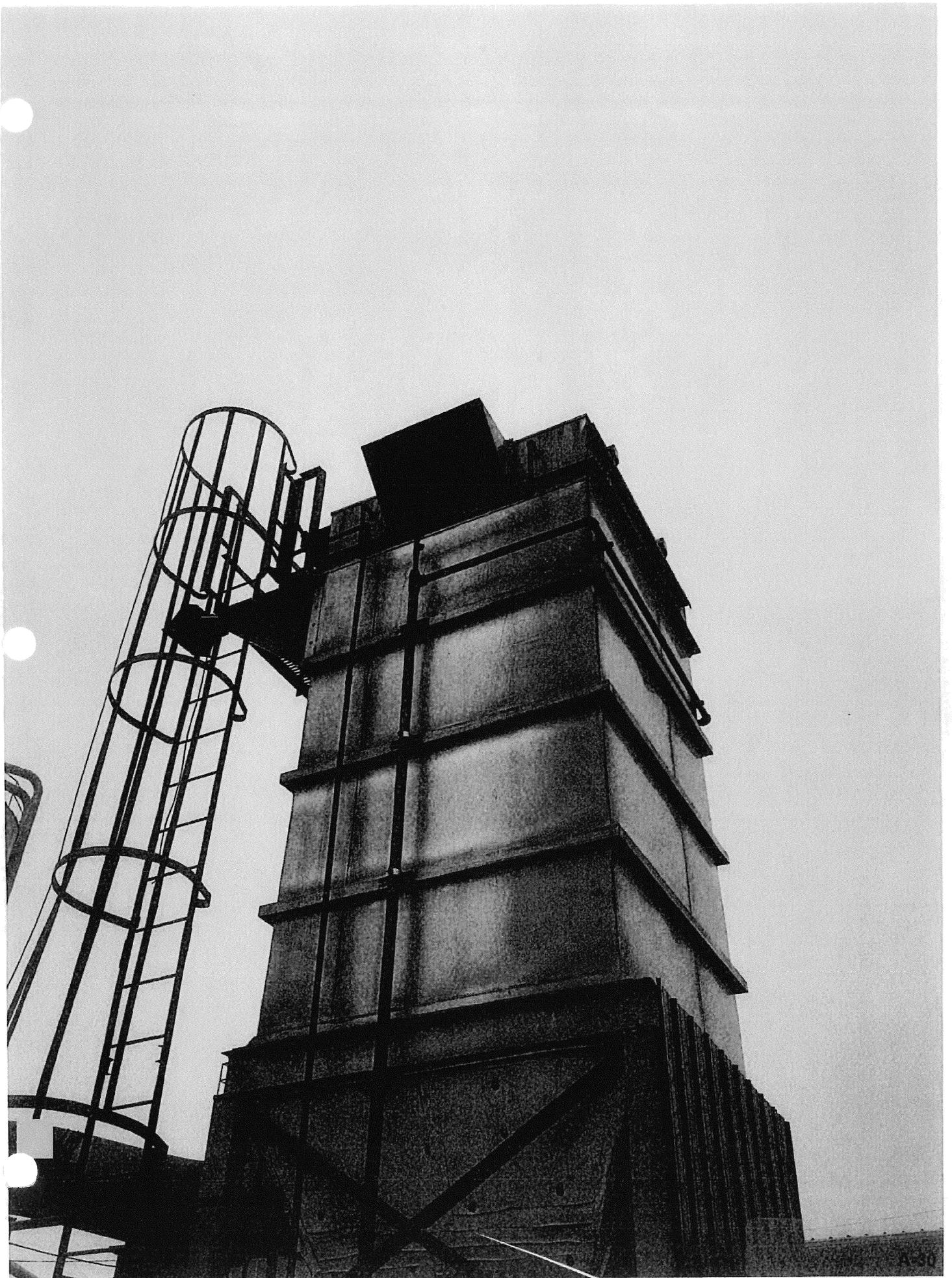




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MikroPul LLC
SERIAL NO: 890269H1
MODEL NO: 1219-10-20 TRH C



§60.14 Modification.

(a) Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable. The Administrator shall use the following to determine emission rate:

(1) Emission factors as specified in the latest issue of "Compilation of Air Pollutant Emission Factors," EPA Publication No. AP-42, or other emission factors determined by the Administrator to be superior to AP-42 emission factors, in cases where utilization of emission factors demonstrates that the emission level resulting from the physical or operational change will either clearly increase or clearly not increase.

(2) Material balances, continuous monitor data, or manual emission tests in cases where utilization of emission factors as referenced in paragraph (b)(1) of this section does not demonstrate to the Administrator's satisfaction whether the emission level resulting from the physical or operational change will either clearly increase or clearly not increase, or where an owner or operator demonstrates to the Administrator's satisfaction that there are reasonable grounds to dispute the result obtained by the Administrator utilizing emission factors as referenced in paragraph (b)(1) of this section. When the emission rate is based on results from manual emission tests or continuous monitoring systems, the procedures specified in appendix C of this part shall be used to determine whether an increase in emission rate has occurred. Tests shall be conducted under such conditions as the Administrator shall specify to the owner or operator based on representative performance of the facility. At least three valid test runs must be conducted before and at least three after the physical or operational change. All operating parameters which may affect emissions must be held constant to the maximum feasible degree for all test runs.

(c) The addition of an affected facility to a stationary source as an expansion to that source or as a replacement for an existing facility shall not by itself bring within the applicability of this part any other facility within that source.

(d) [Reserved]

(e) The following shall not, by themselves, be considered modifications under this part:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of this section and §60.15.

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on that facility.

(3) An increase in the hours of operation.

(4) Use of an alternative fuel or raw material if, prior to the date any standard under this part becomes applicable to that source type, as provided by §60.1, the existing facility was designed to accommodate that alternative use. A facility shall be considered to be designed to accommodate an alternative fuel or raw material if that use could be accomplished under the facility's construction specifications as amended prior to the change. Conversion to coal required for energy considerations, as specified in section 111(a)(8) of the Act, shall not be considered a modification.

(5) The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

(6) The relocation or change in ownership of an existing facility.

(f) Special provisions set forth under an applicable subpart of this part shall supersede any conflicting provisions of this section.

(g) Within 180 days of the completion of any physical or operational change subject to the control measures specified in paragraph (a) of this section, compliance with all applicable standards must be achieved.

(h) No physical change, or change in the method of operation, at an existing electric utility steam generating unit shall be treated as a modification for the purposes of this section provided that such change does not increase the maximum hourly emissions of any pollutant regulated under this section above the maximum hourly emissions achievable at that unit during the 5 years prior to the change.

(i) Repowering projects that are awarded funding from the Department of Energy as permanent clean coal technology demonstration projects (or similar projects funded by EPA) are exempt from the requirements of this section provided that such change does not increase the maximum hourly emissions of any pollutant regulated under this section above the maximum hourly emissions achievable at that unit during the five years prior to the change.

(j)(1) Repowering projects that qualify for an extension under section 409(b) of the Clean Air Act are exempt from the requirements of this section, provided that such change does not increase the actual hourly emissions of any pollutant regulated under this section above the actual hourly emissions achievable at that unit during the 5 years prior to the change.

(2) This exemption shall not apply to any new unit that:

(i) Is designated as a replacement for an existing unit;

(ii) Qualifies under section 409(b) of the Clean Air Act for an extension of an emission limitation compliance date under section 405 of the Clean Air Act; and

(iii) Is located at a different site than the existing unit.

(k) The installation, operation, cessation, or removal of a temporary clean coal technology demonstration project is exempt from the requirements of this section. A *temporary clean coal control technology demonstration project*, for the purposes of this section is a clean coal technology demonstration project that is operated for a period of 5 years or less, and which complies with the State implementation plan for the State in which the project is located and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(l) The reactivation of a very clean coal-fired electric utility steam generating unit is exempt from the requirements of this section.

[40 FR 58419, Dec. 16, 1975, as amended at 43 FR 34347, Aug. 3, 1978; 45 FR 5617, Jan. 23, 1980; 57 FR 32339, July 21, 1992; 65 FR 61750, Oct. 17, 2000]

§60.15 Reconstruction.

(a) An existing facility, upon reconstruction, becomes an affected facility, irrespective of any change in emission rate.

(b) "Reconstruction" means the replacement of components of an existing facility to such an extent that:

(1) The fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new facility, and

(2) It is technologically and economically feasible to meet the applicable standards set forth in this part.

(c) "Fixed capital cost" means the capital needed to provide all the depreciable components.

(d) If an owner or operator of an existing facility proposes to replace components, and the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new facility, he shall notify the Administrator of the proposed replacements. The notice must be postmarked 60 days (or as soon as practicable) before construction of the replacements is commenced and must include the following information:

(1) Name and address of the owner or operator.

(2) The location of the existing facility.

(3) A brief description of the existing facility and the components which are to be replaced.

(4) A description of the existing air pollution control equipment and the proposed air pollution control equipment.

(5) An estimate of the fixed capital cost of the replacements and of constructing a comparable entirely new facility.

(6) The estimated life of the existing facility after the replacements.

(7) A discussion of any economic or technical limitations the facility may have in complying with the applicable standards of performance after the proposed replacements.

(e) The Administrator will determine, within 30 days of the receipt of the notice required by paragraph (d) of this section and any additional information he may reasonably require, whether the proposed replacement constitutes reconstruction.

(f) The Administrator's determination under paragraph (e) shall be based on:

(1) The fixed capital cost of the replacements in comparison to the fixed capital cost that would be required to construct a comparable entirely new facility;

(2) The estimated life of the facility after the replacements compared to the life of a comparable entirely new facility;

(3) The extent to which the components being replaced cause or contribute to the emissions from the facility; and

(4) Any economic or technical limitations on compliance with applicable standards of performance which are inherent in the proposed replacements.

(g) Individual subparts of this part may include specific provisions which refine and delimit the concept of reconstruction set forth in this section.

[40 FR 58420, Dec. 16, 1975]

BELCHER SWANSON LAW FIRM PLLC

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Appellate Court Case Title: Brooks Manufacturing Co., Appellant v. Northwest Clean Air Agency,
Respondent
Superior Court Case Number: 16-2-01367-5

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COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

Brooks Manufacturing Co.,

Appellant,

v.

Northwest Clean Air
Agency,

Respondent.

DECLARATION OF
SERVICE

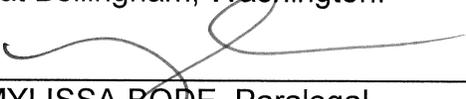
On said day below, I sent via email and regular mail a true and correct copy of Appellant's Opening Brief in the Court of Appeals Cause No. 74863-7 to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to my best knowledge and belief.

DATED April 4, 2018 at Bellingham, Washington.


MYLISSA BODE, Paralegal
Belcher Swanson Law Firm, PLLC

BELCHER SWANSON LAW FIRM PLLC

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