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**Part III**

**Environmental  
Protection Agency**

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**40 CFR Part 61  
National Emissions Standards for  
Hazardous Air Pollutants; Final Rule**

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 61**

[FRL-5011-1]

RIN 2060-AE23

**National Emissions Standards for Hazardous Air Pollutants**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

**SUMMARY:** EPA is rescinding 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). As required by section 112(d)(9) of the Clean Air Act as amended, EPA has determined that the NRC regulatory program protects public health with an ample margin of safety to the same level as would implementation of subpart T. Subpart T is a National Emission Standard for Hazardous Air Pollutants (NESHAPs) which was published on December 15, 1989 and which regulates emissions of radon-222 into the ambient air from uranium mill tailings disposal sites. Subpart T continues to apply to unlicensed uranium mill tailings disposal sites currently regulated under subpart T that are under the control of the Department of Energy (DOE).

**DATES:** This rule is effective June 29, 1994. The provisions in this rule will be applied immediately to all affected facilities including existing sources. Under section 307(b)(1) of the Clean Air Act, judicial review of this final action is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit within 60 days of publication of this rule. Under section 307(b)(2) of the Act, the provisions which are the subject of today's rule will not be subject to judicial review in any civil or criminal proceedings brought by EPA to enforce these requirements.

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**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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**1. 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 (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 called for an impoundment design that would achieve compliance with the 20 pCi/m<sup>2</sup>-s flux standard for 1,000 years, or at least 200 years, but prior to the recent EPA amendments 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 groundwater protection at 40 CFR part 192 (50 FR 41852). NRC completed conforming amendments for groundwater protection in appendix A of 10 CFR part 40 in 1987.

Neither the UMTRCA standards promulgated by EPA in 1983 nor the NRC standards promulgated in 1980 and amended in 1985, established compliance schedules to ensure that non-operational tailings piles would be closed, and that the 20 pCi/m<sup>2</sup>-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 then 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 published 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 USC 7901 *et. seq.*, or are under the control of NRC or Agreement State-licenses 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.

Prior to today's action, subpart T of 40 CFR part 61, limited 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 required that these sites, which consist of large (i.e., numerous acre) impoundments or piles, comply with a radon flux standard of 20 pCi/m<sup>2</sup>-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 called 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 pollutants under then existing CAA section 112, which was first announced in the benzene NESHAPs. 54 FR 38044 (September 14, 1989). The NESHAPs 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 UMTRCA (42 U.S.C. 2022, 7901-7942) would eventually limit radon emissions from those sites to a flux of 20 pCi/m<sup>2</sup>-s (see 40 CFR part 192, subpart D), and thus EPA referred to that level as "baseline." EPA's risk assessment revealed that compliance with the 20 pCi/m<sup>2</sup>-s baseline would result in an estimated lifetime risk to the maximally exposed individual of approximately 1x10<sup>-4</sup> 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/m<sup>2</sup>-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/m<sup>2</sup>-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/m<sup>2</sup>-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. 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 mandated 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 then 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. Under subpart D, sites are now required to construct a permanent radon barrier pursuant to a design to achieve compliance with the 20 pCi/m<sup>2</sup>-s flux

standard as expeditiously as practicable considering technological feasibility (including factors beyond the control of the licensee). EPA announced its 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 then 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 certain date nor did they require monitoring to confirm the efficacy of the design of the cover. 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 final NRC 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. (59 FR 28220, June 1, 1994).

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/m<sup>2</sup>-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 those petitions remained pending before EPA (at least in part), EPA has taken several actions to address the issues they raised, 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 rulemaking.

#### 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/m<sup>2</sup>-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 proposed rescission of subpart T under section 112(d)(9), and issued 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 regulation 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)). NRC agreed in principle with the agreement by letter.

The settlement agreement adds comprehensive detail to, and thereby continues, the approach set forth in the MOU. Actions implemented under the settlement agreement should 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. This enables EPA to satisfy the criteria 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 providing for changing EPA's UMTRCA regulations such that public health would be as well protected under UMTRCA as would implementation of subpart T under the CAA.

#### II. Rationale for Final 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 as amended, 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/m<sup>2</sup>-s UMTRCA standard is met protects public health with an ample margin of safety. Thus, since the regulatory program implemented by NRC assures that sites will achieve the baseline (20 pCi/m<sup>2</sup>-s) as soon as practicable considering technological feasibility and factors beyond the control of the licensee, the NRC program protects the public to the same extent as subpart T and subpart T is not 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 occurs as expeditiously as practicable considering technological feasibility and factors beyond the control of the licensee, 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 not revisiting that analysis here.

#### 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 sites (i.e., Title I), and gives NRC the responsibility for regulating those sites that are owned and operated by its licensees (i.e., Title II). 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 published 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. Among the requirements of subpart D is the mandate that radon releases from the disposal sites not exceed a flux of 20 pCi/m<sup>2</sup>-s. 40 CFR 192.32 (a) and (b). Other aspects of subpart D pertain to groundwater, monitoring, design, and duration of closure. See 40 CFR 192.32 and 192.33. With the exception of the groundwater provisions at 40 CFR 192.20(a)(2)-(3), applicable to Title I sites, all aspects of EPA's regulations were upheld by the Tenth Circuit in *AMC v. Thomas*, 772 F.2d at 640. EPA is currently engaged in rulemaking to address the court's remand of the Title I groundwater provisions.

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. 10 CFR part 40, appendix A, 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<sup>2</sup>-s throughout that period. The design must be able to withstand extreme weather and other natural forces. Upon review, EPA believed 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 1983 general standards or NRC's 1985 amended

implementing criteria 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 NESHAPs 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<sup>2</sup>-s standard.

*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 section 112 of the CAA for those 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 resulting 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<sup>2</sup>-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 at 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<sup>2</sup>-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 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<sup>2</sup>-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, NRC 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.

Under the agreement between EDF, AMC, individual sites and EPA, the pending litigation would not be dismissed until after certain terms in the agreement were fulfilled. The parties agreed that upon rescission of subpart T they would jointly move the court to dismiss the challenges pertaining solely to subpart T. (Paragraph III.1.) By the terms of the agreement (paragraph III.15.), AMC's pending administrative petition for reconsideration of subpart T becomes moot with the final rescission of subpart T. Moreover, the agreement does not legally bind or otherwise restrict EPA's rights or obligations under law rather, by its terms (paragraph III.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.

*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 NESHAPs 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 NESHAPs 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<sup>2</sup>-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) closure of the site closure 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 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 determined to promote timely compliance with the 20 pCi/m<sup>2</sup>-s flux standard. Milestones which are not reasonably determined 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<sup>2</sup>-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<sup>2</sup>-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<sup>2</sup>-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 tailings closure plan (radon), 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<sup>2</sup>-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 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/m<sup>2</sup>-s flux standard. After emplacement of a permanent radon barrier designed and constructed to achieve compliance with, including attainment of, the 20 pCi/m<sup>2</sup>-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/m<sup>2</sup>-s flux standard, 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/m<sup>2</sup>-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 based on a finding that compliance with the 20 pCi/m<sup>2</sup>-s flux standard has been demonstrated by appropriate monitoring, compliance with the 20 pCi/m<sup>2</sup>-s flux standard must be demonstrated each year during the period of the extension.

## 2. NRC Regulatory Action

On May 20, 1994, the Commissioners approved final amendments conforming 10 CFR part 40, appendix A to 40 CFR part 192, subpart D. The final regulations adopted by NRC amend Criterion 6, add a new Criterion 6A and new definitions contained in the Introduction to appendix A. Criterion 6 was revised to provide for appropriate verification that the "final" (or "permanent" as defined by EPA) radon barrier, as designed and constructed, is effective in controlling releases of radon-222 to a level no greater than 20 pCi/m<sup>2</sup>-s when averaged over the entire pile or impoundment. Criterion 6(2) (59 FR 28220, June 1, 1994). The licensee must use EPA Method 115, or another method approved by the NRC as being at least as effective in demonstrating the effectiveness of the "final" radon barrier. *Id.* If the reclamation plan specifies phased emplacement of the "final" radon barrier, the verification must be performed on the portion of the

pile or impoundment as the "final" radon barrier for that portion is emplaced. Additionally, certain reporting and recordkeeping is required in connection with the verification of the effectiveness of the "final" radon barrier. Criterion 6(4) (59 FR 28220, June 1, 1994).

The Introduction section of appendix A to part 40 was amended by adding the following definitions: as expeditiously as practicable considering technological feasibility available technology factors beyond the control of the licensee, final radon barrier, milestone, operation and reclamation plan. While subpart D requires emplacement of the "permanent" radon barrier NRC requires emplacement of the "final" radon barrier. According to NRC, the definition of final radon barrier, is intended to "facilitate the drafting of clear regulatory text and to eliminate any ambiguity with respect to compliance with the 20 pCi/m<sup>2</sup>-s 'flux standard' after completion of the final earthen barrier and not as a result of any temporary conditions or interim measures. (59 FR 28222, June 1, 1994). The final definitions of factors beyond the control of the licensee and available technology have been revised to include a list of possible factors and examples of grossly excessive costs respectively, consistent with subpart D.

Criterion 6A paragraph 1 requires completion of the "final" radon barrier as expeditiously as practicable considering technological feasibility after a pile or impoundment containing uranium byproduct materials ceases operation, and requires it to be done in accordance with a written Commission-approved reclamation plan. In addition, this paragraph requires inclusion of specified interim milestones as a condition of the individual site license. Criterion 6A also specifies 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. 10 CFR part 40, appendix A Criterion 6A (2) and (3) (59 FR 28220, June 1, 1994). These provisions vary somewhat from NRC's proposal, to reflect changes made in EPA's final amendments to subpart D at §§ 192.32(a)(3) (iv) and (v). The changes are "(1) that only byproduct material, not 'similar' material, will be approved for continued disposal after the final radon barrier is essentially complete and the verification of radon flux levels has been made, and (2) that public participation is specifically to be provided for only in the case of continued disposal after radon flux verification, in addition to general

clarification of the paragraph." (59 FR 28224, June 1, 1994).

Additionally NRC's final regulations in Criterion 6A provide for public participation consistent with the MOU and the settlement agreement. Such public participation will be provided through a notice published in the *Federal Register* including the opportunity for public comment on the proposed license amendment and the opportunity to request an informal hearing in accordance with the Commission's regulations at 10 CFR part 2, subpart L. The final regulations contain various revisions to NRC's proposal, both substantive and editorial in nature, primarily for consistency with EPA's final amendments to subpart D.

EPA believes the final revisions clarify NRC's proposal. EPA further believes that although NRC's conforming regulations are not identical to subpart D, the differences are minor in nature, and properly reflect application of the subpart D requirements to NRC's separate regulatory program. NRC's final rule appropriately conforms its regulations to 40 CFR part 192 subpart D. EPA notes that NRC's conforming amendments are an important consideration in EPA's determination that the NRC regulatory program protects the public health with an ample margin of safety.

## 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, and interim stabilization). 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 incorporating the reclamation plan 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 is actively pursuing a timely final decision on the acceptability of the existing Atlas site 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. On March 30, 1994, NRC published a Notice of Intent to Prepare an Environmental Impact Statement and to Conduct a Scoping Process. (59 FR 14912). In that notice, NRC states its determination "that approval of the revised reclamation plan constitutes a major Federal action and that based on the level of controversy related to the proposed action [on-site reclamation] and uncertainties associated with the unique features of the Moab site, preparation of an EIS in accordance with the National Environmental Policy Act (NEPA) and the NRC's implementing requirements in 10 CFR part 51 is warranted. (59 FR 14913, March 30, 1994). The notice describes the proposed action, possible alternative approaches and the scoping process. The alternative approaches include moving the pile to one of two alternative sites. *Id.*

The near edge of the town of Moab 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 part 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.

NRC announced on May 11, 1994 (59 FR 24490) that Atlas Corporation applied to amend condition 55 of its source material license. Atlas proposed to amend the milestone dates by extending the dates for windblown tailings retrieval and placement on the pile, placement of the interim cover and placement of the final radon barrier by one year. NRC has informed EPA that the Commission approved the extension of the date for placement of the interim cover to February 15, 1995 and that the milestone for emplacement of the "final" radon barrier was not extended. See Docket Entry A91-67 IV-D-50 (Letter from NRC to Atlas).

Since NRC will notice any proposed change in the milestone date for emplacement of the permanent radon barrier, EPA and others will have the opportunity to monitor such an extension at that time. Under the present circumstances, it appears an extension of the MOU target date of 1996 would be consistent with the factors to be considered under the "as expeditiously as practicable" standard at 40 CFR 192.32(a)(3)(i), since NRC has determined there is a need for consistency with mandatory requirements of the National Environmental Policy Act (NEPA) and there may be factors beyond the control of the licensee. 40 CFR 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/m<sup>2</sup>-s flux standard contained in the amendments to subpart D. (56 FR 67568, December 31, 1991) (MOU, a copy of which was printed at the end of the proposed rule to rescind subpart T).

### III. Final Rule to Rescind 40 CFR Part 61, Subpart T for NRC and Agreement State Licensees

EPA is rescinding 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 Final Rule pursuant to its authority under section 112(d)(9) of the CAA, as amended in 1990. The support for this action includes (1) the MOU, which reflects consultation with NRC and the affected Agreement States and sets forth a course of conduct to bolster NRC's regulatory program under UMRCA 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 NRC and Agreement State actions concerning license amendments, to date, and (5) NRC's amendments to its implementation regulations at appendix A, 10 CFR part 40.

#### A. 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 accompanying S. 1630 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. Rep. No. 101-952, 101st Cong., 2d Sess. 339 (1990), reprinted in 1 A Legislative History of the Clean Air Act Amendments of 1990, at 1789 (1993) (hereinafter "Legislative History CAAA90").

EPA has already made a determination in promulgating subpart T that compliance with the 20 pCi/m<sup>2</sup>-s flux 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/

m<sup>2</sup>-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 either the risk analysis or decision methodology that supported the promulgation of subpart T rather, EPA is only visiting whether NRC's regulatory program under UMTRCA will result in meeting the 20 pCi/m<sup>2</sup>-s flux standard established in subpart T as being the level that provides an ample margin of safety with compliance achieved in a timely manner thereby rendering subpart T unnecessarily duplicative.

EPA's 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 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/m<sup>2</sup>-s flux standard.

## 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/m<sup>2</sup>-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 occur, as a practical matter, because this schedule represents the earliest that the sites could be closed when all factors are considered. EPA expects that these compliance schedules were developed and will be modified 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<sup>2</sup>-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<sup>2</sup>-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 by the nature of the criteria 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<sup>2</sup>-s flux standard pending final compliance, but believes these increases will be minimal and of limited duration. EPA does not anticipate the short extensions in the time to complete the radon barrier contemplated in subpart D and the NRC conforming amendments to increase the maximum lifetime individual risk beyond 1 in 10,000, the level which EPA found presumptively safe under the benzene policy and for

this category protective of the public health with an ample margin of safety in promulgating subpart T 54 FR 51656 (December 15, 1989). EPA believes that during the short extensions, 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. If NRC or an Agreement State uses this flexibility, public notice is required, and as appropriate, EPA would be aware of its use and could also monitor extensions under the provisions of § 61.226(c) 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.

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 practicable considering technological feasibility." 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 expeditiously 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 changed 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 or an Agreement State in amending a license due to "factors beyond the control of the licensee," or for any other basis.

3. NRC's Conforming Regulations

As discussed previously, the Commission has approved final regulations to conform appendix A of 10 CFR part 40 to EPA's general standards promulgated under UMTRCA. (59 FR 28220, June 1, 1994.) EPA is today making a determination that NRC's final regulations support rescission. EPA believes NRC's final regulations adequately and appropriately implement EPA's amendments to 40 CFR part 192, subpart D. This determination is supported by the comments received in response to EPA's supplemental proposal to rescind subpart T. (59 FR 5674, February 7, 1994.) All commenters agreed that

NRC's proposed conforming regulations support EPA's proposal to rescind subpart T by either adequately and appropriately implementing subpart D, or may reasonably be expected to do so when finalized.

4. License Amendments

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.* Under the MOU, the compliance schedules (i.e., tailings closure plans (radon) under subpart D, as amended) were 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. EPA believes the NRC and the Agreement States have acted in good faith to implement their

commitments under the MOU by amending the site licenses. EPA also believes that uranium mill tailings disposal site owners and operators have acted in good faith by voluntarily requesting the license amendments. The license amendments by NRC and the affected Agreement States appear to reflect closure as expeditiously as practicable under the terms of the MOU and the requirements of subpart D as amended, thus supporting rescission of subpart T and a determination that the NRC program protects public health with an ample margin of safety. See Docket Entry A91-67 IV-D-46 (NRC Comments in Response to EPA's February 7, 1994 Proposal); Docket Entry A91-67 II-D-23 (February 7, 1994, Note to Docket from Gale Bonanno, Office of Radiation and Indoor Air, Criteria and Standards Division detailing approval of NRC licenses and milestone schedules); Docket Entry A91-67 II-D-45 (June 1, 1994, Note to Docket from Gale Bonanno, Office of Radiation and Indoor Air, Criteria and Standards Division detailing approval of Agreement State licenses and milestone schedules); Docket Entry A91-67 IV-D-52 (June 13, 1994, Letter to Gail Bonanno from State of Washington); Docket Entry A91-67 IV-D-49 (Letter to Gail Bonanno [sic] providing information for Washington State licensees, Dawn Mining Company and Western Nuclear, Inc.). 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.

TABLE 1.—STATUS OF RECLAMATION PLAN FOR NON-OPERATIONAL URANIUM MILL TAILINGS IMPOUNDMENTS<sup>1</sup>

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 .....	<sup>3</sup>	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	<sup>4</sup> 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	<sup>5</sup> 1996/2001	<sup>5</sup> 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	1/22/83	1997	<sup>7</sup> 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 .....	<sup>8</sup>	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	<sup>9</sup> 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	<sup>4</sup> 1/31/98

TABLE 1 —STATUS OF RECLAMATION PLANS FOR NON-OPERATIONAL URANIUM MILL TAILINGS IMPOUNDMENTS<sup>1</sup>—  
Continued

Facility	Approval date for rec lamation plan	Approval date for rec lamation milestones	MOU date for final radon cover	License date for final radon cover
WNI, Split Rock, WY .....	6/17/93	11/5/92	1995	12/31/94

NRC and the affected Agreement States committed to complete review and approval of reclamation plans, including schedules for emplacement of earthen covers on non-operational tailings impoundments by September 30, 1993.

<sup>2</sup>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.

<sup>3</sup>Delayed pending resolution of issues raised in response to *Federal Register* notice dated July 20, 1993.

<sup>4</sup>Closure date change is because of groundwater remediation schedule.

<sup>5</sup>Two impoundments: large impoundment to be completed by 1996, small impoundment by 2001 except for areas covered by evaporation ponds. Final radon barrier placement over the remainder of the small impoundment shall be completed within two years of completion of groundwater corrective actions.

<sup>6</sup>Date in the MOU is for final reclamation.

<sup>7</sup>Two impoundments: final radon barrier placement on both by December 31, 1997 One active cell.

<sup>8</sup>Various early 1980s.

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 to incorporate the reclamation plan for the Atlas site is not complete, EPA is confident that NRC is actively pursuing final resolution of the pending reclamation plan. In the notice announcing its intent to prepare an environmental impact statement, NRC published a tentative schedule to: prepare a draft EIS and issue for public comment in October 1994; provide a 45 day comment period; and publish the final EIS in April 1995. (59 FR 14914, March 30, 1994). Pending final approval of a reclamation plan, the Atlas site is continuing to emplace an interim cover on the pile to control radon emissions, and recently received approval to extend the date for placement of the interim cover to February 15, 1995. The date for placement of the "final" radon barrier was not extended by NRC and remains December 31, 1996. See Docket Entry A91-67 IV-E-5 (Note to Docket from Gale Bonanno, Office of Radiation and Indoor Air, Criteria and Standards Division, summary of telephone conversation with legal counsel to AMC); Docket Entry A91-67 IV-D-50 (Letter from NRC to Atlas).

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. On February 11, 1994, NRC published a notice of receipt of a request to amend the reclamation schedule at the ANC Gas Hills site. (59 FR 6658). ANC has requested a one-year extension of the current date for emplacement of the permanent radon barrier. ANC

"believes [it] cannot begin authorized restoration activities in the time necessary to meet current reclamation milestone dates," due to an NRC communication "that a previous amendment request for a reclamation redesign proposal dated April 16, 1992, would not be reviewed by late 1992 or early 1993." *Id.* NRC notes that ANC is continuing to monitor and maintain the interim cover. Further, NRC states—

Approval of the request will be based on determination there be no harm to human health or the environment, that reclamation will be completed as expeditiously as practical[sic], verification that rescheduling reclamation will not impact the final closure date for the entire facility.

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.

On May 9, 1994, ANC informed NRC by letter that it would be ceasing operations and going out of business by the end of May 1994. On May 13, 1994, NRC issued an Order and Demand for Information to ANC. See Docket Entry A91-67 IV-D-47 This Order requires ANC to continue complying with all applicable license conditions, including monitoring and reclamation activities. The Order further states "[D]iscontinuance of those programs and functions in the manner described by the Licensee in its letter of May 9, 1994, would constitute a willful violation of ANC's license." According to the Order, abandonment would constitute a "deliberate violation" of section 184 of the AEA of 1954, as amended, 10 CFR 40.41.(b), and 10 CFR

40.42. The Order further states that "such a deliberate act of abandonment would be a serious violation of the AEA NRC regulations, and ANC's license," and could subject ANC and the individuals causing the violations to further enforcement actions and potential criminal sanctions. NRC also ordered that ANC submit additional information in order for NRC to determine "whether enforcement action should be taken to ensure compliance with NRC statutory and regulatory requirements."

EPA notes that the actions taken to date by NRC regarding this site indicate a good faith intention to implement the MOU and the requirements of subpart D and to respond quickly as the situation at the ANC Gas Hills site develops. EPA fully expects that NRC will take actions consistent with the Commission's enforcement policy and authority. See 10 CFR part 2, subpart B and appendix C. While difficult enforcement questions are raised about this site, EPA notes that the same questions would be raised if subpart T were not rescinded. Under the provisions of the rule adopted today, if future developments meet the criteria and conditions for reconsideration of rescission, the Agency expects it would receive a petition pursuant to § 61.226(b). EPA would then take action consistent with those provisions at that time. In any case, EPA reserves the right to initiate reconsideration if appropriate.

Lastly, the license amendment dates for two additional sites, the Ford-Dawn Mining site and the Western Nuclear, Inc. (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 the State of Washington for these two sites reflect a good faith attempt to implement the MOU and reflect closure of the sites as expeditiously as practical considering technological feasibility under subpart D.

While NRC and the Agreement States have obtained license amendments for all but one of the relevant sites, they have not as yet established a record for enforcement of the milestones, including action on requests for extensions. To date, only one extension for placement of the interim cover at the Atlas site has been approved by NRC. Based on NRC representations, no milestones occurring after the date of the MOU, October 1991, have been missed and, as noted in footnote 2 of Table 1, an application for another extension is pending but no action has been taken. However, given their response to the requirements of the MOU, and the rulemaking conducted by NRC to implement the requirements of subpart D, EPA expects 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 almost all of the actions required by the MOU, including: revising the NRC and affected Agreement State licenses to reflect the MOU and regulatory requirements, promulgating amendments to EPA's UMTRCA regulations at 40 CFR part 192, subpart D, and revising the NRC regulations at 10 CFR part 40 to conform to EPA's revised UMTRCA regulations. Based on EPA's review, to date, of the regulatory program established by NRC under UMTRCA (including amended 10 CFR part 40, appendix A), EPA has determined that the timing and monitoring concerns are fully addressed consistent with EPA's UMTRCA standards, and the NRC criteria result in reclamation designs and schedules fully adequate to ensure compliance with the 20 pCi/m<sup>2</sup>-s flux standard as expeditiously as practicable considering technological feasibility (including factors beyond the control of the licensee). EPA today finds 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 license requirements (tailings closure plan (radon)) that establish milestones for emplacement of a permanent radon barrier that will achieve compliance with the 20 pCi/m<sup>2</sup>-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 license requirements in a manner that EPA reasonably expected to not materially (i.e., more than de minimis)<sup>1</sup> interfere with compliance with the 20 pCi/m<sup>2</sup>-s standard as expeditiously as practicable considering technological feasibility (including factors beyond the control of the licensee).

As announced in the February 7 1994, proposal, EPA is taking today's action since NRC's regulations at 10 CFR part 40, appendix A, were effectively revised, as necessary and appropriate to implement the revisions to EPA's regulations at 40 CFR part 192, subpart D. As stated in the February 1994 proposal, EPA intended to take final action on the proposed rescission prior to the time compliance with the 20 pCi/m<sup>2</sup>-s flux standard is achieved at all sites.

#### 5. Judicial or Administrative Challenges

Neither EPA nor any commenter is aware of any judicial or administrative challenge to these regulations that is pending. Thus, EPA is aware of no challenge which would present a significant risk of interference with the purposes and objectives of the MOU, as reflected in the regulatory changes.

#### 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/m<sup>2</sup>-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

<sup>1</sup>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.

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 was 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. On February 7 1994, EPA proposed 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 did not withdraw its prior reconsideration proposal and the reconsideration options contained therein, the additional reconsideration option proposed in February 1994 was preferred by EPA.

#### 3. Reconsideration Provisions Adopted Today

EPA believes the following reconsideration provisions adopted

today, which include both programmatic and site-specific bases for reinstatement and represent a comprehensive approach under both the MOU and settlement agreement. The Agency notes that the 20 pCi/m<sup>2</sup>-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/m<sup>2</sup>-s flux standard, absent other factors that would indicate the need for reinstatement. For example, EPA may initiate reconsideration under § 61.226 even if a site is meeting the 20 pCi/m<sup>2</sup>-s flux standard if there are factors which show that NRC or an Agreement State failed to implement and enforce in significant part, the applicable regulations, e.g., failure of that site to emplace a permanent radon barrier designed to meet the requirements of subpart D.

This action amends subpart T and 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, this action sets forth the procedures for EPA to act on a petition to reconsider rescission of subpart T which seeks such reinstatement. However, these provisions are not intended to be exclusive. EPA reserves the right to initiate reinstatement of subpart T if appropriate. Pursuant to section 553(a) 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 today's procedures.

The reconsideration provisions set forth in § 61.226 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 these provisions, 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 procedures. 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 license requirements establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m<sup>2</sup>-s flux standard. Thus, EPA is establishing 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. The rulemaking to reinstate subpart T, 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 300-day deadline for a decision on whether to initiate rulemaking or not could lead to a citizen suit action in a federal District Court under CAA section 304 for an order that EPA take final action on the petition. Review of that final response would be in a federal 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 today's procedures, EPA shall summarily dismiss without prejudice a § 61.226(b) 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 § 61.226(b) 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 pCi/m<sup>2</sup>-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/m<sup>2</sup>-s flux standard. Before the Administrator initiates reconsideration of the rescission and reinstatement of subpart T, EPA shall consult with NRC 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 license requirements establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m<sup>2</sup>-s flux standard; (2) reinstate subpart T on a

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

The 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/m<sup>2</sup>-s flux standard. The Administrator also shall reinstate subpart T on a site-specific basis 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 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 action, EPA shall be required to 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/m<sup>2</sup>-s flux standard at uranium mill tailings disposal sites. In rescinding subpart T EPA intends "in significant part" to mean that 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/m<sup>2</sup>-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/m<sup>2</sup>-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 Discussion of Comments and Response to Comments From NPR

Public hearings on EPA's December 31, 1991, proposal to rescind subpart T (56 FR 67561) were held on January 15, 1992 in Washington, D.C. and on January 21-22, 1992 in Santa Fe, New Mexico. Representatives of the Nuclear Regulatory Commission (NRC), the American Mining Congress (AMC), the owners and operators of individual sites and the Southwest Research and Information Center (SWRIC) testified at these hearings. Written comments were also received from the Environmental Defense Fund (EDF), NRC, AMC, owners and operators of individual sites, the Department of Energy and the SWRIC.

In February 1993, an agreement was reached between EPA, EDF, NRDC, AMC, and individual uranium mill tailings disposal sites to settle pending litigation and administrative proceedings, avoid potential future litigation, and otherwise agree to a potential approach to regulation of NRC and Agreement State licensed non-operational uranium mill tailings disposal sites. See 58 FR 17230 (April 1, 1993) (notice announcing settlement agreement under CAA section 113(g)). NRC agreed in principle with the settlement agreement. The settlement agreement added comprehensive detail to, and thereby continued, the approach set forth in the MOU published with the 1991 proposal. (56 FR 67568, December 31, 1991).

Written comments in response to EPA's February 7, 1994 supplemental proposal were received from NRC, EDF, AMC, Homestake Mining Company, Rio Algom Mining Corp., ARCO and Envirocare of Utah, Inc.

Many of the parties who commented on the December 1991 proposal also signed the settlement agreement and commented on the February 1994 proposal. In certain cases, a party's

comments to the December 1991 proposal are inconsistent with and conflict with comments later submitted in response to the 1994 proposal. Given the intervening settlement agreement and the revisions to EPA's and NRC's UMTRCA regulations, EPA believes that the more recent comments submitted by a party in response to the 1994 proposal, should be accorded more weight than comments previously submitted by that same party in 1991, where there is inconsistency between the comments.

In addition, EPA's review of the comments has been limited to the question of whether EPA should rescind subpart T. This rulemaking was not intended to reconsider and did not address whether EPA should have promulgated subpart T in 1989. EPA therefore rejected as irrelevant to this rulemaking, comments addressed to the validity or appropriateness of the promulgation of subpart T.

##### 1. General

In response to the 1991 and 1994 Notices of Proposed Rulemaking (NPR), NRC, environmental and industry groups generally support EPA's proposal to rescind 40 CFR part 61, subpart T as applied to owners and operators of NRC and Agreement State licensed non-operational uranium mill tailings disposal sites. Various commenters to the 1994 proposal suggested specific revisions to the proposed regulatory text and preamble. The Agency has reviewed all comments and suggested revisions carefully. Revisions to the regulatory text and preamble have been made where deemed appropriate.

##### 2. Request for Comments Contained in the 1994 NPR

In the February 1994 proposal, EPA requested 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.

Several commenters responded to the Agency's request for comments. Commenters believed EPA's amendments to 40 CFR part 192, subpart D fulfill the intent of the settlement agreement with respect to actions required by EPA. However, certain commenters noted that the settlement agreement called for action by both EPA and NRC. The commenters universally agreed that based upon NRC's November 3, 1993 proposal, NRC may reasonably be expected to adequately and appropriately implement the Agency's amendments to 40 CFR part 192, subpart D. These commenters believe that when finalized, NRC's regulations at 10 CFR part 40, appendix A should adequately comply with the settlement agreement and conform to EPA's subpart D UMTRCA regulations.

Many commenters noted that NRC and the Agreement States have faithfully implemented their MOU commitment to complete review and approval by no later than September 1993 of detailed reclamation plans including schedules for emplacing an earthen cover on non-operational tailings impoundments to control emissions of radon-222 to 20 pCi/m<sup>3</sup>-s. See 56 FR 67568, December 31, 1991. Several commenters noted that although the license amendment for the Atlas site in Moab, Utah is not yet complete, that site represents a unique situation and should not affect EPA's decision to rescind subpart T.

No commenter was aware of any pending judicial or administrative challenge that would present a significant risk of interference with the MOU and the settlement agreement.

Additionally, EPA requested comments on the proposed reconsideration provisions included in a new § 61.226 added to subpart T. In particular EPA requested comments as to whether these provisions effectively implement the regulatory approach of the settlement agreement, especially the terms providing specific time periods for a reconsideration rulemaking. One commenter believed the criteria and procedures for reconsidering the decision to rescind subpart T were consistent with the terms of the settlement agreement. Several other commenters commented as to specific aspects of those provisions and suggested revisions to the regulatory language for consistency with the settlement agreement. Specific comments pertaining to the proposed provisions for reconsideration of the rescission and reinstatement of subpart T are addressed in Section 4 below.

There was widespread agreement among the commenters that the EPA and NRC regulatory and licensing framework that either has been, or is in the process of being, implemented will ensure that non-operational uranium mill tailings disposal sites will achieve the 20 pCi/m<sup>3</sup>-s flux standard as expeditiously as practicable considering technological feasibility.

### 3. Rescission of Subpart T

#### 3.1 *Timing of Rescission*

*Comment:* In response to the 1991 proposal, one commenter noted EPA should not rescind subpart T until the Agency is assured that the MOU between EPA, NRC and the affected Agreement States is implemented and EPA's amendments to its UMTRCA regulations at 40 CFR part 192, subpart D are complete.

*Response:* As stated in the preamble to the 1994 proposal and the final rule amending 40 CFR part 192, subpart D, EPA is now rescinding subpart T for NRC-licensed uranium mill tailings disposal sites due to the completion of the Agency's amendments to subpart D, completion of NRC conforming regulations, and completion by NRC and affected Agreement States of various license amendments containing schedules for emplacement of the permanent radon barrier. EPA believes it is appropriate to rescind subpart T pursuant to the authority of section 112(d)(9) of the CAA, as amended, since NRC has established a regulatory program to ensure that non-operational uranium mill tailings piles will be closed as expeditiously as practicable considering technological feasibility.

#### 3.2 *Section 112(d)(9) of the Clean Air Act, As Amended ("Simpson Amendment")*

*Comment:* In response to the 1991 proposal, one commenter argued section 112(d)(9) of the CAA, as amended, applies prospectively and does not authorize EPA to rescind a previously promulgated standard.

*Response:* The Agency disagrees and believes that section 112(d)(9) of the CAA authorizes EPA to rescind previously promulgated regulations if certain determinations are made by EPA. Congress clearly intended to give the Agency the discretion to rescind certain previously promulgated regulations and thereby relieve affected facilities from the burdens associated with parallel regulation when the NRC regulatory program would protect public health with an ample margin of safety. See, e.g., 136 Cong. Rec. S 3797-99 (daily ed. April 3, 1990), reprinted in

4 A Legislative History of the Clean Air Act Amendments of 1990, at 7156-7162 (1993). ("Legislative History, CAAA 1990"). This Senate floor debate on Amendment No. 1457 to S. 1630 evidences a clear intention that section 112(d)(9) authorizes rescission of previously promulgated radionuclide NESHAPs. Senator Simpson, the sponsor of the amendment, stated that "[p]assage of this amendment will allow EPA to replace the emission standards issued by EPA in November 1989, for NRC-licensed facilities, including power plants, uranium fuel cycle facilities, and by-product facilities, if that agency concludes that the existing NRC regulatory program adequately protects public health." 4 Legislative History, CAAA 1990 at 7158. Also see 1 Legislative History, CAAA 1990 at 773 (1993) (statement by Senator Burdick during debate on the Conference Committee Report) ("It is clear that the existing regulatory program under the Atomic Energy Act protects the public health with an ample margin of safety. Under these circumstances, additional or dual regulation under the Clean Air Act does not make any sense.")

Additionally in commenting on the 1994 proposal, this commenter expressed the belief that the 1994 proposal is consistent with the terms of the settlement agreement between EPA, EDF NRDC, AMC and individual site owners and operators. The settlement agreement, as described in detail above, promotes the objectives of section 112(d)(9) of the CAA by establishing an agreed upon framework for reconsideration of rescinding subpart T and making minor modifications to the AEA regulatory program for closure of the uranium mill tailings disposal sites. Clearly rescission of the previously promulgated subpart T was contemplated by the parties to the settlement agreement. This particular commenter and EPA were parties to that agreement. EPA continues to implement the terms of the settlement agreement, including today's action rescinding subpart T. Thus, EPA is rejecting the prior comment to the 1991 proposal.

*Comment:* In response to the 1991 proposal, a commenter suggested EPA publish its finding that the NRC regulatory program protects the public health with an ample margin of safety.

*Response:* Pursuant to the settlement agreement, EPA published and invited comment on its proposed determination that the NRC regulatory program protects public health with an ample margin of safety on February 7, 1994 (59 FR 5674). That determination is also contained in this action, which will be published in the **Federal Register**.

*Comment:* Commenters suggested in response to the 1991 proposal that EPA could not determine that the NRC regulatory program protects public health with an ample margin of safety so long as NRC retains the authority to waive standards and time schedules for compliance, and there are no provisions under the AEA for citizens' suits.

*Response:* The commenters suggest that the NRC regulatory program does not ensure that EPA's revised UMTRCA regulations (40 CFR part 192, subpart D) would apply, since NRC has the authority to grant waivers under the AEA due to cost or technological feasibility. EPA recognizes that the NRC has authority under the AEA to waive for economic reasons strict compliance with the requirement that sites meet the 20 pCi/m<sup>2</sup>-s standard as expeditiously as practicable considering technological feasibility (including factors beyond the control of the licensee). AEA section 84c., 42 USC 2114c. However, the full exercise of this authority is not contemplated by either the MOU or the settlement agreement, described above. If this waiver authority is used in a manner inconsistent with the purposes and objectives of the MOU and settlement agreement, today's action includes procedural and substantive provisions designed to facilitate reconsideration of the rescission and possible reinstatement of subpart T.

The amendments to subpart T provide clear authority and procedures for EPA to revisit today's finding should NRC or the affected Agreement States deviate from the regulatory program in place in a manner which materially (i.e., more than de minimis) interferes with compliance with the 20 pCi/m<sup>2</sup>-s flux standard as expeditiously as practicable considering technological feasibility (including factors beyond the control of the licensee). Additionally, EPA believes the actions taken to date by NRC, including the license amendments and the final amendments to the NRC conforming regulations, as described above, reflect the good faith effort on the part of NRC to implement the MOU. Thus, EPA believes under these circumstances NRC's authority to waive strict compliance with the flux standard and the time for compliance does not preclude EPA from finding NRC's regulatory program protects the public health with an ample margin of safety.

Further, the Agency believes that Congress was aware that the legislative authority under the CAA provided for citizen suits while the AEA did not contain such provisions. Congress clearly envisioned that circumstances might be such that EPA would make the finding required by the Simpson

Amendment. In making today's ample margin of safety determination, EPA considered whether NRC is implementing and enforcing, in significant part, the regulations governing disposal of tailings and the license requirements which establish milestones for emplacement of a permanent radon barrier that will achieve compliance with the 20 pCi/m<sup>2</sup>-s flux standard on a programmatic and site-specific basis. UMTRCA gives NRC and the Agreement States the responsibility to implement and enforce regulations promulgated under UMTRCA. If, in the future, NRC or the Agreement States do not implement and enforce, in significant part, the regulations governing disposal of tailings and the license requirements which establish milestones for emplacement of a permanent radon barrier that will achieve compliance with the 20 pCi/m<sup>2</sup>-s flux standard on a programmatic or site-specific basis, reconsideration and reinstatement provisions adopted today allow EPA to reconsider its rescission of subpart T and thus, possibly reinstate the CAA standards. The settlement agreement executed between EPA, EDF NRDC and AMC which provided the regulatory approach for today's action had as an objective the rescission of subpart T. Moreover, NRC's final amendments to the conforming regulations also provide enhanced opportunities for public participation under certain circumstances.

### 3.3 Section 112(q)(3) of the Clean Air Act, As Amended

*Comment:* The comments to the 1991 proposal included a comment that the "Savings Provision" (section 112(q)(3)) of the CAA requires that subpart T remain in effect.

*Response:* Section 112(q)(3) provides this section, as in effect prior to the date of enactment of the Clean Air Act Amendments of 1990, shall remain in effect for radionuclide emissions from disposal of uranium mill tailings piles, unless the Administrator, in the Administrator's discretion, applies the requirements of this section as modified by the Clean Air Act Amendments of 1990 to such sources of radionuclides.

EPA believes the plain language of section 112(q)(3) gives the Administrator the discretion to rescind subpart T pursuant to section 112(d)(9) or allow subpart T to remain in effect pursuant to section 112 as in effect prior to the CAAA of 1990. In this rulemaking, EPA acted to apply section 112 as modified by the 1990 amendments, and pursuant to section

112(d)(9) to decline to regulate "radionuclide emissions from any category or subcategory of facilities licensed by the Nuclear Regulatory Commission (or an Agreement State)" 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. Although the commenter suggests that section 112(q)(3) should cause the Administrator to not rescind subpart T such an interpretation is not harmonious and is inconsistent with the intent of Congress in enacting the CAAA of 1990.

Additionally EPA received comments from this commenter supporting the 1994 proposal, expressing the belief that the 1994 proposal is consistent with the terms of the settlement agreement. The settlement agreement promotes the objectives of section 112(d)(9) of the CAA as amended by establishing an agreed upon framework for consideration of the rescission of subpart T and minor modifications to the AEA regulatory program for closure of uranium mill tailings disposal sites. This commenter, together with EPA and others, was a party to that agreement, which clearly envisions rescission of subpart T.

Thus, EPA is rejecting this comment, since a plain reading of section 112(q)(3) authorizes EPA to exercise its discretion under section 112(d)(9) and as a party to the settlement agreement the commenter clearly supports the goal of the agreement that subpart T be rescinded.

### 3.3 Section 122(a) of the Clean Air Act, as Amended in 1977

*Comment:* The commenter asserts in response to the 1991 proposal that EPA should not rescind subpart T because such rescission is inconsistent with section 122(a) of the CAA of 1977. The commenter contends section 122(a) was not repealed by the 1990 amendments to the CAA and that it required the Agency to list radionuclides as a hazardous air pollutant if the Administrator found that public health was threatened due to air emissions of radionuclides.

*Response:* EPA disagrees with the commenter's interpretation that rescission of subpart T pursuant to section 112(d)(9) of the CAA is inconsistent with section 122(a) of the

CAA. On December 27, 1979, EPA listed radionuclides, including those defined by the AEA as byproduct material, as a Hazardous Air Pollutant pursuant to section 112(b)(1)(A) of the CAA as amended in 1977 (44 FR 76738). In that notice EPA stated that

In accordance with the requirements of sections 122 and 112, the Agency finds that studies of the biological effects of ionizing radiation indicate that exposure to radionuclides increases the risk of human cancer and genetic damage. Based on this information, the Administrator has concluded that emission of radionuclides may reasonably be anticipated to endanger public health, and that radionuclides constitute hazardous air pollutants within the meaning of the Clean Air Act.

*Id.* On April 6, 1983 (48 FR 15076) EPA announced proposed standards for four sources of emissions of radionuclides, and its decision to not regulate uranium mill tailings together with other sources. Under court order, EPA finalized the regulations proposed in 1983 on February 6, 1985. 50 FR 5190. See also *Sierra Club v. Ruckelshaus*, No. 84-0656 (U.S. District Court for the Northern District of California). On September 24, 1986, EPA promulgated a final rule regulating radon-222 emissions from licensed uranium mill processing sites by establishing work practices for new tailings. (51 FR 34056). On April 1, 1988, EPA requested a remand for this standard. On EPA's motion, the Court placed the uranium mill tailings NESHAPs on the same schedule as the other radionuclide NESHAPs to reconsider the standards in light of *Natural Resources Defense Council v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (*Vinyl Chloride*). EPA subsequently promulgated 40 CFR part 61, subpart T, the subject of today's action.

EPA believes section 122 of the CAA must be read consistent with and in harmony with the 1990 amendments to the CAA. EPA took action under section 122 when it listed radionuclides. EPA subsequently regulated radionuclides emissions under section 112. Section 112(d)(9) of the CAA authorizes EPA to now decline to regulate radionuclide emissions from any category or subcategory of facilities licensed by the NRC (or an Agreement State) if the Administrator determines, by rule, and after consultation with the NRC, that the regulatory program established by the NRC pursuant to the AEA 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. While section 122 addresses whether radionuclides should be listed, section 112(d)(9) addresses a separate issue—whether EPA should continue to regulate or initiate regulation of radionuclide air emissions under section 112 based on the NRC regulatory program.

Although the commenter suggests EPA should not rescind subpart T based on section 122(a), EPA believes such a reading of sections 112(d)(9) and 122(a) is not harmonious and is inconsistent with the intent of Congress in enacting section 112(d)(9).

Additionally, EPA received comments from this particular commenter in response to the 1994 proposal expressing the belief that the 1994 proposal to rescind subpart T is consistent with the terms of the settlement agreement. The settlement agreement promotes the objectives of section 112(d)(9) of the CAA as amended through the rescission of subpart T and minor modifications to the AEA regulatory program for closure of the uranium mill tailings disposal sites. This commenter, together with EPA and others, was a party to that agreement. Through today's action rescinding subpart T, EPA is furthering the goal of the settlement agreement.

Thus, EPA is rejecting this comment, since a reading of section 122(a) apparently preventing such rescission is inconsistent with the intent of Congress in enacting section 112(d)(9), and as a party to the settlement agreement the commenter was aware of and supported the goal of the agreement that subpart T be rescinded.

#### 4. Proposed Amendments to 40 CFR Part 61, Subpart T

##### 4.1 General

*Comment:* The rationale for adding the definitions *residual radioactive material* and *tailings*, while deleting the definition of *uranium byproduct material* or *tailings* is not clear. The proposed definitions appear to apply to Title I sites, and significant problems might arise if these definitions were to be applied to Title II sites in the event of reinstatement of subpart T.

*Response:* § 61.220(a) as adopted today states that subpart T applies only to Title I sites except for the reconsideration and reinstatement procedures in § 61.226. The phrase or uranium byproduct materials" was deleted to further clarify that subpart T applies to Title I sites. The phrases "residual radioactive materials" and "tailings" currently appear in § 61.220(a). EPA noted in describing DOE sites in the 1989 BID that the

tailings located at these sites contain residual radioactive materials, including traces of unrecovered uranium, various heavy metals and other elements. *Background Information Document: Risk Assessments; Environmental Impact Statement; NESHAPs for Radionuclides*, Volume 2 at 8-2 (EPA/520/1-89-006-1, September 1989).

EPA believes it appropriate to define *residual radioactive material* and *tailings* for purposes of this subpart. The Agency proposed these definitions on December 31, 1991 and February 4, 1994. (56 FR 67561, 59 FR 5687). The proposed definitions for these terms were consistent with definitions contained in UMTRCA. 42 U.S.C. 7911, sections 101(7) and 101(8). The terms are defined in the Final Rule by expressly referencing UMTRCA, to ensure consistency with that Act. The Agency does not believe these definitions would be problematic if the Agency decided to reinstate subpart T since EPA would amend subpart T at that time to apply to the Title II sites and to include appropriate definitions.

*Comment:* The provisions of subpart T, with the exception of § 61.226, should only apply to Title I sites and some apparent references to Title II sites remain.

*Response:* EPA is rescinding subpart T as applied to NRC or Agreement State licensed non-operational uranium mill tailings disposal sites, and thus, does not intend any provision of subpart T excepting § 61.226 and applicable definitions, to apply to these sites. EPA has revised § 61.220(a) to reflect this intent.

*Comment:* Section 61.226(c)(2) as proposed suggests that no future action can be taken to resolve EPA's concerns after EPA notifies NRC of its intent to initiate a rulemaking to reinstate subpart T.

*Response:* EPA disagrees with the commenter's suggestion that no further action may be taken to resolve the Agency's then existing concerns after EPA notifies NRC of its intent to proceed with a rulemaking to reinstate subpart T. The purpose of consulting with NRC about the Agency's concerns prior to notifying NRC and the subsequent 60-day period is to provide EPA and NRC with an opportunity to address EPA's concerns prior to EPA actually initiating such a rulemaking. Additionally, EPA expects that the two agencies would continue consultations during the rulemaking process to attempt to resolve any remaining concerns. Section 61.226(c)(2) would not limit such continued consultations.

#### 4.2. Provisions for Reconsideration of the Rescission and Reinstatement of Subpart T

*Comment:* Many commenters, although generally opposed to the idea of reinstatement of subpart T favored including provisions for reconsideration and reinstatement of subpart T on either a site-specific or programmatic basis, as set forth in the Agency's 1991 proposal to rescind subpart T.

*Response:* EPA reviewed the various reconsideration options proposed in December 1991, taking into consideration the comprehensive details added to the terms of the MOU by the settlement agreement finalized in April 1993. In its 1994 supplemental proposal, EPA proposed an additional reconsideration option that was a combination of the options originally proposed. EPA did not withdraw the original options, but instead announced the Agency's preference for provisions on reconsideration and reinstatement of subpart T on both programmatic and site-specific bases. The Agency has reviewed carefully all comments submitted on the proposed reconsideration provisions and has revised the regulatory text and preamble where deemed appropriate. The Agency believes the provisions for reconsideration and reinstatement of subpart T adopted today represent a comprehensive approach based on EPA's current evaluation of the NRC regulatory program, and a regulatory structure designed to address future evaluations of the program.

*Comment:* EPA received a variety of comments dealing with the consistency of the proposed regulations with the settlement agreement between EPA, EDF NRDC, AMC, and individual site owners described above; to which NRC agreed in principle. These commenters suggested various minor revisions to the regulations.

*Response:* EPA has adopted certain comments and suggested minor language changes while rejecting others, depending on whether they effectively implement the goal of rescission of subpart T.

*Comment:* Several commenters contend the site-specific reconsideration and reinstatement options contained in the December 1991 proposal would unduly restrict NRC's waiver authority since EPA proposed a non-discretionary duty to reinstate subpart T on a site-specific basis if NRC exercises its waiver authority.

*Response:* As described in the proposals, EPA was concerned over the potential for deviation from the agreements contained in the MOU and

the requirements of revised subpart D. In response, EPA proposed and is now adopting procedural and substantive provisions for site-specific and programmatic reconsideration and reinstatement if certain criteria are met. In promulgating subpart T, the CAA did not permit, and EPA did not consider, site-specific waivers from ultimate compliance with that standard. Thus, in evaluating NRC's regulatory program, EPA recognized in its December 1991 proposal that NRC's waiver authority under the AEA might be exercised in a manner not addressed in the MOU even after the revisions to 40 CFR part 192, subpart D and 10 CFR part 40, appendix A have been promulgated and the licenses amended. However, EPA has no reason to believe such relaxation of the standards will actually occur. EPA believes the provisions adopted today represent a comprehensive approach based on EPA's current evaluation of the NRC regulatory program, and a regulatory structure designed to address future evaluations of the program.

Additionally in response to the 1994 proposal, EPA received subsequent comments from these commenters supporting the rescission of subpart T. Furthermore, these commenters supported the proposed reconsideration and reinstatement provisions with certain modifications. These commenters believe the 1994 proposal to rescind subpart T is consistent with the terms of the settlement agreement between EPA, EDF NRDC, AMC and individual sites. Thus, based on the above reasons for adopting reconsideration and reinstatement provisions, and due to the inconsistency between the earlier comments received and the subsequent expressions of support for the rescission of subpart T, EPA is rejecting the earlier comments.

*Comment:* Many commenters to the 1991 proposal believe that reconsideration of the rescission of subpart T and subsequent reinstatement on a programmatic basis is inappropriate if one site fails to comply.

*Response:* Today's action sets forth provisions for the reconsideration of the rescission of subpart T and reinstatement of that subpart. The regulations adopted today include provisions for programmatic and site-specific reinstatement with separate but somewhat parallel criteria. At this time, EPA is not aware of a situation which would cause it to reinstate subpart T on a programmatic basis if one site fails to comply and would not expect to reinstate subpart T on that basis. However, the Agency cannot predict all future circumstances, and cannot at this time preclude the possibility of such

reinstatement. EPA does, however, believe the criteria adopted today appropriately address both programmatic and site-specific reinstatement.

EPA rejects this comment for the above reasons, and because of the inconsistent responses to the 1991 and 1994 proposals received from the same commenters.

*Comment:* Some commenters assert, in response to the 1991 proposal that EPA lacks the authority to reinstate subpart T on a site-specific basis, since section 112(d)(9) is concerned only with NRC's regulatory program.

*Response:* EPA believes that section 112(d)(9) does not preclude site-specific reinstatement. Section 112(d)(9) of the CAA as amended authorizes EPA to decline to regulate radionuclide emissions from any category or subcategory of facilities licensed by the Nuclear Regulatory Commission (or an Agreement State) 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. The text of this section does not appear to preclude reinstatement on a site-specific basis. Section 112(d)(9) allows EPA to categorize and subcategorize, and for any such category or subcategory determine whether the public health is protected with an ample margin of safety by the NRC regulatory program from a particular source of radionuclide emissions. EPA believes that under the appropriate circumstances, the Agency may want to specifically categorize sites. The CAA as amended does not appear to preclude such specific categories on its face.

EPA rejects this comment for the above reasons, and because of the contradictory and inconsistent nature of the comments received from the same commenters in response to the 1991 and 1994 proposals, and the commenters' support of EPA's 1994 proposal which contains provisions for site-specific reinstatement.

*Comment:* One commenter appears to recognize EPA's authority for site-specific reinstatement of subpart T but is opposed to EPA's exercise of such authority and questions its appropriateness, since it appears to the commenter that NRC's existing inspection and enforcement programs address site-specific failures.

*Response:* This commenter does not oppose the proposed reinstatement

provisions and expresses the clear opinion that EPA committed in the settlement agreement to include provisions for site-specific reconsideration and reinstatement of subpart T. EPA anticipates that before initiating a rulemaking to reinstate subpart T on a site-specific basis, there would be extensive consultation with NRC. Based on the actions of NRC to date in implementing the terms of the MOU, EPA hopes that all concerns could be resolved. EPA is adopting the provisions for site-specific reconsideration and reinstatement as part of a comprehensive approach based on EPA's current evaluation of the NRC regulatory program, and a regulatory structure designed to address future evaluations of the program.

*Comment:* Some commenters contend that in reconsidering the rescission and reinstatement of subpart T on a programmatic basis, section 112(d)(9) requires EPA to determine whether public health is threatened by the failure of a particular site to meet the 20 pCi/m<sup>2</sup>-s flux standard.

*Response:* The Agency disagrees with the commenters' interpretation of section 112(d)(9) as applying to provisions for reinstatement. Section 112(d)(9) does not establish the criteria for reinstatement, rather it authorizes EPA to decline to regulate radionuclide emissions from NRC or Agreement State licensees if the Administrator determines, by rule, and after consultation with the NRC, that the NRC regulatory program protects the public health with an ample margin of safety. Under section 112(d)(9) EPA may rescind subpart T if EPA determines that the NRC regulatory program provides an equivalent level of public health protection (i.e., an ample margin of safety) as would implementation of subpart T in order to rescind subpart T. Section 112(d)(9) does not limit EPA's authority to reinstate subpart T. EPA believes the criteria adopted today appropriately address both programmatic and site-specific reinstatement.

Additionally, this comment was received in response to the 1991 proposal. EPA rejects this comment for the above reasons, and because of the inconsistent responses to the 1991 and 1994 proposals received from the same commenters.

*Comment:* Some commenters contend in response to the 1994 proposal that EPA should not treat reinstatement at the Administrator's initiative on the same terms as reinstatement based on a third party petition. These comments suggest revising the proposed regulations to reflect the differences

between the two, including adding a provision for a third possible result (i.e., a finding that NRC is in compliance).

*Response:* EPA disagrees with the commenters' suggestion that reinstatement at the Administrator's initiative should be treated differently from reinstatement based on a third party petition.

The commenters are basing their contentions on the terms of the settlement agreement which the Agency entered into with EDF NRDC, AMC and individual sites in February 1993. That agreement adds comprehensive details to the regulatory approach of the MOU between EPA, NRC and the affected Agreement States. EPA has reviewed the terms of the settlement agreement pertaining to the reconsideration of rescission and reinstatement of subpart T. The settlement agreement specifies at paragraph III.e. that upon completion of a rulemaking reconsidering the rescission of subpart T EPA may (1) reinstate subpart T on a programmatic basis if certain criteria are met; (2) reinstate subpart T on a site-specific basis if certain criteria are met; or (3) issue a finding that NRC is in compliance with certain criteria and that reinstatement of subpart T is not appropriate.

The Agency believes the criteria in § 61.226(a) for requiring reinstatement upon completion of a reconsideration rulemaking should apply whether the rulemaking is at the Administrator's initiative or based on a third party petition. These criteria are: (1) Failure by the NRC or an Agreement State 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 (i.e., contained in the license) establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m<sup>2</sup>-s flux standard; or (2) failure by NRC or an affected Agreement State 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. Additionally EPA would not be required to reinstate subpart T under § 61.226(a) unless 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/m<sup>2</sup>-s flux standard at uranium mill tailings disposal sites.

The commenters contend that the nature of the party initiating the reconsideration rulemaking should determine whether reinstatement is discretionary (for initiation by the Administrator) or mandatory (for a third party petition), apparently based on a desire to provide EPA with greater flexibility to address concerns over failures of NRC or an Agreement State to implement or enforce applicable requirements. The Agency believes that the nature of the initiating party properly may trigger different procedural requirements. For example, when a private party initiates the process by filing a petition, EPA has established a requirement that it take final action on such a petition within a set time period. However, EPA believes that the nature of the party initiating the process leading to a rulemaking is not relevant to deciding whether to reinstate, assuming the relevant criteria for reinstatement are met under either circumstance. EPA believes that if the Administrator determines, based on the record, that (1) NRC or an Agreement State 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 license) requirements establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m<sup>2</sup>-s flux standard or (2) NRC or an affected Agreement State failed in significant part, 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, then there would be the same reason for the Agency to reinstate subpart T whether the process was initiated by a private petition or at EPA's own initiation. If the Agency makes the determination required to reinstate subpart T based on reconsideration of rescission at the Administrator's initiative and such reinstatement is considered discretionary the Agency is not aware of circumstances which would lead the Agency not to reinstate subpart T. In any case, if the Administrator should make the determination in § 61.226(a) (1) or (2) but decide in her discretion not to reinstate subpart T in a proceeding initiated by the Administrator, then the Agency believes it would promptly receive third party petitions based on the finding made at the Administrator's initiative, and the Agency would then be obligated to

reinstate subpart T. Additionally, upon completion of the reconsideration of rescission pursuant to § 61.226(c) the Administrator may in her discretion issue a finding that reinstatement of this subpart is not appropriate if the Administrator makes certain findings. However, the discretion to issue such a finding is not relevant to the situation where the Administrator has found that the criteria for reinstatement have already been met, since the two findings are mutually exclusive. Finally, the commenters apparently believe that reinstatement at the Administrator's initiative should be discretionary so that EPA and NRC can continue attempts to resolve concerns and thereby avoid the need to reinstate. EPA believes that such ongoing consultation is not precluded by the regulations adopted today, and EPA expects the agencies would continue consultations and make all possible efforts to resolve the concerns during the rulemaking process. The regulation does not establish a time limit for final agency action in this case, and the agency would have discretion to extend the rulemaking if appropriate to continue such inter-agency consultations.

EPA agrees with the commenters that the settlement agreement provides an additional possible result upon completion of a reconsideration rulemaking initiated by the Administrator, namely that the Agency may issue a finding that reinstatement is not appropriate if the Agency finds: (1) NRC and the affected Agreement States are on a programmatic basis implementing and enforcing, 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 license) requirements establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m<sup>2</sup>-s flux standard; or (2) NRC or an affected Agreement State are, in significant part, on a site-specific basis achieving compliance by the operator of the site or sites with applicable license requirements, regulations, or standards implemented by NRC and the affected Agreement States. EPA believes addition of this provision to the regulations will clarify the existence of this option and has revised § 61.226(a) of the reinstatement provisions to provide for this additional result.

*Comment:* One commenter asserts that EPA's characterization of its authority to reconsider rescission of subpart T in the preamble to the 1994 proposal appears overly broad and reinstatement should be clearly limited

to those conditions proposed in § 61.226(a).

*Response:* EPA believes that the provisions for reconsideration of rescission adopted in § 61.226 represent a comprehensive approach under both the MOU and the settlement agreement. The provisions include substantive and procedural provisions for reconsideration of rescission and the reinstatement of this subpart on a programmatic or site-specific basis. The provisions include the obligation to reinstate subpart T if certain conditions are met, procedures for reconsideration and provisions authorizing the Administrator to initiate reconsideration. Although the Agency does not intend to reconsider its decision to rescind subpart T for a site which is in fact meeting the 20 pCi/m<sup>2</sup>-s flux standard absent other factors that would indicate the need for reinstatement, the Agency recognizes that a situation may arise where reconsideration of rescission is nevertheless appropriate. For example, EPA might consider initiating reconsideration under § 61.226 where a site is meeting the 20 pCi/m<sup>2</sup>-s flux standard if there are factors which show that NRC or an Agreement State failed to implement and enforce in significant part, the applicable regulations, e.g., clear failure of that site to emplace the permanent radon barrier within the time periods established in implementing subpart D. EPA is not aware of circumstances under which EPA might reconsider rescission for a site that is meeting the 20 pCi/m<sup>2</sup>-s flux standard, other than those indicating that the milestone for emplacement of the permanent radon barrier has passed, the delay was not approved by NRC or an Agreement State and the licensee failed to emplace the permanent radon barrier, and there are indications that the licensee does not plan to emplace the barrier and NRC or an Agreement State does not plan to enforce this requirement. EPA does not envision such an unusual situation arising. EPA believes the actions taken to date by NRC, including the license amendments and the final amendments to the NRC conforming regulations, as described above, reflect the good faith effort on the part of NRC and the Agreement States to implement the MOU and EPA's subpart D regulations. However, the Agency is not now in the position to determine that there could be no circumstances which might indicate the need to reconsider the rescission of subpart T for a site that is in fact meeting the 20 pCi/m<sup>2</sup>-s flux standard.

Additionally, EPA reserves the right to initiate reinstatement of subpart T if

appropriate, since although the § 61.226 provisions adopted today establish an obligation for the Administrator to reinstate if certain conditions are met, they are not intended to be the exclusive basis for reinstatement. Under the regulations adopted today, EPA has the authority to reconsider the rescission of subpart T at the Administrator's initiative and upon the petition of a third party. The Agency is obligated to reinstate subpart T on a programmatic basis 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/m<sup>2</sup>-s flux standard. Additionally, EPA is obligated to reinstate subpart T on a site-specific basis 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 in significant part 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. The obligation to reinstate subpart T is limited to those failures which may reasonably be anticipated to significantly interfere with timely emplacement of the permanent radon barrier constructed to achieve compliance with the 20 pCi/m<sup>2</sup>-s flux standard. At this time, EPA is not aware of circumstances where it would consider reinstating subpart T if the failure does not significantly interfere with emplacement of the required permanent radon barrier. However, EPA reserves the right to reconsider the rescission where the criteria of § 61.226(a) have not been met, under the Agency's authority to issue NESHAPs contained in section 112 of the CAA. For example, even if the NRC or an Agreement State is implementing and enforcing, in significant part, the applicable regulations and license amendments, the Agency may decide to reconsider the rescission if new information indicated that the public health is not protected with an ample margin of safety. The Agency cannot predict all future circumstances and cannot at this time preclude the possibility of such reconsideration and

possible reinstatement. Despite reserving this authority, the Agency believes this is a theoretical situation and has no current intention to act on this authority.

## 5. Miscellaneous

### 5.1. Monitoring

*Comment:* EPA must ensure that the single monitoring event currently required by subpart T would remain in effect if subpart T is reinstated, particularly in light of the recently proposed "enhanced monitoring" regulations.

*Response:* Subpart T currently requires monitoring to occur only once to demonstrate compliance with the 20 pCi/m<sup>2</sup>-s flux standard of § 61.222. However, EPA published a proposed Enhanced Monitoring Program on October 22, 1993, which would require owners and operators of sources subject to existing NESHAPs to perform enhanced monitoring at emissions units. (58 FR 54648). It appears that the proposal applies the enhanced monitoring requirements for hazardous air pollutants to all emissions units which would be required to obtain an operating permit. (58 FR 54651, October 22, 1993). Additionally, although asbestos demolition and renovation projects (subpart M) were exempted from the enhanced monitoring provisions, it does not appear subpart T would be exempted. The rationale for the proposed asbestos demolition exemption, that EPA was not requiring states to permit those sources and the permit program is the established method for implementing the enhanced monitoring program, does not appear to apply to uranium mill tailings disposal sites. It would be premature for EPA to determine today that in the event subpart T is reinstated for Title II sites, the proposed enhanced monitoring provisions would not apply.

### 5.2 Discussion of 40 CFR part 192, Subpart D Extension Provisions

*Comment:* EPA's discussion of the extension provisions contained in 40 CFR 192.32(a)(3)(ii), (iii) is confusing and should be revised to equally consider the possibility of extensions for factors beyond the control of the licensee.

*Response:* EPA believes its discussion of the extension provisions contained in the Agency's amendments to its UMTRCA regulations at 40 CFR 192.32(a)(3)(ii) and (iii) does not need further clarification. EPA disagrees with the commenter's claim that an extension based upon "factors beyond the control of the licensee" should be considered

equally with the delay provisions encompassed in EPA's UMTRCA regulations. 40 CFR 192.32(a)(3)(ii) and (iii) specifically provide that NRC may grant an extension on either one of two bases. However, an extension due to "factors beyond the control of the licensee" is implicit in the definition of "as expeditiously as practicable." The term "factors beyond the control of the licensee" would be one element for NRC to evaluate in reconsidering a prior decision establishing a date for emplacement of the permanent radon barrier that meets the definition of "as expeditiously as practicable." A change in any one of the factors considered in establishing a date that meets the "as expeditiously as practicable" standard would not automatically lead to an extension, rather NRC would need to evaluate all the relevant factors under § 192.32(a)(3)(i) before it could change a previously established milestone or date for emplacement of the permanent radon barrier.

### 5.3 Discussion of Amendment of NRC and Agreement State Licenses

*Comment:* There is some concern that EPA may be over scrutinizing the NRC license amendment process, particularly with respect to the Atlas site located in Moab, Utah.

*Response:* In order to determine that the NRC regulatory program protects the public health with an ample margin of safety and rescind subpart T, EPA must conclude, *inter alia* that NRC and the affected Agreement States are or will be implementing and enforcing the license requirements (tailings closure plan (radon)) that establish the milestones for emplacement of a permanent radon barrier that will achieve compliance with the 20 pCi/m<sup>2</sup>-s flux standard as expeditiously as practicable considering technological feasibility. The Agency is applying the same basic approach in reviewing all of the license amendments. Presently, Atlas is the only site where the site license has not yet been amended, but the tailings closure plan (radon) milestones are in jeopardy. There is a wealth of information for EPA to review due to the unique circumstances of this site.

EPA is interested in the Atlas site because the license amendment incorporating the reclamation plan has not yet been completed, and this may jeopardize the dates contained in the tailings closure plan (radon). The MOU established a target closure date of 1996. EPA recognizes that this is the only site for which a license amendment incorporating the reclamation plan has not been established, thereby possibly impacting the dates currently contained

in the approved tailings closure plan (radon) adopted pursuant to the MOU and EPA's revised subpart D regulations, and that the circumstances surrounding the delay are unique. EPA believes NRC, the affected Agreement States and the licensees have acted in good faith to amend the site licenses.

The Agency does not believe it is overly scrutinizing the license amendment process. The Agency believes its interest in the Atlas site reflects EPA's commitment to and review of the applicable criteria in finally determining that NRC and the affected Agreement States are or will be implementing and enforcing the license requirements (tailings closure plan (radon)) to achieve compliance with the 20 pCi/m<sup>2</sup>-s flux standard. EPA is merely reviewing current information and monitoring the progress of NRC in implementing the requirements of subpart D. The Agency has not suggested any course of action to NRC.

### 5.4 Public Participation

*Comment:* An industrial site, other than a uranium mill tailings disposal site, commented that publishing a notice in the Federal Register does not provide sufficient notice for citizens of communities where uranium mill tailings disposal sites are located.

*Response:* The EPA made every effort to notify the affected public of the proposed rulemaking action. EPA published a NPR on December 31, 1991, and a supplement to that proposal on February 7, 1994, in the Federal Register. There was a public comment period after each proposal; public hearings were held in Washington, DC and Santa Fe, NM after the 1991 proposal and no request for a hearing was received after the 1994 proposal. EPA believes it has afforded the public with full opportunity to participate in this proceeding, as well as satisfied all such requirements under Clean Air Act section 307

## V Miscellaneous

### A. Disposition of Pending Judicial Challenges and Petitions for Reconsideration

By taking today's action rescinding subpart T as applied to owners and operators of uranium mill tailings disposal sites regulated under Title II of UMTRCA, the stay of subpart T is no longer effective. Thus, the challenge to the stay of subpart T filed by EDF is moot, and EPA expects that the pending litigation will be promptly resolved by dismissal. Based on the terms of the settlement agreement between EDF, NRDC, AMC, individual sites and EPA

as described above, and based on today's rescission of subpart T, AMC's pending administrative petition for reconsideration of subpart T is denied as moot. Additionally, all other pending petitions for reconsideration of subpart T as applied to Title II sites are denied as moot under today's action.

#### B. Paperwork Reduction Act

There are no information collection requirements in this rule.

#### C. 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.

#### D. 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 this 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 the 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 final 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, 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: June 29, 1994.

Carol M. Browner,  
Administrator.

Part 61 of chapter 1 of title 40 of the Code of Federal Regulations is amended as follows:

#### PART 61—[AMENDED]

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

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

2. Section 61.220 is amended by revising paragraph (a) and removing and reserving paragraph (b) 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, except § 61.226 of this subpart which applies to owners and operators of all sites that are regulated under Title II of the Uranium Mill Tailings Radiation Control Act of 1978.

(b) [Reserved]

3. Section 61.221 is amended by revising the introductory text, revising 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 the 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* shall have the same meaning as in section 101(7) of the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. 7911(7).

(d) *Tailings* shall have the same meaning as in section 101(8) of the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. 7911(8).

(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/m<sup>2</sup>-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 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 upon completion of reconsideration of rescission.

(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 license) requirements establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m<sup>2</sup>-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/m<sup>2</sup>-s flux standard at the uranium mill tailings disposal site.

(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 in significant part 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/m<sup>2</sup>-s flux standard at the uranium mill tailings disposal site.

(3) Upon completion of the reconsideration of rescission pursuant to § 61.226(c) the Administrator may issue a finding that reinstatement of this subpart is not appropriate if the Administrator finds:

(i) NRC and the affected Agreement States are on a programmatic basis implementing and enforcing, 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 license) requirements establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m<sup>2</sup>-s flux standard; or

(ii) NRC or an affected Agreement State are on a site-specific basis, in significant part, achieving compliance by the operator of the site or sites with applicable license requirements, regulations, or standards implemented by NRC and the affected Agreement States.

(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/m<sup>2</sup>-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<sup>2</sup>-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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