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^2-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^2-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) [1] interfere with compliance with the 20 pCi/m^2-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^2-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^2-s flux standard occur as expeditiously as practicable considering technological feasibility. 42 U.S.C. 2114(c). NRC considers the term "practicability" to include certain economic considerations not contemplated by the requirement of the MOU that compliance occur as expeditiously as practicable considering technological feasibility. In promulgating subpart T, the CAA did not permit, and EPA did not consider, site-specific waivers from ultimate compliance with that standard. Thus, as a theoretical matter, EPA recognized in its December 1991 proposal that this waiver authority might be exercised in a manner not addressed in the MOU even after the UMTRCA regulations have been promulgated and each license amended, although EPA has no reason to believe such relaxation of restriction will actually occur. Nevertheless, EPA recognized that this authority would not exist under the CAA and subpart T and, thus, there 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

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

today, which include both programmatic and site-specific bases for reinstatement, represent a comprehensive approach under both the MOU and settlement agreement. The Agency notes that the 20 pCi/m²-s flux standard must be met by all sites as provided by 40 CFR part 192, subpart D. EPA does not intend to reconsider the decision to rescind subpart T for any site that is in fact meeting the 20 pCi/m²-s flux standard, absent other factors that would indicate the need for reinstatement. For example, EPA may initiate reconsideration under § 61.226 even if a site is meeting the 20 pCi/ m²-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(e) of the Administrative Procedure Act (5 U.S.C. 553(e) interested persons may petition the EPA to initiate reinstatement of subpart T, in addition to petitions for reinstatement under 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/m²-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/m²-s flux standard. This provision is intended to provide NRC or an Agreement State with an opportunity to address the concerns raised by the potential petitioner through its standard enforcement mechanisms.

The Administrator may also initiate reconsideration of the rescission and reinstatement of subpart T as applied to owners and operators of non-operational uranium mill tailings disposal sites if EPA believes it is appropriate to do so. For example, EPA may initiate such reconsideration if it has reason to believe that NRC or an affected Agreement State has failed to implement and enforce, in significant part, the regulations governing the disposal of uranium mill tailings promulgated by EPA and NRC or the tailings closure plan (radon) requirements establishing milestones for the purpose of emplacing a permanent radon barrier that will achieve compliance with the 20 pCi/m²-s flux standard. Before the Administrator initiates reconsideration of the rescission and reinstatement of subpart T, EPA shall consult with NRC 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/m²-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^2-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^2-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^2-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^2-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^2-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^2-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^2-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 778 (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/m²-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/m²-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 [illegible] 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/m²-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/m²-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

> [I]n 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 suopart 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^2-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^2-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^2-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^2-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^2-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^2-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^2-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^2-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^2-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^2-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^2-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^2-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^2-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^2-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^2-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 ^{2}-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 ^{2}-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 ^{2}-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 ^{2}-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 ^{2}-s flux standard.

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

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

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

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

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