ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[FRL 48–357]

RIN 2060–AE23

National Emissions Standards for Hazardous Air Pollutants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is supplementing its December 31, 1991 proposal to rescind 40 CFR part 61, subpart T (subpart T) as it applies to owners and operators of uranium mill tailings disposal sites licensed by the Nuclear Regulatory Commission (NRC) or an affected Agreement State (Agreement States). This document supplements, and does not withdraw EPA's prior proposal to rescind. This document describes and invites comment on provisions for reconsideration of rescission and reinstatement of subpart T, and describes relevant events that have occurred since the December 1991 proposal. Additionally, EPA invites comment on the Agency's proposed determination that the NRC regulatory program protects public health with an ample margin of safety, including specific aspects of that determination.

Neither proposal applies to uranium mill tailings disposal sites regulated under subpart T that are also under the control of the Department of Energy (DOE). As a National Emission Standard for Hazardous Air Pollutants (NESHAPs) promulgated on December 15, 1989, subpart T regulates emissions of radon-222 into the ambient air from uranium mill tailings disposal sites. EPA is requesting comments only on the contents of this notice and has included a specific request for comments as to certain aspects of this proposal. EPA is establishing a 45 day comment period for receipt of all comments.

DATES: Comments concerning this proposal must be received by EPA on or before March 24, 1994. A public hearing will be held on March 9, 1994, in Washington, DC if a request for such a hearing is received by February 22, 1994.

ADDRESSES: Comments should be submitted (in duplicate if possible) to: Central Docket Section LE–131, Environmental Protection Agency, Attn: Air Docket No. A–91–67, Washington, DC 20460. Requests to participate in the public hearing should be made in writing to the Director, Criteria and Standards Division, 6602J, Office of Radiation and Indoor Air, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Comments and requests to participate in the hearing may also be faxed to EPA at (202) 233–9629.

FOR FURTHER INFORMATION CONTACT: Gale C. Bonanno, Air Standards and Economics Branch, Criteria and Standards Division, 6602J, Office of Radiation and Indoor Air, Environmental Protection Agency, Washington, DC 20460 (202) 233–9219.

SUPPLEMENTARY INFORMATION:

Docket

Docket A–91–67 contains the rulemaking record. The docket is available for public inspection between the hours of 8 a.m. and 4 p.m., Monday through Friday, in room M1500 of Waterside Mall, 401 M Street, SW., Washington, DC 20460. A reasonable fee may be charged for copying.

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I. Background

A. Description of Uranium Mill Tailings

Uranium mill tailings are sand-like wastes that result from the processing of uranium ore. Tailings are stored in large surface impoundments, called piles, in amounts from less than one million tons to over thirty million tons, over areas that may cover hundreds of acres. Most piles are located in the Western United States, and all piles emit radon gas, a decay product of radium in the waste material resulting from the processing of ore to recover uranium at the uranium mills.

B. Regulatory History

To deal specifically with the risks associated with these tailings, Congress passed the Uranium Mill Tailings Radiation Control Act (UMTRCA) in 1978 (42 U.S.C. 2022, 7901–7942). In enacting UMTRCA, Congress found that uranium mill tailings may pose a potential and significant radiation health hazard to the public, and that every reasonable effort should 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 and to prevent or minimize other environmental hazards from such tailings. See 42 U.S.C. 7901(a). Under UMTRCA, two programs were established to protect public health and the environment from the hazards associated with uranium mill tailings. One program (Title I) required the Department of Energy (DOE) to conduct the necessary remedial actions at designated inactive uranium mill tailing sites to achieve compliance with the general environmental standards to be promulgated by EPA. These sites were generally abandoned uranium processing sites for which a license issued by the NRC or its predecessor, the Atomic Energy Commission (AEC), was not in effect on January 1, 1978. The other program (Title II) pertained to active sites, which are those that are licensed by the NRC or an affected Agreement State. Requirements for licensed sites include the final disposal of tailings, including the control of radon after milling operations cease. UMTRCA also required that EPA promulgate standards for these licensed sites, including standards that protect human health and the environment in a manner consistent with standards established under Subtitle C of the Solid Waste Disposal Act, as amended. The NRC, or an Agreement State, is responsible for implementing the EPA

standards at licensed uranium milling sites.

As part of NRC's 1982 authorization and appropriations, Congress amended UMTRCA on January 4, 1983. Public Law 97–415, sections 18(a) and 22(b), reprinted in 2 1982 U.S. Code Cong. & Admin. News at 96 Stat. 2077 and 2080. As partially amended thereby, EPA was required to promulgate standards of general applicability for the protection of the public health, safety, and the environment from radiological and nonradiological hazards associated with the processing and with the possession, transfer, and disposal of byproduct material as defined under section 11e(2) of the AEA, e.g., uranium mill tailings. Requirements established by the NRC with respect to byproduct material must conform to the EPA standards. Any requirements of such standards adopted by the NRC shall be amended as the NRC deems necessary to conform to EPA's standards. In establishing such standards, the Administrator was to consider the risk to the public health, safety, and the environment, the environmental and economic costs of applying such standards, and such other factors as the Administrator determines to be appropriate. See 42 U.S.C. 2022(b)(1).

As promulgated by EPA under subpart D of 40 CFR part 192 in 1983 and implemented by NRC pursuant to its regulations at 10 CFR part 40, appendix A, a Title II site licensed by NRC or an Agreement State, could indefinitely continue to emit radon at levels that could result in risks higher than allowed under the CAA. It was this possibility which compelled EPA to promulgate subpart T of 40 CFR part 61 under CAA section 112. In addition, the UMTRCA regulations prior to the recent EPA amendments called for an impoundment design that would achieve compliance with the 20 pCi/m²-s flux standard for 1,000 years, or at least 200 years, but they did not include any requirement that monitoring occur to verify the efficacy of the design.

On October 16, 1985, NRC promulgated rules at 10 CFR part 40, appendix A to conform NRC's regulations issued five years earlier to the provisions of EPA's general UMTRCA standards other than those affecting ground water protection at 40 CFR part 192. (50 FR 41852). NRC completed conforming amendments for groundwater protection in appendix A of part 40 in 1987.

Neither the UMTRCA standards promulgated by EPA in 1983 nor the NRC standards promulgated in 1985, established compliance schedules to ensure that non-operational tailings piles would be closed, and that the 20 pCi/m²-s standard would be met, within a reasonable period of time. Moreover, the EPA standards and NRC criteria also did not require monitoring to ensure compliance with the flux standard. 50 FR 41852 (October 16, 1985). To rectify these shortcomings of the current EPA and NRC programs regulating uranium mill tailings, EPA promulgated standards under Section 112 of the CAA on October 31, 1989, to ensure that the piles would be closed in a timely manner with monitoring.

On December 15, 1989, EPA promulgated national standards regulating radionuclide emissions to the ambient air from several source categories, including 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 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.

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 was no later than 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 then 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 recordkeeping to establish and demonstrate compliance. See 40 CFR 61.223 and 61.224.

Subpart T was 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 (September 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 a safe level of 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 step, the Agency sets a standard which provides an ample margin of safety, again considering 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.

EPA noted that standards it had already promulgated pursuant to the Uranium Mill Tailings Radiation Control Act (UMTRCA) of 1978 (42 U.S.C. 2022, 7901–7942) would eventually limit radon emissions from those sites to a flux of 20 pCi/m²-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/m²-s baseline would result in an estimated lifetime risk to the maximally exposed individual 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.

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). Additionally, it requires that, once a uranium mill tailings pile or impoundment ceases to be operational, it must be disposed of and brought into compliance with the emission limit within two years of the effective date of the standard (by December 15, 1991) or within two years of the day it ceases to be operational, whichever is later. Lastly, it requires monitoring of the disposed pile to demonstrate compliance with the radon emission limit. See 40 CFR 61.223 and 61.224. 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 did 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. However, due to then-existing CAA section 112(c)(1)(B)(ii), EPA was constrained to requiring compliance with the 20 pCi/m²-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.

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 at the time of promulgation. *Id.* Thus, the earliest date by which sites were required to comply with the subpart T standards was 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 cover to meet that emissions level be installed as expeditiously as practicable considering technological feasibility.

The numerical radon emission limit of subpart T, is the same as the UMTRCA standard at 40 CFR part 192, subpart D (subpart D) (although under UMTRCA, the limit is to be met through proper design of the disposal impoundment, and is to be implemented by DOE and NRC for the individual sites, while under the CAA, the standard is an emissions limit with compliance established by EPA through monitoring). However, the two year disposal requirement and the radon monitoring requirement were not separately required by the existing UMTRCA regulations.

EPA amended 40 CFR part 192, subpart D on November 15, 1993, 58 FR 60340 to fill a specific regulatory gap with respect to timing and monitoring that existed in that subpart. Under subpart D, sites are now required to construct a permanent radon barrier pursuant to a design to achieve compliance with the 20 pCi/m²-s flux standard as expeditiously as practicable considering technological feasibility (including factors beyond the control of the licensee) with a goal that this occur by December 31, 1997, for those non-operational uranium mill tailings piles listed in the MOU between EPA, NRC and the affected Agreement States (at 56 FR 67568), or seven years after the date on which the impoundments cease operation for all other piles. The new requirement for verifying the flux with monitoring is meant to assure the efficacy of the design of the permanent radon barrier following construction.

Section 84a(2) of the Atomic Energy Act requires NRC to conform its regulations to EPA's regulations promulgated under UMTRCA. As noted above, the existing NRC criteria while providing a comprehensive response to EPA's general UMTRCA standards did not compel sites to proceed to final closure by a date certain nor did they require monitoring. NRC proposed uranium mill tailings regulations to conform the NRC requirements to EPA's proposed amended standards at 40 CFR part 192 subpart D. 58 FR 58657 (November 3, 1993). The proposed regulations amend Criterion 6 and add a new Criterion 6A together with new definitions in the Introduction to appendix A to part 40 of title 10 of the CFR.

These CAA and UMTRCA programs duplicate each other by creating dual regulatory oversight, including independent procedural requirements, while seeking to ensure compliance with the same numerical 20 pCi/m²-s flux standard. Concern over this duplication inspired several petitions for reconsideration, most notably from NRC, the American Mining Congress (AMC) and Homestake Mining Co. It was also alleged that subpart T was unlawful because it was physically impossible for some sites to come into compliance with subpart T in the time required. While these petitions remain pending before EPA (at least in part), EPA has taken several actions to address the issues they raise, including publishing the proposal to rescind subpart T, as well as the Final Rule to amend 40 CFR part 192, subpart D (UMTRCA regulations) and a Final Rule staying subpart T pending the conclusion of this proposed rule.

C. Clean Air Act Amendments of 1990

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

D. Memorandum of Understanding (MOU) Between EPA, NRC and Affected Agreement States

In July of 1991, EPA, NRC and the affected Agreement States entered into discussions over the dual regulatory programs established under UMTRCA and the CAA. In October 1991, those discussions resulted in a Memorandum of Understanding (MOU) between EPA, NRC and the Agreement States which outlines the steps each party will take to both eliminate regulatory redundancy and to ensure uranium mill tailings piles are closed as expeditiously as practicable. See 56 FR 55434 (MOU reproduced as part of proposal to stay subpart T); see also 56 FR 67537 (final rule to stay subpart T). The primary purpose of the MOU is to ensure that owners of uranium mill tailings disposal sites that have ceased operation, and owners of sites that will cease operation in the future, bring those piles into compliance with the 20 pCi/m²-s flux standard as expeditiously as practicable considering technological feasibility (including factors beyond the control of the licensee) with the goal that all current disposal sites be closed and in compliance with the radon emission standard by the end of 1997, or within seven years of the date on which existing operations and standby sites enter disposal status. This goal comports with Congress's concern over timing as reflected in CAA section 112(i)(3), as amended.

E. The Settlement Agreement

As contemplated by the MOU, on December 31, 1991, EPA took final action to stay and propose rescission of subpart T under section 112(d)(9), and to issue an advance notice of proposed rulemaking under UMTRCA. See 55 FR 67537, 67561 and 67569. In order to preserve its rights, EDF filed a lawsuit challenging the legality of the stay. *EDF v. Reilly*, No. 92–1082 (D.C. Cir.). Litigation had previously been filed by EDF, NRDC, AMC, Homestake and others, challenging subpart T. *AMC, et al. v. EPA*, Nos. 90–1058, 90–1063, 90–1068, and 90–1074 (D.C. Cir.). NRC, AMC and Homestake had also filed an administrative petition for reconsideration of subpart T.

Discussions continued with the litigants and NRC, and in February 1993, an agreement was reached to settle the pending litigation and the administrative proceeding, avoid potential future litigation, and otherwise agree to a potential approach to regulations of NRC-licensed non-operational uranium mill tailings disposal sites. See 58 FR 17230 (April 1, 1993) (notice announcing settlement agreement under CAA section 113(g)).

The settlement agreement adds comprehensive detail to, and thereby continues, the approach set forth in the MOU. If implemented, the settlement agreement will result in the expeditious control of radon-222 emissions at non-operational uranium mill tailings disposal sites without the delays and resource expenditures engendered by litigation and contentious administrative process. It will enable EPA to fulfill the requirement of section 112(d)(9) that EPA find, by rule, that the NRC regulatory program protects public health with an ample margin of safety. It does this, in part, by changing EPA's UMTRCA regulations such that public health will be as well protected under UMTRCA as would implementation of subpart T under the CAA.

Under the agreement, the pending litigation will not be dismissed until after certain terms in the agreement are fulfilled. Moreover, the agreement does not legally bind or otherwise restrict EPA's rights or obligations under law; rather, by its terms (paragraph 12), there is no recourse for a court order to implement the agreement. Indeed, the only remedy for failure to meet the terms of the final agreement is activation by the litigants of the underlying litigation.

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

In light of the new statutory authority provided EPA by section 112(d)(9) of the Clean Air Act Amendments of 1990, EPA met 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/m²-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 (20 pCi/m²-s) as soon as practicable considering technological feasibility and factors beyond the control of the licensee, then the NRC program would protect the public to the same extent as subpart T, and subpart T would not be necessary for these facilities. 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 and factors beyond the control of the licensee, 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.

A. The Regulatory Scheme Under UMTRCA

As a supplement to the Atomic Energy Act of 1954, as amended, UMTRCA (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/m²-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 previously compelled sites to proceed towards 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 previously required 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.

B. Clean Air Act Amendments of 1990: Section 112(d)(9) ("Simpson Amendment")

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 radionuclides under the CAA for 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 decline to 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.

C. Memorandum of Understanding (MOU)

EPA, NRC and the affected Agreement States entered intensive discussions about these matters. This inter-agency consultation and review resulted in the execution of a Memorandum of Understanding (MOU), a copy of which was printed at the end of the proposed rule to rescind subpart T published December 31, 1991 (56 FR 67568). The primary purpose of the MOU is to ensure that non-operational uranium mill tailings piles and impoundments licensed by NRC or an affected Agreement State achieve compliance through emplacement of a permanent radon barrier with the 20 pCi/m^2-s flux standard specified in EPA's UMTRCA standards (40 CFR 192.32(b)(1)) as expeditiously as practicable considering technological feasibility (including factors beyond the control of the licensee). The goal 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.

The MOU called 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. In addition, the MOU called for NRC to modify its implementing regulations at 10 CFR part 40, appendix A, as appropriate, and 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 (including factors beyond the control of the licensee). This was to be accomplished either through voluntary cooperation with the licensees, or through administratively enforceable orders. In accordance with the MOU, the NRC and affected Agreement States have agreed to amend the licenses of all sites whose milling operations have ceased and whose tailings piles remain partially or totally uncovered. The amended licenses would require each mill operator to establish a detailed tailings closure plan for radon to include key closure milestones and a schedule for timely emplacement of a permanent radon barrier on all non-operational tailings impoundments to ensure that radon emissions do not exceed a flux of 20 pCi/m^2-s. 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) for rescission of subpart T.

D. Settlement Agreement

In light of CAA section 112(d)(9), and in order to foster a consensus approach to regulation in this area, EPA then commenced discussions with NRC, the American Mining Congress (AMC), and the Environmental Defense Fund (EDF). As a result of discussions after execution of the MOU, a final settlement agreement was executed between EPA, AMC, EDF, NRDC and individual site owners, to which NRC agreed in principle by letter. The settlement agreement continues the regulatory approach set forth in the MOU adding extensive detail to that agreement.

E. Actions by NRC and EPA Pursuant to the MOU and Settlement Agreement

1. EPA Regulatory Actions

On December 31, 1991, EPA took several steps towards fulfilling its responsibilities under the MOU and in implementing CAA section 112(d)(9) by publishing three **Federal Register** (FR)

notices. In the first notice (56 FR 67537), EPA published a final rule to stay the effectiveness of 40 CFR part 61, subpart T, as it applies to owners and operators of non-operational uranium mill tailings disposal sites licensed by the NRC or an Agreement State. The stay will remain in effect until the Agency rescinds the uranium mill tailings NESHAP at 40 CFR part 61, subpart T. However, if EPA fails to complete that rulemaking by June 30, 1994, the stay will expire and the requirements of subpart T will become effective.

In a second notice published on December 31, 1991, the Agency proposed to rescind the NESHAP for radionuclides that appears at 40 CFR part 61, subpart T, as it applies to non-operational uranium mill tailings disposal sites licensed by the NRC or an Agreement State (56 FR 67561).

In the third notice, EPA published an advanced notice of proposed rulemaking to amend 40 CFR part 192, subpart D (56 FR 67569) to provide for site closure to occur as expeditiously as practicable considering technological feasibility (including factors beyond the control of the licensee), and appropriate monitoring requirements for non-operational uranium mill tailings piles. These amendments would ensure timely compliance and add monitoring requirements currently lacking in the UMTRCA regulations.

EPA published a notice on June 8, 1993, proposing to amend 40 CFR part 192 subpart D. (58 FR 32174). On November 15, 1993, EPA published the final rule amending 40 CFR part 192, subpart D. (58 FR 60340). This final rule requires: (1) Emplacement of a permanent radon barrier constructed to achieve compliance with, including attainment of, the 20 pCi/m^2-s flux standard by all NRC or Agreement State licensed sites that, absent rescission, would be subject to subpart T; (2) interim milestones to assure appropriate progress in emplacing the permanent radon barrier; and (3) that site closure occur as expeditiously as practicable considering technological feasibility (including factors beyond the control of the licensee) after the impoundments cease operation. EPA announced a goal that this occur by December 31, 1997, for those non-operational uranium mill tailings piles listed in the MOU between EPA, NRC and affected Agreement States (at 56 FR 67568), or seven years after the date on which the impoundments cease operation for all other piles.

As intended by EPA, the phrase "as expeditiously as practicable considering technological feasibility," means as quickly as possible considering: (1) The physical characteristics of the tailings and sites; (2) the limits of available technology; (3) the need for consistency with mandatory requirements of other regulatory programs; and (4) factors beyond the control of the licensee. While this phrase does not preclude economic considerations to the extent provided by the phrase "available technology," it also does not contemplate utilization of a cost-benefit analysis in setting compliance schedules. The radon control compliance schedules are to be developed consistent with the targets set forth in the MOU as reasonably applied to the specific circumstances of each site.

EPA recognized that the UMTRCA regulatory scheme encompasses a design standard. EPA made minor amendments to this scheme to better facilitate implementation of the regulation without fundamentally altering the current method of compliance. Subpart D, as amended, requires site control to be carried out in accordance with a written tailings closure plan (radon), and in a manner which ensures that closure activities are initiated as expeditiously as practicable considering technological feasibility (including factors beyond the control of licensees). The tailings closure plan (radon), either as originally written or subsequently amended, will be incorporated into the individual site licenses, including provisions for and amendments to the milestones for control, after NRC or an affected Agreement State finds that the schedule reflects compliance as expeditiously as practicable considering technological feasibility (including factors beyond the control of the licensee). The compliance schedules are to be developed consistent with the targets set forth in the MOU as reasonably applied to the specific circumstances of each site with a goal that final closure occur by December 31, 1997, for those non-operational uranium mill tailings piles listed in the MOU between EPA, NRC and affected Agreement States (at 56 FR 67568), or seven years after the date on which the impoundments cease operation for all other piles. These schedules must include key closure milestones and other milestones which are reasonably calculated to promote timely compliance with the 20 pCi/m^2-s flux standard. Milestones which are not reasonably calculated to advance timely compliance with the radon air emissions standard, e.g. installation of erosion protection and groundwater corrective actions, are not relevant to the tailings closure plans (radon). In addition, subpart D requires that licensees ensure that radon closure milestone activities, such as wind blown tailings retrieval and placement on the pile, interim stabilization (including dewatering or the removal of freestanding liquids and recontouring), and radon barrier construction, are undertaken to achieve compliance with, including attainment of, the 20 pCi/m^2-s flux standard as expeditiously as practicable considering technological feasibility.

The goal of the amendments to subpart D is for existing sites, or those that become non-operational in the future, to achieve compliance as expeditiously as practicable considering technological feasibility (including factors beyond the control of licensees) within the time periods set forth in the MOU, including Attachment A thereto, and for new sites to achieve compliance no later than seven years after becoming non-operational.

However, if the NRC or an Agreement State makes a finding that compliance with the 20 pCi/m^2-s flux standard has been demonstrated through appropriate monitoring, after providing an opportunity for public participation, then the performance of the milestone(s) may be extended. If an extension is granted, then during the period of the extension, compliance with the 20 pCi/m^2-s flux standard must be demonstrated each year. Additionally, licensees may request, based upon cost, that the final compliance date for emplacement of the permanent radon barrier, or relevant milestone set forth in the applicable license or incorporated in the (radon) tailings closure plan, be extended. The NRC or an affected Agreement State may approve such a request if it finds, after providing the opportunity for public participation, that: (1) The licensee is making good faith efforts to emplace a permanent radon barrier constructed to achieve the 20 pCi/m^2-s flux standard; (2) such delay is consistent with the definition of "available technology;" and (3) such delay will not result in radon emissions that are determined to result in significant incremental risk to the public health. Such a finding should be accompanied by new deadlines which reasonably correspond to the target dates identified in Attachment A of the MOU. (56 FR 67569).

EPA expects the NRC and Agreement States to act consistently with their commitment in the MOU and provide for public notice and comment on proposals or requests to (1) incorporate radon tailings closure plans or other schedules for effecting emplacement of a permanent radon barrier into licenses,

and (2) amend the radon tailings closure schedules as necessary or appropriate for reasons of technological feasibility (including factors beyond the control of the licensees). Under the terms of the MOU, NRC should do so with notice timely published in the **Federal Register**. In addition, consistent with the MOU, members of the public may request NRC for action on these matters pursuant to 10 CFR 2.206. EPA also expects the Agreement States to provide comparable opportunities for public participation pursuant to their existing authorities and procedures.

The UMTRCA regulations, as promulgated by EPA and implemented by NRC prior to the 1993 amendments, while ultimately limiting emissions to the same numerical level as subpart T, were 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 1,000 years or at least 200 years, but did 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. Subpart D, as amended, requires all appropriate monitoring be conducted pursuant to the procedures described in 40 CFR part 61, appendix B, Method 115, or any other measurement method proposed by a licensee and approved by NRC or the affected Agreement State as being at least as effective as EPA Method 115 in demonstrating the effectiveness of the permanent radon barrier in achieving compliance with the 20 pCi/m²-s flux standard. After emplacement of a permanent radon barrier designed and constructed to achieve compliance with, including attainment of, the 20 pCi/m²-s flux standard, the licensee shall conduct appropriate monitoring and analysis of the radon flux through the barrier. This monitoring will verify that the design of the permanent radon barrier is effective in ensuring that emissions of radon-222 will not exceed compliance with the 20 pCi/m²-s, as contemplated by 40 CFR 192.32(b)(1)(ii). EPA intends that the permanent radon barrier be designed to ensure sustained compliance with the 20 pCi/m²-s flux standard by all sites, but does not require continuous emissions monitoring. Rather, a single monitoring event may suffice to verify the design of the permanent radon barrier to ensure continued compliance. Note, however, that if the NRC or an Agreement State extends the time for performance of milestones after making a finding that compliance with the 20 pCi/m²-s flux standard has been demonstrated by appropriate monitoring, compliance with the 20 pCi/m²-s flux standard must be demonstrated each year during the period of the extension.

2. NRC Regulatory Action

On November 3, 1993, NRC proposed uranium mill tailings regulations to conform the NRC requirements to EPA's proposed amended standards at 40 CFR part 192 subpart D. (58 FR 58657). Section 84a(2) of the Atomic Energy Act requires NRC to conform its regulations to EPA's regulations promulgated under UMTRCA. As noted above, the existing NRC criteria while providing a comprehensive response to EPA's general UMTRCA standards did not compel sites to proceed to final closure by a date certain nor did they require monitoring. The proposed regulations amend Criterion 6 and add a new Criterion 6A and definitions to the Introduction to appendix A to part 40 of title 10 of the CFR. Consistent with the MOU, NRC's proposal provides for timely emplacement of the "final" radon barrier and requires appropriate verification of the radon flux through that barrier.

Proposed Criterion 6 paragraph 2 provides for appropriate testing and analysis to verify that the construction of the barrier effectively controls radon from uranium byproduct material to a level not exceeding 20 pCi/m²-s. Paragraph 3 requires verification of the radon flux to be conducted over the covered portion of the pile or impoundment if phased emplacement of the barrier is authorized. Paragraph 4 would require reporting and recordkeeping.

As proposed, Criterion 6A addresses the timeliness of complying with the requirements of Criterion 6 as applied to uranium mill tailings. Paragraph 1 would require compliance with Criterion 6 as expeditiously as practicable considering technological feasibility after a pile or impoundment containing uranium byproduct materials ceases operation. In addition, this paragraph would require inclusion of specified interim milestones in the individual site license. Proposed Criterion 6A also sets forth the conditions for Commission approval of extensions for performance of milestones and continued acceptance of uranium byproduct and other materials in the pile or impoundment. See Proposed 10 CFR part 40 appendix A Criterion 6A paragraphs 2 and 3 at 58 FR 58664.

3. Amendment of NRC and Agreement State Licenses

Consistent with their commitments under the MOU, as well as EPA's previous proposal to rescind subpart T (56 FR 67561 December 31, 1991), NRC and the affected Agreement States agreed to amend the licenses of all non-operational uranium mill tailings sites to ensure inclusion of schedules for emplacing a permanent radon barrier on the tailings impoundments, as well as interim milestones (e.g., wind blown tailings retrieval and placement on the pile, interim stabilization and radon barrier construction). To this end, NRC and the Agreement States requested the licensees to voluntarily seek amended licenses and have completed processing those requests. NRC has continued the spirit of cooperation between EPA and NRC by keeping the Agency apprised of the status of the approval of reclamation plans and amendment of licenses.

As of September 30, 1993, NRC and the Agreement States had completed all license amendments for closure of licensed non-operational impoundments, with the exception of the license amendment for the Atlas site located in Moab, Utah.

NRC informed EPA by letter that the Commission received extensive comments on NRC's July 20, 1993 proposal to approve the Atlas reclamation plan, including the closure schedule and interim milestones required by the MOU, and the Environmental Assessment and the Finding of No Significant Impact for the Atlas mill. NRC rescinded its Finding of No Significant Impact for the Atlas mill in October 1993. 58 FR 52516 (October 8, 1993). One issue appears to be the potential for flooding of the Atlas impoundment if it is reclaimed on-site, due to the proximity of the site to the Colorado River. This concern and others appear to have caused delays in the license amendment for this site. NRC informed EPA it intends to reassess the reclamation plan for that site and prepare a report. Based on the results of that reassessment, the NRC will determine what the next steps should be. In its reassessment of the reclamation plan, NRC will obtain input from Federal, State, and local representatives. NRC is actively pursuing a timely final decision on the Atlas site location and its reclamation plan. To this end, NRC informed EPA by letter dated December 28, 1993, that NRC has conducted several meetings with the various representatives enumerated above and has requested additional technical information from the licensee.

The near edge of town is located about 2 km to the east of the Atlas tailings impoundment. However, it appears the area within a 1.5 km radius of the Atlas mill tailings impoundment site is sparsely populated. An interim cover is being placed over the impoundment for radon emission control as the Atlas tailings impoundment dries sufficiently to allow access of the necessary equipment. As discussed in the Background Information Document (BID) for the amendments to 40 CFR 192 subpart D, interim covers significantly reduce radon emissions. Technical Support for Amending Standards for Management of Uranium Byproduct Materials: 40 CFR Part 192 Background Information Document, EPA 402–R–93–085, October 1993.

If the 1996 MOU target date for emplacement of the permanent radon barrier is extended by NRC, EPA will review such an extension at that time. Under the present circumstances, it appears an extension of the MOU target date would be consistent with the factors to be considered under the "as expeditiously as practicable" standard at 40 CFR section 192.32(a)(3)(i), since there may be a need for consistency with mandatory requirements of other regulatory programs (i.e., NEPA) and there may be factors beyond the control of the licensee. 40 CFR section 192.31(k). Based on representations from NRC, EPA believes that the extra time NRC is taking to further review the proposed Atlas mill site reclamation plan is necessary to address the large amount of public comments received and that it will result in a final solution that is more responsive to public comment.

NRC and the affected Agreement States have also agreed to enforce the provisions of the amended licenses to ensure compliance with the new schedules for emplacing the permanent radon barriers, including interim milestones, and to ensure (and verify) the efficacy of the design and construction of the barrier to achieve compliance with the 20 pCi/m2-s flux standard contained in the amendments to subpart D.

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

EPA is proposing 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 sets forth this proposal pursuant to its authority under CAA section 112(d)(9), as amended in 1990. The support for this proposal includes (1) The MOU, which reflects consultation with NRC and the affected Agreement States 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, (2) the settlement agreement which adds comprehensive detail to the MOU, (3) EPA's amendments to 40 CFR part 192 subpart D, (4) the relevant license amendments, to date, and (5) expected amendments by NRC to its implementation regulations at Appendix A, 10 CFR part 40.

A. Proposed EPA Determination Under CAA Section 112(d)(9)

1. Background

Section 112(d)(9) authorizes EPA to decline to regulate radionuclide emissions from NRC-licensees under the CAA provided that EPA determines, by rule, and after consultation with NRC, that the regulatory scheme established by NRC protects the public health with an ample margin of safety. The legislative history of section 112(d)(9) provides additional guidance as to what is meant by "an ample margin of safety to protect the public health" and what process the Administrator should follow in making that determination in a rulemaking proceeding under section 112(d)(9). The Conference Report points out that the "ample margin of safety" finding under section 112(d)(9) is the same "ample margin of safety" requirement that was contained in section 112 of the CAA prior to its amendment in 1990. The conferees also made clear that the process the Administrator was expected to follow in making any such determination under section 112(d)(9) was that "required under the decision of the U.S. Court of Appeals in *NRDC* v. *EPA*, 824 F.2d 1146 (D.C. Cir 1987) (*Vinyl Chloride*)." H.R. Rep. 952, 101st Cong., 2d Sess. 339 (1990).

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. EPA conducted a risk analysis in promulgating subpart T in 1989. At that time, EPA determined that the 20 pCi/m²-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 achievement of the flux standard at non-operational sites in a timely manner. In conducting this rescission rulemaking, EPA is not revisiting the risk analysis nor 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/m²-s flux standard established in subpart T as being a safe level in a timely manner thereby rendering subpart T unnecessarily duplicative.

EPA's proposed determination that the NRC regulatory program protects public health with an ample margin of safety includes a finding that NRC and the affected Agreement States are implementing and enforcing, in significant part on a programmatic and site-specific basis: (1) The regulations governing the disposal of uranium mill tailings promulgated by EPA and NRC consistent with the settlement agreement described above; and (2) the operating license (i.e., tailings closure plan) requirements that establish milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m²-s flux standard. In addition, in determining whether EPA's and NRC's 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.

2. EPA's UMTRCA Standards

As discussed above, EPA has modified its UMTRCA regulations (40 CFR part 192 subpart D) to require compliance with the 20 pCi/m²-s flux standard as expeditiously as practicable considering technological feasibility (and factors beyond the control of the licensee), and to require appropriate monitoring to verify the efficacy of the design of the permanent radon barrier. 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 expects that these compliance schedules will be developed consistent with the targets set forth in the MOU as reasonably applied to the specific circumstances of each site.

When EPA promulgated subpart T it recognized that many sources might not be able to comply with the two year compliance date then required pursuant to section 112. Based on this, subpart T includes a provision that in such a case EPA would "establish a compliance agreement which will assure that disposal will be completed as quickly as possible." 40 CFR 61.222(b). The time

period required for closure under subpart D embodies the same approach. In practice, therefore, both subpart T and subpart D establish the same basic timeframes for achievement of the flux standard. Assuming NRC and the Agreement States faithfully implement subpart D and the license amendments required under subpart D, EPA would not expect there to be any significant difference between these two programs in the amount of time required for sites to comply with the flux standard.

As discussed above, subpart D as amended, provides that NRC may grant an extension of time to comply with either of the following deadlines: (1) Performance of milestones based upon a finding that compliance with the 20 pCi/m^2-s flux standard has been met, or (2) final compliance beyond the date or relevant milestone based upon cost. EPA considers these two bases upon which NRC may grant an extension to be mutually exclusive, i.e., a request for a specific extension may be based on one or the other but not both grounds. If a milestone is being extended for a basis other than cost, such an extension may be granted if NRC finds that compliance with the 20 pCi/m^2-s flux standard has been demonstrated using EPA Method 115 or an NRC approved alternative. In addition the site must continue to demonstrate compliance with this flux standard on an annual basis. However, if a licensee requests extension of the final compliance date (or relevant milestone) based upon cost, such an extension may only be granted if NRC finds that the three criteria specified in 40 CFR section 192.32(a)(3)(iii) are met. Any extensions of the final compliance date based upon cost will be granted on a site-specific basis.

If a licensee requests an extension of the final compliance date based upon cost, technology may not be used as a basis for granting the extension unless the costs are grossly excessive, as measured by normal practice within the industry. EPA recognizes that the emissions from the pile may exceed the 20 pCi/m^2-s flux standard pending final compliance, but believes these increases will be minimal and of limited duration. Further, a lifetime individual risk of approximately 1 in 10,000 is considered safe under the benzene policy based on 70 years of exposure. 54 FR 38044 (September 14, 1989). EPA does not anticipate the short extensions in the time to complete the radon barrier contemplated in subpart D and the proposed NRC conforming amendments to increase the maximum lifetime individual risk beyond 1 in 10,000, the level which EPA found to protect the public health with an ample margin of safety in promulgating subpart T. 54 FR 51656 (December 15, 1989). EPA believes this is consistent with the reality of short-term risks from radon emissions during the period of delay, and consistent with the risks associated with negotiated compliance agreements when non-operational sites fail to close within the two year period required by subpart T. EPA believes these emissions should not exceed those emissions which could occur under subpart T if compliance agreements had been negotiated. Extensions based upon cost will only be granted if NRC or an Agreement State finds, after providing an opportunity for public participation, that the emissions caused by the delay will not cause significant incremental risk to the public health. Additionally, a site requesting an extension based upon cost must demonstrate that it is making a good faith effort to emplace the permanent radon barrier. In many situations, where an interim cover is in place, radon emissions are significantly reduced and tailings which are wet or ponded emit no significant levels of radon. EPA would also evaluate extensions under the proposed section 61.226(c) provisions to determine whether the Agency should reconsider the rescission and seek reinstatement of subpart T, on either a programmatic or site-specific basis. Thus, under the circumstances, EPA believes affording authority for extensions of the final compliance date based upon cost is not inconsistent with protecting the public health and today's proposal.

Additionally, NRC or an Agreement State may extend the date for emplacement of the radon barrier based on "factors beyond the control of the licensee," as that term is implicit in the definition of "as expeditiously as practicable." EPA understands that under subpart D's provisions there is no bar to NRC or an Agreement State reconsidering a prior decision establishing a date for emplacement of the radon barrier that meets the standard of "as expeditiously as possible." Such reconsideration could, for example, be based on the existence of factors beyond the control of the licensee, or on a change in any of the various factors that must be considered in establishing a date that meets the "as expeditious as practicable" standard of § 192.32(a)(3)(i). However EPA stresses that such a change in circumstances would not automatically lead to an extension. It would be incumbent on NRC or an Agreement State to evaluate all the factors relevant under § 192.32(a)(3)(i) before it could change a previously established milestone or date for emplacement of the final barrier, and any new date would have to meet the standard set out in § 192.32(a)(3)(i). Finally, NRC's and Agreement States' authority to reconsider previously established milestones or dates would include authority to shorten or speed up such dates, as well as extend them. EPA also expects that public participation consistent with that level of participation provided in the MOU and the settlement agreement will be afforded the public by NRC and the Agreement States in amending the licenses due to "factors beyond the control of the licensee," or for any other basis.

3. NRC's Proposed Conforming Regulations

As discussed previously, NRC has proposed regulations to conform appendix A of 10 CFR part 40 to EPA's general standards promulgated under UMTRCA; the proposed rule is currently in the public comment stage 58 FR 58657 (November 3, 1993). Because the public process may alter the final rule, especially since an alternative for *Criterion 6A* paragraph 2 was proposed, EPA believes that the adequacy of the NRC conforming regulations can only be determined after the NRC conforming regulations are finalized. In making this determination, EPA's decision will be based upon the Commission's final rule which must implement 40 CFR part 192, subpart D. EPA will determine whether NRC's regulations support rescission in its final rule to rescind subpart T. EPA is inviting comments as to whether NRC's proposed conforming regulations support EPA's proposal(s) to rescind subpart T by either adequately and appropriately implementing EPA's amendments to 40 CFR part 192, subpart D, or may reasonably be expected to do so prior to rescission of subpart T.

4. License Amendments to Date

Table 1 illustrates that all NRC and affected Agreement State licenses, except one, have been modified pursuant to the MOU. Attachment A to the MOU, developed in conjunction with each site and considering the particular circumstances of that site, lists target dates for emplacement of the permanent radon barrier with "a guiding objective that this occur to all current disposal sites by the end of 1997, and within seven years of when the existing operating and standby sites cease operation." 56 FR 67568 (December 31, 1991). The MOU requires NRC and the Agreement States to

"ensure . . . 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 mill tailings." Id. The compliance schedules are to be developed consistent with the MOU targets as reasonably applied to the specific circumstances of each site with a goal that final closure occur by December 31, 1997, for those non-operational uranium mill tailings piles listed in the MOU.

TABLE 1.—STATUS OF RECLAMATION PLANS FOR NON-OPERATIONAL URANIUM MILL TAILINGS IMPOUNDMENTS [1]

Facility	Approval date for reclamation plan	Approval date for reclamation milestones	MOU date for final radon cover	License date for final radon cover
ANC, Gas Hills, WY	4/10/83	11/5/92	1995	12/31/94 [2] 6/30/96
ARCO Coal, Bluewater, New Mexico	1/30/92	11/9/92	1995	12/28/94
Atlas, Moab, Utah	[3]	11/4/92	1996	12/31/96
Conoco, Conquista, Texas	9/8/93	9/8/93	1996	12/31/93
Ford-Dawn Mining, Ford, WA	9/30/93	9/30/93	2010	[4] 12/31/18
Hecla Mining, Duria, CO	9/30/93	9/30/93	1997	12/31/95
Homestake Milan, NM	7/23/93	11/9/92	[5] 1996/2001	[5] 12/31/01
Pathfinder-Lucky Mc, Gas Hills, Wyoming	9/17/93	12/29/92	1998	9/30/98
Petrotomics, Shirley Basin, WY	10/23/89	1/21/93	1995	12/31/95
Quivira, Ambrosia Lake, NM	10/5/90	1/22/93	1997	12/31/97
Rio Algom, Lisbon, UT	9/29/93	12/31/96	1996	12/31/96
Sohio L-Bar, Cebolleta, New Mexico	5/1/89	11/4/92	1992	12/31/92
UMETCO, Gas Hills, Wyoming	Various-early 80s.	12/2/92	1995	12/31/95
UMETCO, Maybell, CO	7/30/93	7/30/93	1997	12/31/97
UMETCO, Uravan, CO	12/31/87	12/31/87	[6] 2002	12/31/96
UNC, Church Rock, NM	3/11/92	10/29/92	1997	12/31/97
Union Pacific, Bear Creek, Wyoming	4/3/92	11/5/92	1996	12/31/96
WNI, Sherwood, WA	9/30/93	9/30/93	1996	[4] 1/31/98
WNI, Split Rock, WY	6/17/93	11/5/92	1995	12/31/94

[1] NRC and the affected Agreement States committed to complete review and approval of reclamation plants, including schedules for emplacement of earthern covers on non-operational tailings impoundments by September 30, 1993.
[2] Two impoundments; 1996 date is for impoundment which was accepting waste from off-site for disposal. Licensee has requested an amendment for a one year extension of dates for placement of radon barrier on the two piles.
[3] Delayed pending resolution of issues raised in response to **Federal Register** notice dated July 20, 1993.
[4] Closure date change is because of groundwater remediation schedule.
[5] Two impoundments: large impoundment to be completed by 1996, small impoundment by 2001. Final radon barrier placement over the entire pile shall be completed within two years of completion of groundwater corrective actions.
[6] Date in the MOU is for final reclamation.

EPA believes the NRC and the Agreement States are acting in good faith to implement their commitments under the MOU by amending the site licenses. The license amendments by NRC and the affected Agreement States appear to reflect closure as expeditiously as practicable, thus supporting rescission of subpart T and a determination that the NRC program protects public health with an ample margin of safety. In addition, consistent with their commitments under the MOU, NRC and the affected Agreement States are providing opportunities for public participation in the license amendment process.

The license amendments noted in Table 1 reflect consistent application of the dates contained in the MOU. Three exceptions are worth noting. First, although the license amendment for the Atlas site is not complete, EPA is confident that NRC is actively pursuing final resolution of the pending reclamation plan. Pending final approval of a reclamation plan, the Atlas site is continuing to emplace an interim cover on the pile to control radon emissions.

Second, the license amendments for the ANC Gas Hills site address two separate impoundments. Consistent with the MOU, the license amendment for the non-operational impoundment contains a December 31, 1994, date for emplacement of the permanent radon barrier. Additionally, an impoundment previously designated as operational for in-situ waste disposal is now non-operational. Emplacement of the permanent radon barrier on this second impoundment is scheduled to be completed by June 30, 1996, well within the seven year goal of the MOU for impoundments which cease operations after December 31, 1991.

Lastly, the license amendment dates for two additional sites, the Ford-Dawn Mining site and the WNI site both located in the Agreement State of Washington, are also beyond the dates contained in the MOU. However, Washington State notes that for these sites the closure date was changed because of the groundwater remediation schedule, and the difficulty experienced in drying the piles due to the evaporation and precipitation rates. In sum, EPA believes that the license amendments adopted by NRC and the Agreement States to date reflect a good faith attempt to implement the MOU and require closure of the sites as expeditiously as practical considering technological feasibility.

While NRC and the Agreement States have obtained license amendments for all but one of the relevant sites, they have not as of yet established a record for enforcement of these milestones, including action on requests for extensions. Based on NRC representations, no milestones occurring after the date of the MOU, October 1991, have been missed and as included in footnote 2 of Table 1, an application for an extension is pending but no action has been taken. However, given their response to the requirements of the MOU, and the rulemaking being conducted by NRC to implement the requirements of subpart D, EPA believes it may well be able to conclude that the milestones established in the licenses

for emplacement of the permanent radon barrier (i.e., the tailings closure plan (radon)) will be implemented and enforced in significant part on a programmatic and site-specific basis. The relevant portions of the amended licenses have been placed in the docket for this action, as well as letters from NRC to EPA apprising the Agency of the status of the license amendments.

EPA and NRC have completed many actions required by the MOU, including: revising the NRC and affected Agreement State licenses to reflect the MOU requirements, promulgating amendments to EPA's UMTRCA regulations at 40 CFR part 192, subpart D, and proposing to conform the NRC regulations at 40 CFR part 10 to EPA's revised UMTRCA regulations. Based on EPA's review, to date, of the regulatory program established by NRC under UMTRCA (as contained at 10 CFR part 40, appendix A), EPA has determined that, once the timing and monitoring concerns are fully and finally addressed consistent with EPA's UMTRCA standards, as well as consistent with and including the other actions (e.g., license amendments) 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 (including factors beyond the control of the licensee). Additionally, EPA expects that when the NRC regulations are finally amended, the Agency should be able to find that NRC and the affected Agreement States are or will be implementing and enforcing, in significant part, the regulations governing disposal of tailings and the operating license requirements (tailings closure plan (radon)) that establish milestones for emplacement of a permanent radon barrier that will achieve compliance with the 20 pCi/m²-s flux standard on a programmatic and a site-specific basis. The Agency intends "in significant part" to mean that NRC or an affected Agreement State is implementing and enforcing the regulatory and operating license requirements in a manner that EPA reasonably expected to not materially (i.e., more than de minimis)[1] interfere with compliance with the 20 pCi/m²-s standard as expeditiously as practicable considering technological feasibility (including factors beyond the control of the licensee). As part of its determination, EPA requests comments on whether any judicial challenge to EPA's and NRC's regulations are to be expected and whether such challenge presents a significant risk of interference with the purposes and objectives of the MOU, as reflected in the regulatory changes as part of its determination of whether EPA's and NRC's regulatory changes have been effectively promulgated.

EPA does not intend to take final action on its proposals until 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 at 40 CFR part 192, subpart D. EPA does intend, however, to take final action on the proposed rescission prior to the time compliance with the 20 pCi/m²-s flux standard is achieved at all sites.

B. Reconsideration Provisions

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. 42 U.S.C. 2114(c). NRC considers the term "practicability" to include certain economic considerations not contemplated by the requirement of the MOU that compliance occur as expeditiously as practicable considering technological feasibility. In promulgating subpart T, the CAA did not permit, and EPA did not consider, site-specific waivers from ultimate compliance with that standard. Thus, as a theoretical matter, EPA recognized in its December 1991 proposal that this waiver authority might be exercised in a manner not addressed in the MOU even after the UMTRCA regulations have been promulgated and each license amended, although EPA has no reason to believe such relaxation of restriction will actually occur. Nevertheless, EPA recognized 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.

1. December 31, 1991 Proposed Rule To Rescind subpart T

In response to the concern over the waiver authority in the Atomic Energy Act, and in order to ensure its exercise does not alter EPA's finding that the NRC regulatory program protects public health with an ample margin of safety, EPA announced in its December 31, 1991, proposal that certain conditions and grounds for reconsideration would be included in any final decision to rescind subpart T. In this way, EPA might 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 would revisit that finding should NRC or the affected Agreement States substantially deviate from that program. Thus, in December 1991, EPA proposed certain conditions and grounds for reconsideration, to provide assurance that any finding by the Agency that the NRC program is sufficient to justify rescission of subpart T under CAA section 112(d)(9) would be revisited if the NRC program is actually implemented in a manner inconsistent with that finding. The specific reconsideration options proposed by EPA were published at 56 FR 67565 (December 31, 1991).

2. Reconsideration Options

EPA has reviewed the various options for reconsideration proposed in December 1991 in light of the comprehensive details added to the terms of the MOU by the settlement agreement finalized in April 1993. EPA is now proposing an additional reconsideration option that is a combination of the options proposed in December 1991. It is in effect a hybrid of that December 1991 proposal. While EPA is not withdrawing its prior reconsideration proposal and the reconsideration options contained therein, the additional reconsideration option proposed today is currently preferred by EPA.

EPA believes the following reconsideration provisions, which include both programmatic and site-specific bases for reinstatement, represent a comprehensive approach under both the MOU and settlement agreement. EPA requests comment on these proposed reconsideration provisions. The Agency notes that the 20 pCi/m²–s flux standard must be met by all sites as provided by 40 CFR part 192, subpart D. EPA does not intend to reconsider the decision to rescind subpart T for any site that is in fact meeting the 20 pCi/m²-s flux standard, absent other factors that would indicate the need for reinstatement.

Today's proposal establishes an obligation for the Administrator to reinstate subpart T as applied to owners and operators of non-operational uranium mill tailings disposal sites licensed by NRC or an affected Agreement State provided certain conditions are met. Additionally, today's proposal sets forth the procedures for EPA to act on a petition to reconsider rescission of subpart T which seeks such reinstatement.

[1] The phrase "de minimis" as used in this notice is not intended to be restricted to the meaning of section 112(g)(1)(A) of the Clean Air Act, as amended.

However, the proposed provisions are not intended to be exclusive. EPA reserves the right to initiate reinstatement of subpart T if appropriate. Pursuant to section 553(e) of the Administrative Procedure Act (5 U.S.C. 553(e) interested persons may petition the EPA to initiate reinstatement of subpart T, in addition to petitions for reinstatement under the procedures proposed today.

The proposed reconsideration provisions establish procedures for persons to petition EPA for reconsideration of the rescission and seek reinstatement of subpart T and EPA's response to such petitions. Provisions for the substantive conditions for reconsideration of the rescission of this subpart and subsequent reinstatement for NRC-licensees are also included. Under the provisions proposed today, a person may petition the Administrator for reconsideration of the rescission and seek reinstatement of subpart T under § 61.226(a) which provides for programmatic and site-specific reinstatement. If reconsideration is initiated it must be conducted pursuant to notice and comment rulemaking. It is important that any alleged failures by NRC or an affected Agreement State to implement and enforce the regulations governing uranium mill tailings or the applicable license requirements be addressed in a timely manner. These provisions are intended to ensure that persons may seek recourse from the Administrator if they are adversely affected by the failure of NRC or an affected Agreement State to implement and enforce, in significant part, on a programmatic and a site-specific basis the regulations governing the disposal of uranium mill tailings promulgated by EPA and NRC, requirements of the tailings closure plan or operating license requirements establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m²–s flux standard. Thus, EPA is proposing to establish a non-discretionary duty to take final action granting or denying an authorized petition for reconsideration of the rescission of subpart T within 300 days of receipt of the petition. If EPA grants such petition it would then proceed to initiate rulemaking to reinstate subpart T. This rulemaking, however, is not subject to the 300 day time period. This schedule is intended to provide EPA and NRC adequate time to resolve any potential problems identified by a petition. Failure to meet this deadline may be subject to an action in District Court under CAA section 304 to order that EPA take final action on the petition. Review of that final response would be in the Circuit Court of Appeals under CAA section 307(b). If EPA grants such a petition and initiates rulemaking to reinstate subpart T, then final agency action would not occur until EPA had concluded such rulemaking. Consistent with the settlement agreement, EPA may propose to grant or deny the petition within 120 days of receipt, allow a comment period of at least 60 days, and take final action granting or denying the petition within 120 days of the close of the comment period.

Under the proposed procedures, EPA shall summarily dismiss without prejudice a § 61.226(a) petition to reconsider the rescission and seek reinstatement of subpart T on a programmatic basis, unless the petitioner demonstrates that it provided written notice of the alleged failure to NRC or an affected Agreement State at least 60 days before filing its petition with EPA. This notice to NRC must include a statement of the grounds for such a petition. This notice requirement may be satisfied, among other ways, by submissions or pleadings submitted to NRC during a proceeding conducted by NRC. The purpose of this advance notice requirement is to provide NRC or an affected Agreement State with an opportunity to address the concerns raised by the potential petitioner. Additionally, EPA shall summarily dismiss without prejudice a section 61.226(a) petition to reconsider the rescission and seek reinstatement of subpart T on a site-specific basis, unless the petitioner demonstrates that it provided, at least 60 days before filing its petition with EPA, a written request to NRC or an affected Agreement State for enforcement or other relief, and unless the petitioner alleges that NRC or the affected Agreement State failed to respond to such request by taking action, as necessary, to assure timely implementation and enforcement of the 20 pC1/m²–s flux standard. This provision is intended to provide NRC or an Agreement State with an opportunity to address the concerns raised by the potential petitioner through its standard enforcement mechanisms.

The Administrator may also initiate reconsideration of the rescission and reinstatement of subpart T as applied to owners and operators of non-operational uranium mill tailings disposal sites if EPA believes it is appropriate to do so. For example, EPA may initiate such reconsideration if it has reason to believe that NRC or an affected Agreement State has failed to implement and enforce, in significant part, the regulations governing the disposal of uranium mill tailings promulgated by EPA and NRC or the tailings closure plan (radon) requirements establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m²–s flux standard. Before the Administrator initiates reconsideration of the rescission and reinstatement of subpart T, EPA shall consult with NRC prior to initiating a rulemaking to address EPA's concerns. If the consultation does not resolve the concerns, EPA shall provide NRC with 60 days notice of the Agency's intent to initiate rulemaking to reinstate this subpart.

Upon completion of a reconsideration rulemaking, EPA may: (1) Reinstate subpart T on a programmatic basis if EPA determines, based on the record, that NRC has significantly failed to implement and enforce, in significant part, on a programmatic basis, (a) the regulations governing the disposal of uranium mill tailings promulgated by EPA and NRC or (b) the operating license requirements establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m²-s flux standard; (2) reinstatement subpart T on a site-specific basis if EPA determines, based on the record, the NRC or an affected Agreement State has significantly failed to implement and enforce, in significant part, on a site-specific basis, (a) the regulation governing the disposal of uranium mill tailings promulgated by EPA and NRC or (b) the operating license requirements establishing milestones for the purpose of replacing a permanent radon barrier will not achieve compliance with the 20 pCi/m²-s flux standard; or (3) issue a finding that NRC is implementing and enforcing on either a site-specific or programmatic basis the regulations operating license requirements described above and that reimbursement of subpart T is not appropriate.

The proposed regulations establish an obligation for the Administrator to reinstate subpart T as applied to owners and operators of non-operational uranium mill tailings disposal sites if the Administrator determines by rulemaking, based on the record, that NRC or an affected Agreement State has failed on a programmatic basis to implement and enforce, in significant part, the regulations governing the disposal of uranium mill tailings promulgated by EPA and NRC or the tailings closure plan (radon) requirements establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve

compliance with the 20 pCi/m²-s flux standard. The Administrator also shall reinstate subpart T on a site-specific basis as applied to owner and operators of non-operational uranium mill tailings disposal sites if the Administrator determines by rulemaking, based on the record, that NRC or an affected Agreement State has failed on a site-specific basis to achieve compliance by the operator of the site or sites with applicable license requirements, regulations, or standards implemented by NRC and the affected Agreement States. Under today's proposal, EPA shall reinstate subpart T only for the failures enumerated in the preceding sentence that may reasonably be anticipated to significantly interfere (i.e., more than de minimis) with the timely emplacement of a permanent radon barrier constructed to achieve compliance with the 20 pCi/m²-s flux standard at uranium mill tailings disposal sites. EPA intends "in significant part" to mean that in rescinding subpart T, EPA must find that NRC or an affected Agreement State is implementing and enforcing, on a programmatic and a site-specific basis: (1) The regulations governing the disposal of uranium mill tailings promulgated by EPA and NRC consistent with the MOU and settlement agreement and (2) the tailings closure plan (radon) requirements establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m²-s flux standard in a manner that is not reasonably expected to materially (i.e., more than de minimis) interfere with compliance with the 20 pCi/m²-s flux standard as expeditiously as practicable considering technological feasibility (including factors beyond the control of the licensee). Reinstatement would require an EPA finding that NRC or an affected Agreement State has failed to implement and enforce in this manner.

IV. Request for Comments

EPA requests comments on its proposed determination that the NRC regulatory program protects public health with an ample margin of safety, including comments on whether: (1) EPA has effectively promulgated appropriate revisions to 40 CFR part 192, subpart D; (2) NRC's regulations at 10 CFR part 40, appendix A either already adequately and appropriately implement the revisions to EPA's regulations, or may reasonably be expected to do so prior to rescission of subpart T; (3) the revision of NRC and affected Agreement State licenses reflect the new requirements of subpart D; and (4) any judicial or administrative challenge to EPA or NRC regulations is expected to present a significant risk of interference with full compliance with the MOU and the settlement agreement. Additionally, EPA requests comments on the proposed reconsideration provisions described above and included in a new section 61.226 added to subpart T. In particular EPA requests comments as to whether these provisions effectively implement the regulatory approach of the MOU and settlement agreement, especially the terms providing specific time periods for a reconsideration rulemaking.

V. Miscellaneous

A. Paperwork Reduction Act

There are no information collection requirements in this proposed rule.

B. Executive Order 12866

Under Executive Order 12866, (58 FR 57735, October 4, 1993) the Agency must determine whether this regulation, if promulgated, is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This action is not a significant regulatory action as that term is defined in Executive Order 12866, since it will not result in an annual effect on the economy of $100 million or another adverse economic impact; it does not create a serious inconsistency or interfere with another agency's action; it does not materially alter the budgetary impacts of entitlements, grants, user fees, etc.; and it does not raise novel legal or policy issues. Thus, 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 or an affected Agreement State is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

C. 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.

Most firms that own uranium mill tailings piles are divisions or subsidiaries of major U.S. and international corporations. Many are parts of larger diversified mining firms which are engaged in a number of raw materials industries; the disposal of uranium mill tailings piles represents only a small portion of their overall operations. Others are owned by major oil companies and electric utilities which were engaged in horizontal and vertical integration, respectively, during the industry's growth phase in the 1960s and 1970s.

It was found in 1989 rulemaking that there was no significant impact on small business entities. There has been no change in this, and no new tailings piles have been constructed since 1989. I certify that this proposed rule to rescind 40 CFR part 61, subpart T as applied to owners and operators of NRC licensed non-operational uranium mill tailings disposal sites, if promulgated as a final rule, will not have significant economic impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 61

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

Dated: January 31, 1994.

Carol M. Browner,

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 revised 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 Radiation Control Act of 1978.

(b) [Reserved]

3. Section 61.221 is amended by revising the introductory text, paragraphs (a) and (c) and by adding paragraphs (d) and (e) 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.

* * * * *

(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.

(e) *In significant part* means in a manner that is not reasonably expected to materially (i.e., more than de minimis) interfere with compliance with the 20 pCi/m²-s flux standard as expeditiously as practicable considering technological feasibility (including factors beyond the control of the licensee).

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 an owner or operator to complete disposal within that time, EPA shall, after consultation with the mill owner or operator, 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.

6. Section 61.226 is added to subpart T to read as follows:

§ 61.226 Reconsideration of rescission and reinstatement of this subpart.

(a) Reinstatement of this subpart.

(1) The Administrator shall reinstate 40 CFR part 61, subpart T as applied to owners and operators of non-operational uranium mill tailings disposal sites that are licensed by the NRC or an affected Agreement State if the Administrator determines by rulemaking, based on the record, that NRC or an affected Agreement State has:

(i) Failed on a programmatic basis to implement and enforce, in significant part, the regulations governing the disposal of uranium mill tailings promulgated by EPA and NRC or the tailings closure plan (radon) (i.e., contained in the operating license) requirements establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m²-s flux standard; and

(ii) Those failures may reasonably be anticipated to significantly interfere (i.e., more than de minimis) with the timely emplacement of a permanent radon barrier constructed to achieve compliance with the 20 pCi/m²-s flux standard at uranium mill tailings disposal sites.

(2) The Administrator shall reinstate 40 CFR part 61, subpart T on a site-specific basis as applied to owners and operators of non-operational uranium mill tailings disposal sites that are licensed by the NRC or an affected Agreement State if the Administrator determines by rulemaking, based on the record:

(i) That NRC or an affected Agreement State has failed on a site-specific basis to achieve compliance by the operator of the site or sites with applicable license requirements, regulations, or standards implemented by NRC and the affected Agreement States; and

(ii) Those failures may reasonably be anticipated to significantly interfere (i.e., more than de minimis) with the timely emplacement of a permanent radon barrier constructed to achieve compliance with the 20 pCi/m²-s flux standard at uranium mill tailings disposal sites.

(b) Procedures to Petition for Reconsideration of Rescission of this subpart.

(1) A person may petition the Administrator to reconsider the rescission and seek reinstatement of this subpart under § 61.226(a).

(2) EPA shall summarily dismiss a petition to reconsider rescission and seek reinstatement of this subpart under § 61.226(a)(1) (programmatic basis), without prejudice, unless the petitioner demonstrates that written notice of the alleged failure(s) was provided to NRC at least 60 days before filing the petition with EPA. This notification shall include a statement of the grounds for such a petition and this notice requirement may be satisfied by, but is not limited to, submissions or pleadings submitted to NRC during a proceeding conducted by NRC.

(3) EPA shall summarily dismiss a petition to reconsider rescission and seek reinstatement of this subpart under § 61.226(a)(2) (site-specific basis), without prejudice, unless the petitioner demonstrates that a written request was made to NRC or an affected Agreement State for enforcement or other relief at least 60 days before filing its petition with EPA, and unless the petitioner alleges that NRC or the affected Agreement State failed to respond to such request by taking action, as necessary, to assure timely implementation and enforcement of the 20 pCi/m²-s flux standard.

(4) Upon receipt of a petition under § 61.226(b)(1) that is not dismissed under § 61.226 (b)(2) or (b)(3), EPA will propose to grant or deny an authorized petition to reconsider, take comments on the Agency's proposed action, and take final action granting or denying such petition to reconsider within 300 days of receipt.

(c) Reconsideration of Rescission of this subpart Initiated by the Administrator.

(1) The Administrator may initiate reconsideration of the rescission and reinstatement of this subpart as applied to owners and operators of non-operational uranium mill tailings disposal sites if EPA has reason to believe that NRC or an affected Agreement State has failed to implement and enforce, in significant part, the regulations governing the disposal of uranium mill tailings promulgated by EPA and NRC or the tailings closure plan (radon) requirements establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m^2-s flux standard.

(2) Before the Administrator initiates reconsideration of the rescission and reinstatement of this subpart under § 61.226(c)(1), EPA shall consult with NRC to address EPA's concerns and if the consultation does not resolve the concerns, EPA shall provide NRC with 60 days notice of the Agency's intent to initiate rulemaking to reinstate this subpart.

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