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Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under "DATES" or at locations other than the Casper Field Office will not necessarily be considered in the final rulemaking or included in the administrative record.

Public Hearing

Persons wishing to testify at the public hearing should contact the person listed under "FOR FURTHER INFORMATION CONTACT" by 4 p.m., m.s.t. January 15, 1992. The location and time of the hearing will be arranged with those persons requesting the hearing. If no one requests an opportunity to testify at the public hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested, as it will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSM officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to testify have been heard. Persons in the audience who have not been scheduled to testify, and who wish to do so, will be heard following those who have been scheduled. The hearing will end after all persons scheduled to testify and persons present in the audience who wish to testify have been heard.

Public Meeting

If only one person requests an opportunity to testify at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSM representatives to discuss the proposed amendment may request a meeting by contacting the person listed under "FOR FURTHER INFORMATION CONTACT." All such meetings will be open to the public and, if possible, notices of meetings will be posted at the locations listed under "ADDRESSES." A written summary of each meeting will be made a part of the administrative record.

List of Subjects in 30 CFR Part 934

Intergovernmental relations, Abandoned Mine Land Reclamation.

Dated: December 24, 1991.

Allen D. Klein,

Acting Assistant Director, Western Support Center.

[FR Doc. 91-31249 Filed 12-30-91; 8:45 am]

BILLING CODE 4310-05-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[FRL 4087-5]

National Emission Standards for Hazardous Air Pollutants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is today proposing to rescind 40 CFR part 61, subpart T (subpart T) as it applies to owners and operators of uranium mill tailings disposal sites that are licensed by the Nuclear Regulatory Commission (NRC) or an affected NRC Agreement Stete (affected Agreement States). Today's proposal does not concern subpart T sites that are under the control of the Department of Energy (DOE). Subpart T, which regulates radon emissions into ambient air, is one of the Agency's National Emissions Standards for Hazardous Air Pollutants (NESHAPs) for radionuclides, which were promulgated on December 15, 1989 (54 FR 51654) pursuant to Clean Air Act (CAA) Section 112, as it existed prior to the 1990 amendments. EPA is establishing a 60 day period for receipt of comments on this issue. Published elsewhere in today's Federal Register are two related rulemakings: a Notice of a Final Rule which stays the effectiveness of subpart T as it applies to non-operational uranium mill tailings disposal sites that are licensed by the NRC or an affected Agreement State pending completion of this rulemaking, or June 30, 1994, whichever first occurs, and an Advanced Notice of Proposed Rulemaking (ANPR) in which EPA is announcing its intention to enter into a future rulemaking which would amend 40 CFR part 192, subpart D, which was enacted pursuant to the Uranium Mill Tailings Radiation Control Act (UMTRCA) of 1978.

DATES: Comments concerning this proposed rule must be received by EPA on or before February 24, 1992. Public hearings will be held on January 15, 1992 in Washington, DC, and in Sante Fe, New Mexico on January 21 and 22, 1992.

ADDRESSES: Comments should be submitted (in duplicate if possible) to: Central Docket Section LE-131, Environmental Protection Agency, Attn: Docket No. A-91-67, Washington, DC 20460. Requests to participate in the hearing should be made in writing to the Director, Criteria and Standards Division, ANR-460W, Office of Radiation Programs, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Comments and requests to participate in the hearings may also be faxed to EPA at (703) 308-8783.

Public hearings will be held on January 15, 1992 at 11 Dupont Circle, 8th Floor, Washington, DC 20036, and on January 21 and 22 at the Inn at Loretto, 211 Old Santa Fe Trail, Sante Fe, New Mexico 87501. Comments concerning this proposed rule must be received by EPA on or before February 24, 1991.

FOR FURTHER INFORMATION CONTACT: Jamie Burnett, Air Standards and Economics Branch, Criteria and Standards Division, ANR-460W, Office of Radiation Programs, Environmental Protection Agency, Washington, DC 20460 (703) 308-8787.

SUPPLEMENTARY INFORMATION:

A. Background

1. Regulatory History

On December 15, 1989, EPA promulgated national standards regulating radionuclide emissions to the ambient air from several source categories, including from non-operational sites used for the disposal of uranium mill tailings. 54 FR 51654. These sites are either under the control of the DOE pursuant to title I of the Uranium Mill Tailings Radiation Control Act (UMTRCA) of 1978, 42 U.S.C. 7901 *et. seq.*, or the sites are under the control of NRC or Agreement State-licensees pursuant to title II of UMTRCA. These standards—subpart T of 40 CFR part 61 (subpart T)—were promulgated pursuant to the authority of Clean Air Act (CAA or Act) section 112 as it existed in 1989, and were part of a larger promulgation of National Emission Standards for Hazardous Air Pollutants (NESHAPs) for Radionuclides.

Subpart T requires compliance by owners and operators of uranium mill tailings disposal sites within two years of becoming non-operational (40 CFR 61.22(b)). Pursuant to its authority under then-existing CAA section 112(c)(1)(B)(ii) EPA waived compliance for two years for sites that were non-operational a t the time of promulgation. *Id.* Thus, the earliest date by which sites must comply with the subpart T standards is December 15, 1991. Even so, EPA recognized at the time of

promulgation that many sources subject to subpart T might not be able to achieve compliance by December 15, 1991. Because EPA felt constrained by the CAA as it existed at that time, EPA stated that for those sites the Agency would negotiate expeditious compliance schedules pursuant to its enforcement authority under CAA section 113. See 54 FR 51683. By so doing, subpart T in effect mandates that the earthen cover to meet that emissions level be installed as expeditiously as practicable considering technological feasibility.

The primary subpart T standard is the requirement that radon-222 emissions not exceed a flux of 20 pCi/m²-s. 40 CFR 61.222(a). In its 1989 action, EPA recognized that even though NRC implements general EPA standards (promulgated under UMTRCA) which also regulate these sites and call for compliance with a 20 pCi/m²-s flux standard (see 40 CFR part 192, subpart D), the UMTRCA regulatory program does not answer the critical timing concern addressed by subpart T.

> The existing UMTRCA regulations set no time limits for disposal of the piles. Some piles have remained uncovered for decades emitting radon. Although recent action has been taken to move toward disposal of these piles, some of them may still remain uncovered for years.
>
> 54 FR at 51683

In addition to regulating radon emissions, subpart T also requires specific testing and record keeping. See 40 CFR 61.223 and 61.224. The UMTRCA regulations, as currently promulgated by EPA and implemented by NRC, while ultimately limiting emissions to the same level as subpart T, are supported by a variety of design-based substantive and procedural requirements that speak to UMTRCA's unique concern that final site closure occur in a manner that will last at least 1,000 years, but do not require monitoring of emissions to confirm the performance of the earthen cover. See generally 10 CFR part 40, appendix A and 40 CFR part 192.

These CAA and UMTRCA programs duplicate each other by creating dual regulatory oversight, including independent procedural requirements, while seeking to ensure compliance with the identical 20 pC1/m²-s flux standard. Concern over this duplication inspired several petitions for reconsideration, most notably from NRC and the American Mining Congress (AMC). While these petitions remain pending before EPA, today's proposal to rescind subpart T, as well as the companion actions (1) An Advance Notice of Proposed Rulemaking (ANPR) to amend 40 CFR part 192 (UMTRCA regulations) and (2) a Notice of Final Rule to stay subpart T pending the conclusion of today's proposed rescission, comprises EPA's efforts towards addressing the issues they raise. As discussed further below, underlying these actions is a Memorandum of Understanding (MOU) which has been entered into by EPA, NRC, and the affected Agreement States (the MOU is published at the end of this notice, as it was at the end of the notice proposing to stay subpart T (see 56 FR at 55434)).

2. Clean Air Act Amendments of 1990

After promulgation of subpart T (and receipt of reconsideration petitions), in November 1990, the Clean Air Act was substantially amended. Included in the new Act was an amendment that speaks directly to the duplication issue. Newly enacted section 112(d)(9) of the amendments provides:

> No standard for radionuclide emissions from any category or subcategory of facilities licensed by the Nuclear Regulatory Commission (or an Agreement State) is required to be promulgated under this section if the Administrator determines, by rule, and after consultation with the Nuclear Regulatory Commission, that the regulatory program established by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act for such category or subcategory provides an ample margin of safety to protect the public health.

This provision strives to eliminate duplication of effort between EPA and NRC, so long as public health is protected with an ample margin of safety.

Moreover, Congress expressed sensitivity to the special compliance problems of uranium mill tailings sites through new section 112(i)(3). This provision provides an additional 3-year extension to mining waste operations (e.g., uranium mill tailings) if the 4 years allowed (including a one-year extension) for compliance with standards promulgated under the amended section 112 is insufficient to dry and cover the mining waste (thereby controlling emissions).

3. Memorandum of Understanding (MOU) between EPA, NRC and the Affected Agreement States

In light of these provisions, and given the express authority of section 112(d)(9), as amended, EPA, NRC and the affected Agreement States, have been meeting to discuss the dual regulatory programs under UMTRCA and the CAA. The result of this intensive inter-agency consultation has been the execution of a Memorandum of Understanding (MOU), a copy of which is attached to this proposal and was also attached to the proposed stay published in the Federal Register on October 25, 1991 (56 FR 55434). The purpose of the MOU is to ensure that owners and operators of existing non-operational uranium mill tailings piles licensed by NRC or an affected Agreement State, or owners and operators of piles that will in the future become non-operational, effect site closure—emplacement of an earthen cover to permanently limit radon emissions to a flux of no more than 20 pCi/m²-s—as expeditiously as practicable considering technological feasibility. The goal is that all current and future disposal sites achieve compliance by the end of 1997, or within seven years of when the currently operating and standby sites become non-operational.

B. Discussion of Existing EPA Standard 40 CFR Part 61, Subpart T

As described in section A(1) above, subpart T (of 40 CFR part 61) limits radon-222 emissions to the ambient air from non-operational uranium mill tailings disposal sites licensed by the NRC or an affected Agreement State. Subpart T requires that these sites, which consist of large (i.e., numerous acre) impoundments or piles, comply with a radon flux standard of 20 pCi/m²-s (40 CFR 61.222(a)). Moreover, compliance must be achieved within two years of when the site becomes non-operational, 40 CFR 61.222(b), which for piles which had ceased operation prior to the time of promulgation is December 15, 1991. While at the time of promulgation EPA recognized that many sources might not be able to achieve this date, EPA was constrained by existing CAA section 112(c)(1)(B)(ii)) which allows a maximum of two years for facilities to come into compliance. EPA stated that for those sites which could not meet the two-year date, the Agency would negotiate expeditious compliance schedules pursuant to its enforcement authority under CAA section 113. See 54 FR 51683. Subpart T also calls for monitoring and record keeping to establish and demonstrate compliance. See 40 CFR 61.223 and 61.224.

Subpart T is part of a larger promulgation of radionuclide NESHAPs that represent the Agency's application of the policy for regulating CAA section 112 pollutants which was first announced in the benzene NESHAP (54 FR 38044 (Sept. 14, 1989)). The NESHAP policy utilized a two-step approach. In the first step, EPA considered the lifetime risk to the maximally exposed individual, and found that it is presumptively acceptable if it is no higher than approximately one in ten

thousand. This presumptive level provides a benchmark for judging the acceptability of a category of emissions. This first step also considers other health and risk factors such as projected incidence of cancer, the estimated number of persons exposed within each individual lifetime risk range, the weight of evidence presented in the risk assessment, and the estimated incidence of non-fatal cancer and other health effects. After considering all of this information, a final decision on acceptable risk is made. This becomes the starting point for the second step, determining the ample margin of safety.

In the second step, EPA strives to provide protection for the greatest number of persons possible to an individual lifetime risk level no higher than approximately one in one million. In this ample margin decision, the Agency again considers all of the health risk and other health information considered in the first step, as well as additional factors such as costs and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors.

As part of the risk assessment associated with the promulgation of subpart T, EPA examined the doses to the maximally exposed individuals (MEI) from uranium mill tailings disposal sites. In so doing, EPA noted that standards it had already promulgated pursuant to the Uranium Mill Tailings Radiation Control Act (UMTRCA) of 1978 would eventually limit radon emissions from those sites to a flux of 20 pCi/m^2-s (see 40 CFR part 192, subpart D), and thus EPA referred to that level as "baseline." EPA's risk assessment revealed that compliance with the 20 pCi/m^2-s baseline would result in an MEI of approximately 1×10^{-4}, a level EPA determined to be safe under the first step of the analysis. EPA further concluded in the second step, which considers additional factors such as cost and technological feasibility, that the baseline level also provided an ample margin of safety.

Even though EPA determined that the baseline was protective of public health with an ample margin of safety, EPA still found it was necessary to promulgate subpart T. This was because the baseline assumed compliance with the UMTRCA regulations even though those regulations did not require that compliance occur in the foreseeable future and, in fact, many sites were not proceeding towards the baseline level at the time subpart T was promulgated. In other words, EPA promulgated subpart T to address the timing issue, which was not addressed in the UMTRCA regulations. However, due to then-existing CAA section 112(c)(1)(B)(ii), EPA was constrained to requiring compliance with the 20 pCi/m^2-s baseline within two years, a date the Agency recognized many sites might find impossible to meet. EPA announced that those situations could be dealt with through site-specific enforcement agreements under CAA section 113.

C. Rationale for Proposed Rule to Rescind 40 CFR Part 61 Subpart T for NRC Licensees

In light of the new statutory authority provided EPA by CAA section 112(d)(9) of the Clean Air Amendments of 1990, EPA has been meeting with NRC and the affected Agreement States to determine whether, with certain modifications to its regulatory program under UMTRCA, the NRC regulatory program might provide an ample margin of safety. If so, subpart T would be rendered superfluous and, therefore, needlessly duplicative and burdensome such that rescission pursuant to CAA section 112(d)(9) would be appropriate.

In applying the risk methodology for CAA section 112 to the risk assessment for subpart T, EPA has already determined that the baseline that would result once the 20 pCi/m^2-s UMTRCA standard is met protects public health with an ample margin of safety. Thus, if the regulatory program implemented by NRC assures that sites will achieve the baseline as soon as practicable considering technological feasibility, then subpart T would not be necessary. More specifically, appropriate modifications to the UMTRCA regulatory scheme as implemented by NRC and the affected Agreement States to ensure specific, enforceable closure deadlines and monitoring requirements such that compliance with the baseline will occur as expeditiously as practicable considering technological feasibility, would protect public health with an ample margin of safety. In so concluding, EPA relies wholly upon the risk analysis it conducted in promulgating subpart T. EPA is neither revisiting that analysis here, nor does the Agency seek comment on that analysis.

1. The Regulatory Scheme Under UMTRCA

As a supplement to the Atomic Energy Act of 1954, as amended, the Uranium Mill Tailings Radiation Control Act (UMTRCA) of 1978 (42 U.S.C. 2022, 7901–7942) was enacted to comprehensively address the dangers presented by uranium mill tailings, including their disposal:

> uranium mill tailings located at active and inactive mill operations may pose a potential and significant radiation health hazard to the public, and * * * the protection of the public health, safety, and welfare * * * require[s] that every reasonable effort be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner of such tailings in order to prevent or minimize radon diffusion into the environment * * *."

42 U.S.C. 7901(a); *see American Mining Congress* v. *Thomas*, 772 F.2d 617 (10th Cir. 1985), *cert. denied*, 426 U.S. 1158 (1986). As to uranium mill tailings disposal sites in particular, UMTRCA gives the Department of Energy (DOE) the responsibility to clean up and dispose of certain (i.e., title I) sites, and gives NRC the responsibility for those (i.e., title II) sites that are owned and operated by its licensees. EPA is responsible for promulgating the generally applicable environmental standards to be implemented by both NRC and DOE. 42 U.S.C. 2022(a), 7911–7924; *AMC*, 724 F.2d at 621. EPA promulgated its final UMTRCA regulations on December 15, 1982 for title I sites and on September 30, 1983 for title II sites. 48 FR 590 and 48 FR 45926 (codified at 40 CFR part 192).

Parts of EPA's final UMTRCA regulations are directed to the permanent disposal of uranium mill tailings. See 40 CFR part 192, subpart D (subpart D). Among the requirements of Subpart D is the mandate that radon releases from the disposal sites not exceed a flux of 20 pCi/m^2-s. 40 CFR 192.32 (a) and (b). Other aspects of subpart D pertain to ground water, monitoring, design, and duration of closure. See 40 CFR 192.32 and 192.33. With the exception of the ground water provisions at 40 CFR 192.20(a) (2)–(3), all of subpart D was upheld by the Tenth Circuit in *AMC* v. *Thomas*, 772 F.2d at 640. EPA is currently engaged in rulemaking to address the ground water remand.

Because NRC implements EPA's general UMTRCA standards for its licensees (as do its Agreement States), it has promulgated its own implementing regulations in the form of "criteria." See generally 10 CFR part 40, appendix A. While these criteria set forth a variety of specific requirements—financial, technical, and administrative—to govern the final reclamation (i.e., closure) design for each disposal site, they also provide for "site-specific" flexibility by authorizing alternatives that are at least as stringent as EPA's general standards and NRC's criteria, "to the extent practicable" as provided in Section 84c

of the Atomic Energy Act of 1954, as amended. *Id.* at Introduction.

Overall, NRC's implementation criteria set forth a rigorous program governing the reclamation of the disposal sites so that closure will (1) Last for 1,000 years to the extent reasonable, but in any event at least 200 years, and (2) limit radon release to 20 pCi/m^2-s throughout that period. The design must be able to withstand extreme weather and other natural forces. Upon review, EPA believes the NRC criteria comprise a comprehensive response to EPA's general standards at 40 CFR part 192, subpart D. However, as noted above, nothing in either EPA's general standards or NRC's implementing criteria compel sites to proceed toward final closure by a certain date. This was the reason for EPA's decision in 1989 to promulgate the subpart T NESHAP under the CAA. Moreover, neither EPA's general UMTRCA regulations, nor NRC's implementing criteria require appropriate monitoring to ensure compliance with the 20 Pci/m^2-s standard. Nevertheless, as discussed below, the CAA was subsequently amended to allow the EPA not to regulate NRC licensees if it concludes that the NRC regulatory scheme provides an ample margin of safety to protect the public health.

2. Clean Air Act Amendments of 1990: Section 112(d)(9)

As set forth and discussed above in section A(2), the CAA was substantially amended in 1990. As part of that enactment, section 112(d)(9) was added to the statute. The purpose of this provision is to preserve governmental resources and avoid needless, burdensome, and potentially contradictory CAA regulations. Specifically, section 112(d)(9) makes explicit that EPA need not regulate under the CAA, radionuclide sources that are sufficiently regulated by NRC or its Agreement States (under the Atomic Energy Act or its component acts, such as UMTRCA). More particularly, section 112(d)(9) allows EPA to not regulate under section 112 if the Administrator determines "by rule, and after consultation with the [NRC]," that NRC's regulatory program for a particular source "category or subcategory provides an ample margin of safety to protect the public health."

As EPA interprets section 112(d)(9), the Agency may rescind the Subpart T NESHAP as it applies to non-operational uranium mill tailings disposal facilities licensed by NRC or an affected Agreement State if the Agency (1) Consults with NRC, (2) engages in public notice and comment rulemaking, and (3) finds that the separate NRC regulatory program provides an equivalent level of public health protection (i.e., an ample margin of safety) as would implementation of subpart T. While this rulemaking may commence prior to final development of NRC's regulatory program, that program must fully satisfy the statute at the time EPA takes final action. In so doing, EPA must find that the NRC regulatory program satisfies the CAA standard, not that full and final implementation of that program has already successfully occurred.

3. The Memorandum of Understanding (MOU)

EPA has had intensive discussions about these matters with NRC and the affected Agreement States. The result of this interagency consultation and review has been the execution of a Memorandum of Understanding (MOU), a copy of which is printed at the end of this notice. The primary purpose of the MOU is to ensure that non-operational uranium mill tailings piles licensed by NRC or an affected Agreement State achieve compliance (through installation of an earthen cover) with the 20 pCi/m^2-s flux standard from EPA's UMTRCA standards (40 CFR 192.32(b)(1) as expeditiously as practicable considering technological feasibility. A guiding objective is that this occur as to all current disposal sites by the end of 1997, or within seven years of when the existing operating and standby sites enter disposal status. This objective comports with Congress's concern over timing as reflected in CAA section 112(i)(3), as amended.

The MOU calls for EPA to modify its UMTRCA regulations (at 40 CFR part 192, subpart D) to address the timing concern that resulted in EPA's 1989 decision to promulgate subpart T. Moreover, EPA understands that NRC staff will recommend to the Commission to modify its implementing regulations at 10 CFR part 40, appendix A, as appropriate. The MOU also calls for NRC and the affected Agreement States to immediately commence efforts to amend the licenses of the non-operational mill tailings disposal site owners and operators to include reclamation plans that require compliance with the 20 pCi/m^2-s standard as expeditiously as practicable considering technological feasibility. This will be done either through voluntary cooperation with the licensees, or through administratively enforceable orders. These actions, coupled with NRC's commitment to enforce the amended licenses, are intended to provide the basis for EPA to make the requisite findings under CAA section 112(d)(9) necessary for rescission of subpart T.

4. Evaporation Ponds

This proposal is directed to a finding that the UMTRCA regulatory program as implemented by NRC and the affected Agreement States protects public health with an ample margin of safety from the risks associated with releases into ambient air of radon-222. The regulations contemplated by this notice seek to control the emission of radon-222 by requiring the installation of an earthen cover over the disposal piles as expeditiously as practicable considering technological feasibility. However, there are other aspects to the UMTRCA regulatory scheme, including the long-term maintenance of the piles (once controlled) against erosion, and the reclamation and maintenance of ground water. To these other ends, remedial actions have already commenced, under the regulatory program of the NRC and the affected Agreement States, that have the dual purpose of both readying the piles for installation of the earthen cover that will control radon and reclaiming and maintaining ground water. These actions entail the use of evaporation ponds that in some instances, for varying reasons, have been placed directly upon the disposal site. In seeking to modify the UMTRCA regulations to require the expeditious installation of an earthen cover to control radon, the question has arisen whether the requirement extends to the evaporation pond thereby jeopardizing the other remedial aspects of the UMTRCA program.

EPA does not intend that the expeditious radon cover requirement extend to the areas where evaporation ponds are located, even if on the pile itself, to the extent that such evaporation pond is deemed by the implementing agency (NRC or an affected Agreement State) to be an appropriate aspect to the overall remedial program for the particular site involved. Rather, the evaporation pond area may be covered to control radon after it is no longer in use and ready for covering. EPA believes the overall public health interest in comprehensively resolving the problems associated with each site is best served by requiring that the radon cover be expeditously installed in a manner that does not require interruption of this other aspect of remediation. Moreover, the ponds themselves serve as an effective radon barrier, thus this decision is bolstered by the absence of

any evidence that there is a significant public health risk presented by the radon emissions from these evaporation ponds during the period they are employed as part of the overall remediation of the site. Rather, EPA believes that provided all other parts of the pile are covered with the earthen cover, compliance with the 20 pCi/m²-s standard will result, and this will be maintained by covering the evaporation pond area when it is no longer in use.

D. Proposed Rule to Rescind 40 CFR Part 61, Subpart T for NRC and Agreement State Licensees

EPA today proposes to rescind subpart T as it applies to non-operational uranium mill tailings disposal sites licensed by NRC or an affected Agreement State. The Agency makes this proposal pursuant to its authority under CAA section 112(d)(9), as amended. The proposal is supported by the MOU, which both reflects consultation with NRC and sets forth a course of conduct that will bolster NRC's regulatory program under UMTRCA so that it is protective of public health with an ample margin of safety. As part of this action, EPA has reviewed the regulatory program implemented by NRC under UMTRCA (as contained at 10 CFR part 40, appendix A) and determined that, once the timing and monitoring concerns are fully addressed, consistent with and including the other actions (e.g., license amendment) contemplated by the MOU, the NRC criteria will result in reclamation designs and schedules fully adequate to ensure compliance with the 20 pCi/m²-s flux standard as expeditiously as practicable considering technological feasibility.

40 CFR part 61, subpart T requires owners or operators of uranium mill trailings piles to conduct a one-time measurement of their radon emissions using monitoring methods specified in appendix B, Method 115, or other procedures which have EPA approval. This measurement must be performed 60 days following the closure of the pile but prior to long term stabilization under UMTRCA standards found in 40 CFR 192.02(a) or 192.32(b)(i). The UMTRCA standards have no such monitoring requirements associated with them since radon control is achieved through design of the cover.

Under the MOU, EPA will engage in rulemaking to modify its UMTRCA regulations to require compliance with the 20 pCi/m²-s flux standard as expeditiously as practicable considering technological feasibility, and to require appropriate monitoring to verify compliance. The goal of this revision will be that compliance will occur no later than the end of 1997 for all existing non-operational disposal sites, or within seven years of when operating or standby sites become non-operational. Moreover, all NRC and affected Agreement State licenses will be modified to incorporate a reclamation schedule that assures compliance with the 20 pCi/m²-s flux standard under UMTRCA as expeditiously as practicable considering technological feasibility.

As intended by EPA, the phrase "expeditiously as practicable considering technological feasibility," means as quickly as possible considering: (1) The physical characteristics of the tailings or the site; (2) the limits of available technology; (3) the need for consistency with mandatory requirements of other regulatory programs; and (4) delays beyond the control of the licensee (e.g., inclement weather). While this phrase does not preclude economic considerations, it also does not contemplate utilization of a cost-benefit analysis in setting compliance schedules. In other words, the compliance schedules are to be developed consistent with the target set forth in the MOU as reasonably applied to the specific circumstances of each site. By definition, no more rapid compliance can, as a practical matter occur, because this schedule represents the earliest that the sites could be closed. EPA has already made a determination in promulgating subpart T that compliance with the 20 pCi/m²-s standard protects public health with an ample margin of safety. Thus, once these actions are taken, including requiring appropriate monitoring to verify compliance, EPA believes the basis will exist for a finding that the NRC regulatory program protects public health with an ample margin of safety.

EPA does not intend to take final action on this proposal until after (1) It effectively promulgates the above-discussed revision to its UMTRCA regulations at 40 CFR part 192, subpart D, (2) NRC's regulations at 10 CFR part 40, appendix A, are effectively revised, as necessary and appropriate to implement the revisions to EPA's regulations, and (3) the other conditions of the MOU occur, including the revision of the NRC and affected Agreement State licenses to reflect these new requirements. In determining whether the above regulatory changes have been effectively promulgated, EPA will assess whether any judicial challenge to these regulations is pending and, if so, whether such challenge presents a significant risk of interference with the purposes and objectives of the MOU, as reflected in the regulatory changes.

E. Reconsideration

EPA will take final action on this proposal only after it revises the UMTRCA regulations to require compliance with the 20 pCi/m²−s flux standard as expeditiously as practicable, NRC revises its implementing regulations, as appropriate, to reflect EPA's changes, and NRC and the affected Agreement States have amended the applicable licenses to reflect these requirements. However, EPA does intend to take final action on this proposal prior to when actual compliance with the 20 pCi/m²−s flux standard is achieved at all sites. In addition, under the Atomic Energy Act, NRC has the authority to waive, for reasons of practicability, the dual requirement of the MOU that compliance with the 20 pCi/m²−s flux standard occur as expeditiously as practicable considering technological feasibility. As currently understood and defined by NRC, the term "practicability" includes certain economic considerations which are not contemplated by the requirement of the MOU which requires that compliance occur as expeditiously as practicable considering technological feasibility. Thus, as a theoretical matter, this waiver authority may be exercised even in a manner not addressed in the MOU even after the UMTRCA regulations are promulgated and each license is amended, although EPA has no reason to believe such relaxation of restriction will actually occur. Nevertheless, EPA does recognize that this authority would not exist under the CAA and subpart T and, thus, there is some concern over the potential for deviation from the agreements contained in the MOU.

In response to the concern over the waiver authority in the Atomic Energy Act, and in order to ensure that authority is not utilized to defeat the finding that the NRC regulatory program protects public health with an ample margin of safety, EPA is in advance proposing that certain conditions and grounds for reconsideration be included in any final decision to rescind subpart T. In this way, EPA may base its rescission finding upon its view of the NRC regulatory program contemplated by the MOU at the time of taking final action, while also providing some assurance that EPA will revisit that finding should NRC or the affected Agreement States substantially deviate from that program. Thus, the following conditions and grounds for

reconsideration are proposed by EPA to provide assurance that any finding by EPA that the NRC program is sufficient to justify rescission of subpart T under CAA section 112(d)(9) will be revisited if the NRC program is actually implemented in a manner inconsistent with that finding:

1. Because any decision to rescind subpart T will be based upon EPA finding, as called for by the MOU, that the UMTRCA regulatory program implemented by NRC and the affected Agreement States requires (1) compliance with the 20 pCi/m^2—s flux standard (2) as expeditiously as practicable considering technological feasibility, it is important that any alleged failure of those findings be addressed in a timely manner. Thus, EPA is proposing that it establish a non-discretionary duty that it propose to grant or deny the petition within 90 days, and to take final action granting or denying the petition for reconsideration within 90 days of the proposal (180 days total). Failure to meet that deadline may be subject to an unreasonable delay action in District Court under CAA section 304 to order that EPA propose and take final action on the petition. Review of that final response would be in the Court of Appeals under CAA section 307(b).

2. As noted above, any finding to rescind Subpart T will be based on the dual purpose of the MOU to require (1) Compliance with the 20 pCi/m^2—s flux standard (under EPA's general UMTRCA regulations at 40 CFR part 192, subpart D) (2) as expeditiously as practicable considering technological feasibility. The first part of the finding derives from the risk analysis conducted by EPA in promulgating Subpart T in 1989. At that time, EPA determined that the 20 pCi/m^2—s flux standard was a "baseline" that was provided by EPA's general UMTRCA standards at 40 CFR part 192, subpart D. EPA further determined that compliance with that baseline would be protective of public health with an ample margin of safety. EPA promulgated subpart T to ensure that all sites comply with that standard as expeditiously as practicable. In so doing, the CAA did not permit, and EPA did not consider, site-specific waivers from ultimate compliance with that standard. In conducting this rescission rulemaking, EPA is *not* revisiting the risk analysis or decision methodology that supported the promulgation of subpart T; rather, EPA is only visiting whether NRC's regulatory program under UMTRCA will meet the 20 pCi/m^2—s standerd in a timely manner thereby rendering Subpart T unnecessarily duplicative. With this in mind, EPA is setting the following grounds for examining the recision finding once finalized:

(a) The 20 pCi/m^2—s flux standard must be strictly met by all sites, and once met the obligation is ongoing. Below are two options for implementing that requirement in the context of reconsideration of the rescission. Note that under either option, EPA does not intend to reconsider the rescission for any site that is in fact meeting the 20 pCi/m^2—s standard, and has not sought or received permission from NRC or an affected Agreement State to exceed that standard in the future.

Option 1

If the weight of the evidence shows that either (1) NRC or an affected Agreement State is authorizing that one or more sites exceed the 20 pCi/m^2—s flux standard (pursuant to a waiver, license revision, reclamation plan modification, or other means), or (2) that monitoring reveals the standard is not being met and the source, NRC or the affected Agreement State decides not to take or require corrective action within a reasonable period of time, even though such has been requested of them in writing (as contemplated by the MOU), EPA will revoke its rescission of subpart T as to that source. However, should it ultimately be determined that EPA lacks the authority to reinstate subpart T on a site-specific basis, subpart T shall instead be reinstated in its entirety.

Option 2

The same as Option 1, above, except that EPA must further find that the failure(s) to meet the standard is of such a nature as indicates a "programmatic failure" on the part of NRC or an affected Agreement State. Programmatic failure is demonstrated when the weight of the evidence indicates an intent by the implementing agency to depart from its obligation (and commitment under the MOU) to ensure compliance with the 20 pCi/m^2—s standard. This is in contrast to excusable inadvertence, aberration, or a benign exercise of prosecutorial discretion. The intent is that the rescission be revoked only if NRC or the affected Agreement States, for legal or policy reasons, appear not to be keeping the commitments contained in the MOU. Under this option, revocation of the recision would be as to all licensees under the control of NRC or the affected Agreement State, or both.

(b) The requirement that compliance with the 20 pCi/m^2—s flux standard occur as expeditiously as practicable considering technological feasibility must also be met by all sites. Below are two options for implementing that requirement in the context of reconsideration of the rescission.

Option 1

If the substantial weight of the evidence shows that schedule slippages or delays from the requirement that compliance occur as expeditiously as practicable considering technological feasibility are occurring, EPA will revoke its rescission of subpart T as to that site. The phrase "expeditiously as practicable considering technological feasibility" means as quickly as possible considering: (1) The physical characteristics of the tailings and the site; (2) the limits of available technology; (3) the need for consistency with mandatory requirements of other regulatory programs; and (4) delays beyond the control of the licensee. While this phrase does not preclude economic considerations, it also does not contemplate utilization of a cost benefit analysis in setting compliance schedules. In other words, the compliance schedules are to be developed consistent with the target set forth in the MOU as reasonable applied to the specific circumstances of each site. However, should it ultimately be determined that EPA lacks the authority to re-institute subpart T on a site-specific basis, subpart T shall instead be reinstated in its entirety.

Option 2

The same as Option 1, above, except that EPA must further find that the failure(s) to achieve compliance as expeditiously as practicable considering technological feasibility is (are) of such a nature as to indicate a "programmatic failure" on the part of NRC or the affected Agreement State. Programmatic failure is defined when the weight of the evidence indicates an intent by the implementing agency to depart from its obligation (and commitment under the MOU) to ensure that this requirement is met. It is contrasted to excusable inadvertence, aberration, or a benign exercise of prosecutorial discretion. The intent is that the rescission be revoked only if NRC or the affected Agreement States, for legal or policy reasons, appear not to be keeping the commitments contained in the MOU. Under this option, revocation of the rescission would be as to all licensees under the control of NRC or an affected Agreement State, or both.

3. Any decision to revoke the rescission of subpart T will be done pursuant to notice and comment rulemaking. This means that EPA will subject any finding under 2(a) or 2(b)

above to public comment. However, in so doing, EPA will neither consider novel arguments such as whether public health was significantly threatened by the alleged failure, nor revisit the findings that underlie subpart T. Rather, because the health risk analyses necessary for the original promulgation of subpart T are not being revisited in conducting the rulemaking to rescind subpart T as to NRC or affected Agreement State licensees, such analysis will likewise not be a part of any decision to reconsider or ultimately revoke the recision. All that is at issue is whether the 20 pCi/m^2—s flux standard is being met as expeditiously as practicable considering technological feasibility under the UMTRCA regulatory scheme, thereby supporting the finding that subpart T was unnecessarily duplicative.

F. Miscellaneous

1. Paperwork Reduction Act

There are no information collection requirements in this proposed rule.

2. Executive Order 12291

Under Executive Order 12291, EPA is required to judge whether this regulation, if promulgated, would be a "major rule" and therefore subject to certain requirements of the Order. The EPA has determined that rescinding subpart T as it applies to owners and operators of uranium mill tailings disposal sites that are licensed by the NRC would not result in one of the adverse economic effects set forth in section I of the Order as grounds for finding a regulation to be a "major rule." This regulation would not be major because the nationwide compliance costs would not meet the $100 million threshold, the regulation would not significantly increase prices or production costs, and the regulation would not cause significant adverse effects on domestic competition, employment, investment, productivity, innovation or competition in foreign markets.

The Agency has not conducted a Regulatory Impact Analysis (RIA) of this purposed regulation because this action does not constitute a major rule. This regulation has been reviewed by the Office of Management and Budget and their written comments (if any) are available in the public docket.

3. Regulatory Flexibility Analysis

Section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603, requires EPA to prepare and make available for comment an "initial regulatory flexibility analysis" which describes the effect of the proposed rule on small business entities. However, section 604(b) of the Act provides that an analysis not be required when the head of an Agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

This proposed rule to rescind 40 CFR part 61, subpart T, if promulgated as a final rule, will have the effect of easing the burdens associated with the provisions of subpart T and for those reasons, I certify that this rule will not have significant economic impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 61

Air pollution control, Arsenic, Asbestos, Benzene, Beryllium, Hazardous substances, Mercury, Radionuclides, Radon, Reporting and Recordkeeping requirements, Uranium, Vinyl chloride.

Dated: December 19, 1991.

William K. Reilly,

Administrator.

Part 61 of chapter I of title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 61—[AMENDED]

1. The authority citation for part 61 continues to read as follows:

Authority: 42 U.S.C. 7401, 7412, 7414, 7416, 7601.

2. Section 61.220 is amended by revising paragraph (a) to read as follows:

§ 61.220 Designation of facilities.

(a) The provisions of this subpart apply to owners and operators of all sites that are used for the disposal of tailings, and that managed residual radioactive material during and following the processing of uranium ores, commonly referred to as uranium mills and their associated tailings, that are listed in, or designated by the Secretary of Energy under title I of the Uranium Mill Tailings Control Act of 1978.

* * * * *

3. Section 61.221 is revised to read as follows:

§ 61.221 Definitions.

As used in this subpart, all terms not defined here have the meanings given them in the Clean Air Act or subpart A of part 61. The following terms shall have the following specific meanings:

(a) *Long term stabilization* means the addition of material on a uranium mill tailings pile for purpose of ensuring compliance with the requirements of 40 CFR 192.02(a). These actions shall be considered complete when the Nuclear Regulatory Commission determines that the requirements of 40 CFR 192.02(a) have been met.

(b) *Operational* means a uranium mill tailings pile that is licensed to accept additional tailings, and those tailings can be added without violating subpart W or any other Federal, state or local rule or law. A pile cannot be considered operational if it is filled to capacity or the mill it accepts tailings from has been dismantled or otherwise decommissioned.

(c) *Residual radioactive materials* means:

(1) Waste (which the Secretary determines to be radioactive) in the form of tailings resulting from the processing of ores for the extraction of uranium and other valuable constituents of the ores; and

(2) Other waste (which the Secretary determines to be radioactive) at a processing site which relate to such processing, including any residual stock of unprocessed ores or low grade materials.

(d) *Tailings* means the remaining portion of a metal-bearing ore after some or all of such metal, such as uranium, has been extracted.

4. Section 61.222 is amended by revising paragraph (b) to read as follows:

§ 61.222 Standard.

* * * * *

(b) Once a uranium mill tailings pile or impoundment ceases to be operational it must be disposed of and brought into compliance with this standard within two years of the effective date of the standard. If it is not physically possible for DOE to complete disposal within that time, EPA shall, after consultation with DOE, establish a compliance agreement which will assure that disposal will be completed as quickly as possible.

5. Section 61.223 is amended by revising paragraph (b)(5) to read as follows:

§ 61.223 Compliance procedures.

* * * * *

(b) * * *

(5) Each report shall be signed and dated by a public official in charge of the facility and contain the following declaration immediately above the signature line:

I certify under penalty of law that I have personally examined and am familiar with the information submitted herein and based on my inquiry of those individuals immediately responsible for obtaining the

information. I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment. See, 18 U.S.C. 1001.

* * * * *

Memorandum of Understanding Between EPA, NRC and The State of Colorado, Texas, and Washington Concerning Clean Air Act Standards for Radon Releases from Uranium Mill Tailings, Subparts T and W, 40 CFR Part 61

In accordance with section 112(d)(9) and 122(c)(2) of the Clean Air Act, as amended in 1990, and in order to minimize regulatory duplication and conserve resources in the control of radionuclide emission to air from uranium mill tailings sites licensed by the Nuclear Regulatory Commission (NRC) or its Agreement States under the Atomic Energy Act of 1954, as amended, NRC, the Environmental Protection Agency (EPA), and the States of Colorado, Texas, and Washington (the affected Agreement States) agree as follows:

General Goal of Agreement

EPA, NRC and affected Agreement States are entering into this MOU to ensure that owners and operators of existing uranium mill tailings disposal sites licensed by the NRC, or the affected Agreement States, who have ceased operations and those owners and operators that will in the future cease operation, effect emplacement of a final earthen cover to limit radon emissions to a flux of no more than 20 $pCi/m^2/s$, as expeditiously as practicable considering technological feasibility. A guiding objective is that this occur to all current disposal sites (see Attachment A) by the end of 1997, and within seven years of when the existing operating and standby sites cease operation. The final closure requirement shall be enforceable by NRC or the affected Agreement States.

NRC and Affected State Lead Actions

1. NRC or the affected Agreement States will complete review and approval of detailed reclamation (i.e., final closure) plans, including schedules for emplacement of earthen covers on non-operational tailing impoundments such that radon emissions will not exceed a flux of 20 $pCi/m^2/s$, as soon as practicable but in any event not later than September of 1993. NRC or the affected Agreement States will immediately solicit voluntary requests by uranium mill tailings disposal site licensees to amend their licenses to set forth, or incorporate by reference, the schedule for reclamation schedules will be enforceable. If any licensee fails to voluntarily have a firm reclamation schedule (consistent with this MOU) incorporated into its license, NRC or the Agreement States will impose the appropriate license amendments by order (in accordance with applicable regulatory procedures).

NRC or the affected Agreement States will ensure that the schedules and conditions for effecting final closure are flexible enough to contemplate technological feasibility and that cover emplacement on the tailings impoundments occurs as expeditiously as practicable considering both short-term reductions in radon releases and long-term stability of the uranium tailings.

2. NRC agrees to provide for public notice and comment by publishing in the **Federal Register** receipt of requests, intent to issue amendments, or intent to issue orders which (1) Incorporate reclamation plans or other schedules for effecting final closure into licenses, and (2) amend reclamation schedules as necessary for reasons of technological feasibility (including inclement weather, litigation which compels delays to emplacement, or other factors beyond control of the licensee) after the reclamation plans have been incorporated into the licenses. The affected Agreement States agree to provide comparable public notice and comment.

3. NRC will conduct enforcement actions in accordance with 10 CFR part 2, appendix C, to compel licensee adherence to reclamation schedules, except when the licensee both demonstrates that compliance was not technologically feasible and has made written application to NRC for a license amendment to reflect that concern. The affected Agreement States shall act pursuant to their authority to similarly enforce. NRC and the affected Agreement States will consider and act within a reasonable time period upon requests from EPA or other interested parties to institute a proceeding to modify, suspend, or revoke a license or other enforcement action as may be proper. NRC will consider such requests in accordance with the procedures in 10 CFR 2.206; the affected Agreement States will consider such requests in accordance with State law and existing State procedures.

EPA Lead Actions

4. In or about October 1991, EPA will develop and publish in the **Federal Register** a Notice of Proposed Rulemaking to stay existing 40 CFR part 61, subpart T pending implementation of this agreement, including the rulemaking initiatives described in paragraphs 5 and 6, below, and the license amendments described in paragraphs 1 and 2, above. Final action will be taken on or about December 15, 1991.

5. On or about December 15, 1991, EPA will develop and publish in the **Federal Register** a Notice of Proposed Rulemaking or an Advance Notice of Proposed Rulemaking, pursuant to its authority under Atomic Energy Act Section 275, to make specific amendments to 40 CFR part 192 that would require emplacement of a final earthen cover on non-operational tailing impoundments such that radon emissions will not exceed a flux of 20 $pCi/m^2/s$, as expeditiously as practicable, but with a goal that such occur no later than December 31, 1997 or seven years after the date on which the impoundment ceased operations, whichever is later. This proposal will include generic performance obligations towards closure. NRC and the affected Agreement States will assist EPA in developing the technical basis to support this rulemaking. Final action will be taken as soon as practicable.

6. On or about December 15, 1991, EPA will develop and publish in the **Federal Register** a Notice of Proposed Rulemaking, pursuant to its authority under Clean Air Act Action section 112(d)(9), to rescind its existing uranium mill tailings disposal regulations at 40 CFR part 61, subpart T. This proposal, which will occur only if the purposes and provisions of this MOU are proceeding expeditiously, requires that the Administrator find that the regulatory program implemented by NRC and the affected Agreement States will protect public health with an ample margin of safety. It is expected, subject to public notice and comment, that the basis for this finding will ultimately be provided through compliance by NRC, the affected Agreement States, and EPA with all aspects of this agreement, including finalized, enforceable reclamation plans and expeditious closure schedules for all affected facilities. Final action will be taken as soon as practicable after completion of the rulemaking described in paragraph 5 and the licensing described in paragraphs 1 and 2.

7. During or after performance of the actions described in paragraphs 1, 4, 5 and 6, EPA, NRC and the affected Agreement States will cooperate in addressing pursuant to CAA section 112 (d)(9) duplication of regulation presented by 40 CFR part 61, subpart W, which relates to radionuclide emissions from uranium mill tailings piles that are operational or in standby status.

Effective Date, Revision, and Termination

This memorandum shall be effective immediately and shall continue in effect until revised by mutual agreement, unless terminated by any party after 120 days notice in writing.

Nuclear Regulatory Commission.

Dated: October 17, 1991.

Robert M. Bernero,

Director, Office of Nuclear Material Safety and Safeguards.

Environmental Protection Agency.

October 18, 1991.

William G. Rosenberg,

Assistant Administrator For Air and Radiation.

State of Colorado.

Dated: October 23, 1991.

Joel Kohn,

Interim Executive Director, Department of Health.

State of Texas.

Dated: October 23, 1991.

Robert A. MacLean,

Acting Commissioner of Health.

State of Washington.