rules and regulations

Title 7—Agriculture

CHAPTER IX—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; FRUITS, VEGETABLES, NUTS), DEPARTMENT OF AGRICULTURE

[Grapefruit Reg. 77, Amdt. 8]

PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND TANGELOS GROWN IN FLORIDA

Amendment of Grade Regulation

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This amendment lowers the minimum grade requirement applicable to domestic and export shipments of Florida white seedless grapefruit from Improved No. 2 to Improved No. 2 Russet during the period April 22 through August 14, 1977. The amendment recognizes the supplies of fruit remaining for fresh shipment and is designed to permit movement of available supplies of fruit consistent with the interests of producers and consumers.

EFFECTIVE DATE: April 22, 1977.

FOR FURTHER INFORMATION CONTACT:

Charles R. Brader, Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250, 202–447–3545.

SUPPLEMENTARY INFORMATION: *Findings.* (1) Pursuant to the amended marketing agreement, and Order No. 905, as amended (7 CFR Part 905), regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida, effective under the applicable provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and upon the basis of the recommendations of the committees established under the amended marketing agreement and order, and upon other available information, it is hereby found that the regulation of shipments of grapefruit, as hereinafter provided, will tend to effectuate the declared policy of the act.

(2) This amendment reflects the Department's appraisal of the current and prospective demand for Florida white seedless grapefruit by domestic and export market outlets. Less restrictive grade requirements for such fruit are consistent with the character of much of the fruit remaining for fresh shipment.

(3) It is hereby further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking procedure, and postpone the effective date of this amendment until 30 days after publication in the FEDERAL REGISTER (5 U.S.C. 553) because the time intervening between the date when information became available upon which this amendment is based, and the time when this amendment must become effective in order to effectuate the declared policy of the act is insufficient; and this amendment relieves restrictions on the handling of white seedless grapefruit grown in Florida.

Order. The provisions of § 905.565 (Grapefruit Regulation 77; 41 FR 42177, 49474, 51029, 54917; 42 FR 9663, 10833, 14865, 18271) are amended by revising paragraphs (a) (3) and (b) (3) as follows:

§ 905.565 Grapefruit Regulation 77.

(a) * * *

(3) Any seedless grapefruit, grown in the production area, which do not grade at least Improved No. 2: *Provided,* That during the period March 11, 1977, through August 14, 1977, no handler shall ship any pink seedless grapefruit, grown in the production area, which do not grade at least Improved No. 2 Russet: *Provided further,* That during the period April 22, 1977, through August 14, 1977, no handler shall ship any white seedless grapefruit, grown in the production area, which do not grade at least Improved No. 2 Russet; or

* * * * *

(b) * * *

(3) Any seedless grapefruit, grown in the production area, which do not grade at least Improved No. 2: *Provided,* That during the period March 11, 1977, through August 14, 1977, no handler shall ship any pink seedless grapefruit, grown in the production area, which do not grade at least Improved No. 2 Russet: *Provided further,* That during the period April 22, 1977, through August 14, 1977, no handler shall ship any white seedless grapefruit, grown in the production area, which do not grade at least Improved No. 2 Russet; or

* * * * *

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.)

Dated: April 22, 1977, to become effective April 22, 1977.

CHARLES R. BRADER,
Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc.77-12105 Filed 4-26-77;8:45 am]

[Grapefruit Reg. 17, Amdt. 6]

PART 944—FRUITS; IMPORT REGULATIONS

Minimum Grade Requirements for Imports of White Seedless Grapefruit

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This amendment lowers the minimum grade requirement applicable to imported white seedless grapefruit from Improved No. 2 to Improved No. 2 Russet grade to coincide with such requirements being made effective on Florida grapefruit. This amendment is required by Federal law.

EFFECTIVE DATE: April 22, 1977.

FOR FURTHER INFORMATION CONTACT:

Charles R. Brader, Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250, telephone 202–447–3545.

SUPPLEMENTARY INFORMATION: This amendment is consistent with section 8e of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). This section requires that whenever specified commodities, including grapefruit, are regulated under a federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodity. This amendment fixes the same minimum grade requirement on imported white seedless grapefruit as is effective under Marketing Order No. 905, as amended (7 CFR Part 905), regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida.

ORDER

In § 944.113 (Grapefruit Regulation 17; 41 FR 42181, 49109; 42 FR 9664, 10835, 14867, 18271) the provisions of paragraph (a) (3) are revised to read as follows:

§ 944.113 Grapefruit Regulation 17.

(a) * * *

(3) Seedless grapefruit shall grade at least Improved No. 2: *Provided,* That during the period March 11, 1977, through August 14, 1977, pink seedless grapefruit shall grade at least Improved No. 2 Russet: *Provided further,* That during the period April 22, 1977, through August 14, 1977, white seedless grapefruit shall grade at least Improved No. 2 Russet; and

* * * * *

It is hereby found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice, engage in public rulemaking procedure, and postpone the effective time of this amendment beyond that hereinafter specified (5 U.S.C. 553) in that: (a) The regulation are imposed pursuant to section 8e of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), which makes such regulation mandatory; (b) this amendment fixes the same requirements for imports of white seedless grapefruit as are applicable under amended Grapefruit Regulation 77 (§ 905.565) to the shipment of white seedless grapefruit grown in Florida; and (c) this amendment lowers the minimum grade requirement applicable to imported white seedless grapefruit.

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.)

Dated April 22, 1977, to become effective April 22, 1977.

CHARLES R. BRADER,
Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc.77-12104 Filed 4-26-77;8:45 am]

Title 18—Conservation of Power and Water Resources

CHAPTER II—TENNESSEE VALLEY AUTHORITY

PART 301—PROCEDURES

Clarifying Amendment to Government in the Sunshine Act Regulations

AGENCY: Tennessee Valley Authority.

ACTION: Clarifying amendment to final regulations.

SUMMARY: Following the end of the 30-day comment period on TVA's proposed Government in the Sunshine Act regulations and the publication of final regulations, TVA received two comments which construed the last sentence of § 301.43 as an absolute prohibition on the use of cameras or other recording devices at TVA Board meetings. TVA's practice over the past years during which Board meetings were open to public observation before there was any requirement to do so and the practice which continues at Board meetings now subject to the Government in the Sunshine Act, permits the use of cameras and recording devices. This clarifying amendment makes clear TVA's intent to continue this practice under which cameras and recording devices may be used at Board meetings but to recognize that such use should not be disruptive of the meetings.

EFFECTIVE DATE: April 27, 1977.

FOR FURTHER INFORMATION CONTACT:

John Van Mol, Director of Information, Tennessee Valley Authority, Room E12A4 Knoxville Office Complex, 400 Commerce Avenue, Knoxville, Tennessee 37902. (615–632–3257.) Information is also available at TVA's Washington Office. (202–343–4537.)

SUPPLEMENTARY INFORMATION: On January 26, 1977, there was published in the FEDERAL REGISTER (42 FR 4859) the TVA Board of Directors' notice of its proposed Government in the Sunshine Act regulations. After a 30-day comment period, TVA adopted final regulations effective March 12, 1977 (42 FR 14086).

Since TVA's adoption of final regulations, two comments considered the last sentence of § 301.43 which provides:

> Public observation does not include the recording of any deliberations or actions by means of electronic or other devices or cameras

as an absolute prohibition on the use of such devices. TVA has not prohibited, nor does it intend to prohibit, the reasonable use of cameras or other recording devices at its open Board meetings and the purpose of this clarifying amendment is to make that explicit. TVA has been holding its formal Board meetings in public for over two years and during that time the press and public have made unrestricted use of cameras and other devices to record the meetings. In fact, TVA makes its audio and other equipment available to the press to facilitate the recording of Board meetings.

Since this clarifying amendment is being made in response to comments received by TVA shortly after the close of the comment period on the proposed regulations, and since it will eliminate an apparent restriction in the final regulations, the TVA Board for good cause finds that it is unnecessary to publish notice of this clarifying amendment as a proposed regulation and that the clarifying amendment can become effective immediately upon publication in the FEDERAL REGISTER.

Accordingly, 18 CFR 301.43 is amended to read as follows:

§ 301.43 Open meetings.

Members shall not jointly conduct or dispose of TVA business other than in accordance with this Subpart. Except as provided in § 301.46, every portion of every meeting of the agency shall be open to public observation, and TVA shall provide suitable facilities therefor, but participation in the deliberations at such meetings shall be limited to members and certain TVA personnel. The public may make reasonable use of electronic or other devices or cameras to record deliberations or actions at meetings so long as such use is not disruptive of the meetings.

(Sec. 3(a), Pub. L. No. 94-409, 90 Stat. 1241 (5 U.S.C. 552b), and 48 Stat. 58, as amended 16 U.S.C. 831–831dd).)

NOTE.—TVA has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11949 and OMB Circular A-107.

Dated: April 18, 1977.

H. N. STROUD, JR.,
Acting General Manager.

[FR Doc.77-12023 Filed 4-26-77;8:45 am]

Title 28—Judicial Administration

CHAPTER I—DEPARTMENT OF JUSTICE

[Order No. 712–77]

PART 52—UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES

Revoking Obsolete Regulations

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: The present regulations governing relocation assistance and land acquisition policies of the Department of Justice under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 are published in Part 52 of Title 28, Code of Federal Regulations. Those regulations are being replaced by revised regulations issued by the Assistant Attorney General for Administration and published in Part 128-18 of Title 41, Code of Federal Regulations. This order therefore revokes the regulations in 28 CFR Part 52.

EFFECTIVE DATE: April 16, 1977.

FOR FURTHER INFORMATION CONTACT:

William H. O'Donoghue, Chief, Administrative Programs Section, Security and Administrative Programs Staff, Office of Management and Finance, Department of Justice, 10th and Constitution Avenue, NW., Washington, D.C. 20530, 202–739–2971.

Part 52 [Revoked]

By virtue of the authority vested in me by 28 U.S.C. 509, 510, and 5 U.S.C. 301, Part 52 of Title 28, Code of Federal Regulations, is hereby revoked.

Dated: April 16, 1977.

GRIFFIN B. BELL,
Attorney General.

[FR Doc.77-12085 Filed 4-26-77;8:45 am]

Title 39—Postal Service

CHAPTER 1—U.S. POSTAL SERVICE

PART 266—PRIVACY OF INFORMATION

Exemption of Systems of Records

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This notice announces the amendment of Postal Service regulations to exempt a system of records from specified provisions of the Privacy Act of 1974, and to widen the previously announced exemption of another system of records.

EFFECTIVE DATE: April 27, 1977.

ADDRESSES: Records Officer, U.S. Postal Service, Washington, D.C. 20260.

FOR FURTHER INORMATION CONTACT:

Mr. John Finlay, 202–245–4142.

SUPPLEMENTARY INFORMATION: On February 22, 1977, the Postal Service published for comment in the FEDERAL REGISTER (42 FR 10320, as corrected at 42 FR 13307) a proposal to amend 39 CFR

266.9, dealing with the exemption of Postal Service systems of records from certain provisions of the Privacy Act of 1974. Acting under 5 U.S.C. 552a(k)(5), which allows an agency to safeguard the identity of a source who furnished information in confidence as a part of an investigation conducted solely for the purpose of determining suitability, eligibility, or qualifications of an individual for employment, the Postal Service proposed to exempt system USPS 120.130, Personnel Records—Postmaster Selection Program Records, from 5 U.S.C. 552a (d)(1)–(4) and (e)(1), and further to exempt system USPS 120.110, Personnel Records—Personnel Investigations Records, from 5 U.S.C. 552a(d)(2)–(4). Members of the public were invited to submit comments concerning the proposed exemptions.

No comments regarding the proposed exemptions were received. Accordingly, after a review of the proposed text, the Postal Service adopts the following amendments to title 39, Code of Federal Regulations, effective April 27, 1977.

In 39 CFR 266.9, revise paragraph (b)(3) and add paragraph (b)(7) to read as follows:

§ 266.9 Exemptions.

* * * * *

(b) * * *

(3) Postal Service Personnel Investigations Records from 5 U.S.C. 552a (d)(1)–(4) and (e)(1) to the extent that information in the system is subject to exemption under 5 U.S.C. 552a(k)(5) as relating to the identity of a source who furnished information to the Government in confidence as a part of an investigation conducted solely for the purpose of determining suitability, eligibility, or qualifications of an individual for employment.

* * * * *

(7) Postal Service Postmaster Selection Program Records from 5 U.S.C. 552a (d)(1)–(4) and (e)(1) to the extent that information in the system is subject to exemption under 5 U.S.C. 552a(k)(5) as relating to the identity of a source who furnished information to the Government in confidence as a part of an investigation conducted solely for the purpose of determining suitability, eligibility, or qualifications of an individual for employment.

BENJAMIN F. BAILAR,
Postmaster General.

[FR Doc.77-11915 Filed 4-26-77;8:45 am]

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

[FRL 704-6]

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Utah Plan Revisions

AGENCY: U.S. Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) takes final action to approve and, where appropriate, disapprove changes to the Utah State Implementation Plan (SIP) submitted by the Governor of Utah. The changes were submitted to correct certain deficiencies in the State's SIP. The intended effect of this action is to ensure the attainment of EPA's national ambient air quality standards.

EFFECTIVE DATE: April 27, 1977.

FOR FURTHER INFORMATION CONTACT:

Louis W. Johnson, Chief, Planning and Operations, Section, Air Programs Branch, U.S. Environmental Protection Agency, Region VIII, 1860 Lincoln Street, Denver, Colorado 80295. (303–837–3711)

SUPPLEMENTARY INFORMATION: On May 31, 1972 (37 FR 10842), pursuant to section 110 of the Clean Air Act, as amended, and 40 CFR Part 51, the Administrator of the Environmental Protection Agency (EPA) approved, with specific exceptions, a plan for implementation of the national ambient air quality standards (NAAQS) submitted by Utah. Regulations to correct deficiencies in the Utah plan were promulgated on May 14, 1973 (38 FR 12696), November 27, 1973 (38 FR 32656), September 5, 1974 (38 FR 32113), November 26, 1975 (40 FR 54786), and December 5, 1975, (40 FR 56890). On December 12, 1975, the Kennecott Copper Corporation filed a Petition for Reconsideration, requesting the Agency to reconsider the sulfur dioxide regulation promulgated on November 26, 1975. The company also challenged the regulation in the 10th Circuit Court of Appeals. The Agency ruled on said petition on December 3, 1976, after having considered new air quality data and other newly obtained information.

On July 10, 1975, the Governor of Utah submitted revised Utah Air Conservation Regulations as a revision to the State Implementation Plan (SIP). The new regulations were adopted by the Utah Air Conservation Committee on June 26, 1975, following public hearing on January 9, 1975, and became effective on July 9, 1975. On September 19, 1975 (40 FR 43231), the Administrator published a summary of the significant changes to the state's regulations and the EPA's proposed actions. However, the Agency did not consider it appropriate to take final action on the state regulations prior to ruling on the issues contained in the Petition for Reconsideration that was pending before it.

Although the state submittal contained all of the Utah Air Conservation Regulations, the Administrator's proposed action pertained only to the changes, that is Sections 1.3, 1.4, 1.5, 1.6, and 2.5. Other regulations had either been approved or disapproved by the Administrator previously. However, the public was invited to inspect and comment on the entire submission, including the state's rescinding of the 80 percent SO_2 control requirement for new sources (Section 3.6), pollution control equipment requirements (Section 1.7), and planned maintenance provisions (Section 2.2.6b).

The Utah SIP revisions and EPA's evaluation report were available for public inspection at the offices of the Environmental Protection Agency in Denver, Colorado, Salt Lake City, Utah, and Washington, D.C.

Comments were received from five interested parties and considered in this rulemaking. On the basis of these comments, including clarification of intent by the state regarding several of EPA's concerns, the Administrator is taking the following final action on the state's submittal:

1. As indicated in the Administrator's proposal, Section 1.3 (Air Quality Degradation) is inadequate to insure Prevention of Significant Deterioration (PSD) in the clean air regions of the state. Consequently, the disapproval notice published in § 52.2346 (40 FR 25010) will remain in effect and EPA will administer the PSD program in Utah until the state complies with the requirements of 40 CFR 52.21 or receives delegation of EPA's new source review authority under those regulations. At the present time the state is taking steps designed to assume responsibility under PSD.

2. Approving Section 1.4, which provides for public availability of emission data.

3. Withdrawing the proposed disapproval of the state's variance procedure contained in Section 1.5, which was considered to be too broad. The Agency is approving Section 1.5 in view of the clarification by the state and since the variances granted by the state under said section will be submitted to EPA as SIP revisions. The Agency will review these variances on a case-by-case basis to insure protection of the NAAQS.

4. Approving Section 1.6, requiring notice to the state of the intent to construct a new source or modify an existing source prior to initiation of construction. Section 1.6.2 adopts the Federal New Source Performance Standards into the new source review criteria.

5. Several comments addressed the proposed disapproval of the state's SO_2 regulation (Section 2.5) applicable to the Kennecott copper smelter. The Administrator is disapproving Section 2.5 because it: (1) only imposes a monthly emission limitation which is not sufficient to attain the short-term NAAQS for SO_2; (2) is unenforceable since no method of determining compliance is specified; (3) contains a malfunction provision which is also unenforceable; and (4) allows the utilization of a supplementary control system without requiring the application of reasonably available control technology (RACT). The Agency's reasons for rejecting the exemption approach of the state's malfunction regulation is discussed in the

preamble to EPA's replacement regulation which is being promulgated in another section of this FEDERAL REGISTER.

EPA's authority to disapprove the regulation was questioned by the state and Kennecott. However, EPA's position that constant control technology must be utilized to achieve the NAAQS and that a supplementary control system (SCS) may be credited as an interim control measure only after the application of RACT is supported by the weight of judicial authority. See, e.g., *Big Rivers Electric Corporation, et al.* v. *EPA, et al.*, 523 F. 2d 16 (6th Cir., 1975) and *Kennecott Copper Corporation* v. *Train*, 526 F. 2d 1149 (9th Cir., 1975).[1] It is EPA's position that the state regulation does not require installation of RACT. In addition, recently obtained air monitoring data indicate that even after RACT is installed by the company, the NAAQS will not be met in the vicinity of the Kennecott plant. Therefore, in the near future EPA will propose, as an interim measure, an SCS system for the smelter. The Agency is also promulgating a malfunction regulation, which will take into consideration the problem of malfunction and yet not render the emission limitation unenforceable.

Kennecott Copper Corporation also commented that, because of their brevity, the EPA notice proposing disapproval of the state regulation and the supportive documentation did not comply with the Administrative Procedure Act. It is the Agency's position that the notice and and the supporting documents complied with the requirements of the Administrative Procedure Act, inasmuch as they adequately described the subject and the issues of the proposed action, enabling the public to understand and meaningfully comment.

Since no persuasive technical or legal evidence has been presented in support of this regulation, the Administrator is disapproving Section 2.5 as proposed. The SO_2 regulation for Kennecott, promulgated by EPA on November 26, 1975, the malfunction regulation being promulgated by EPA, and the SCS regulation to be proposed, will provide for the attainment of the NAAQS for SO_2 until such time as the state adopts and submits an approvable SO_2 regulation to EPA.

Insofar as the provisions approved herein have existed as State law for a substantial period of time and, as a result, do not impose any additional burdens on sources subject to such provisions, no useful purpose would be served in deferring the effective date of this action for 30 days. Accordingly, good cause is found for instituting this rulemaking effective immediately.

ADDRESSES: Copies of the public comments and EPA's detailed analysis of the comments are available for public inspection at the EPA offices listed below:

Environmental Protection Agency, Region VIII, Air and Hazardous Materials Division, Suite 900, 1860 Lincoln Street, Denver, Colo. 80295.

Environmental Protection Agency, Public Information Reference Unit, Room 2922, 401 M Street SW., Washington, D.C. 20460.

Environmental Protection Agency, Room 4223, Federal Building, 126 South State Building, Salt Lake City, Utah 84111.

(42 U.S.C. 1857c-5.)

Dated: March 30, 1977.

BARBARA BLUM,
Acting Administrator.

Part 52 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

Subpart TT—Utah

1. In § 52.2320, paragraph (c) is amended to read as follows:

§ 52.2320 Identification of plan.

* * * * *

(c) The plan revisions listed below were submitted on the dates specified:

* * * * *

(5) The Revised Utah Air Conservation Regulations on July 10, 1975, by the Governor.

2. In § 52.2325, paragraph (a) is amended to read as follows:

§ 52.2325 Control strategy: Sulfur oxides.

(a) * * * Furthermore, section 2.5 of the Utah Air Conservation Regulations is disapproved because it does not provide for attainment of the short-term ambient standards for SO_2, is unenforceable, and allows the utilization of a supplementary control system without requiring the application of reasonably available control technology.

[FR Doc.77-12000 Filed 4-26-77;8:45 am]

[FRL 704-7]

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Utah SO_2 Control Strategy

AGENCY: U.S. Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The purpose of this rulemaking is to finalize regulations relating to excess emissions due to start-up shutdown and malfunction from the Kennecott Copper Corporation smelter located in Salt Lake City, Utah.

EFFECTIVE DATE: May 27, 1977.

FOR FURTHER INFORMATION CONTACT:

Louis W. Johnson, Chief, Planning and Operations Section, Air Programs Branch, U.S. Environmental Protection Agency, Region VIII, 1860 Lincoln Street, Denver, Colorado 80295. (303-837-3711.)

SUPPLEMENTARY INFORMATION: On October 29, 1975, EPA proposed regulations which require the reporting of excess emissions from the Kennecott Copper Corporation smelter to the Administrator. In response to the proposed regulations, various issues have been raised by the owner and operator of the subject smelter. These comments object to the proposed regulations because: (1) The proposal does not grant an automatic exemption from the emissions limitations after compliance with the reporting requirement; (2) there is no provision relating to the excess emissions resulting from the phasing in or out of process and control equipment or from routine maintenance of this equipment; (3) the proposal of a "reporting requirement" is inconsistent with the Agency's alleged approval of State malfunction provisions which exempt sources from applicable emission limitations during periods of excess emissions.

DISCRETION VS. AUTOMATIC EXEMPTION

The claim that an emission limitation exemption should be automatic during periods of excess emissions due to start-up, shutdown or malfunction is based on smelter's contention that to penalize an operation for emissions that are beyond the control of a prudent operator is unreasonable. The Administrator agrees that the issuance of an administrative order or the initiation of judicial action following a period of excess emissions caused by circumstances beyond the control of the operator may not be appropriate. However, the Administrator has determined that the automatic granting of a regulatory exemption for these periods of excess emissions is not a suitable remedy.

Although the Administrator recognizes that some relief should be afforded during certain upset situations, the promulgation of an upset regulation should not diminish the smelter's incentive to develop better operating and maintenance procedures. If an automatic exemption were promulgated, it would encourage the smelter to claim, after every period of excess emissions, that an exemption is warranted. If the operator of the smelter were so inclined, it would be relatively easy for the company, as a result of the burden of proof placement, to effectively block all Federal enforcement against the smelter.

Clearly, the better approach and the one which is consistent with the enforcement imperatives of section 110 is to place the burden of proving the existence of an unavoidable malfunction on the source. Consequently, the only enforceable means available to the Agency in dealing with all emission excursions—be they potentially due to malfunctions or otherwise—is to issue notices of violations with the source being given an opportunity to prove that the violation was due to an unavoidable malfunction.

The Administrator has concluded that the appropriate enforcement process, as prescribed by section 113, affords ample opportunity for the owner or operator of the smelter to identify malfunctions and upsets beyond his reasonable control prior to the issuance of an administrative order. Therefore, the Administrator has determined that the way to encourage the continued improvement in the operation of a smelter and its attendent control equipment is to retain his discretion to order administrative actions or initiate judicial proceedings following a

[1] But see *Kennecott Copper Corporation* v. *Train*, 9 ERC 1593 (D.C. Nev. 1976).