IN RE UMETCO MINERALS CORPORATION

CAA Appeal No. 94-6

FINAL DECISION

Decided July 25, 1995

Syllabus

U.S. EPA Region VIII has appealed from an order for accelerated decision dismissing its complaint against Umetco Minerals Corporation ("Umetco") for failing to report the results of radon emissions testing during 1990 from a uranium mill tailings impoundment ("the A-9 pit"), in violation of 40 C.F.R. Part 61, Subpart W. The Region argues that the Presiding Officer erred in his conclusion that Umetco's tailings pile was not operational because the mill had ceased operations and thus the impoundment was not subject to Subpart W in 1990.

Held: The Board holds that the A-9 pit was subject to the radon reporting requirement in Subpart W. Contrary to the presiding officer's conclusion, we find that the Umetco mill tailings *impoundment* was operational in 1990 regardless of the status of the mill and therefore, Umetco was subject to the radon reporting requirement for operating mill tailings impoundments. The Initial Decision is reversed and the matter is remanded to the presiding officer for further proceedings consistent with this decision.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

Umetco Minerals Corporation ("Umetco") owns a facility in East Gas Hills, Natrona County, Wyoming, that is licensed by the Nuclear Regulatory Commission (NRC) to mine and process uranium ore. Umetco's license also authorizes it to dispose of the byproduct materials from uranium processing (generally referred to as uranium mill tailings or mill tailings) at several on-site locations, including a 28-acre sub-grade impoundment called the A-9 pit.

Uranium milling facilities that are licensed by the NRC are subject to environmental regulations promulgated by EPA pursuant to the Uranium Mill Tailings Radiation Control Act (UMTRCA), 42 U.S.C. §§ 2022 and 7901 and 7942. In addition, radon emissions from uranium byproducts that result from uranium milling are subject to regulation under the Clean Air Act (CAA). More specifically, EPA has designated

radionuclides (including radon) as hazardous air pollutants under section 112(a) of the Clean Air Act, 42 U.S.C. § 7412(a). *See* 44 Fed. Reg. 76,738 (Dec. 27, 1979). In accordance with CAA § 112(d)(1), EPA has issued National Emission Standards for Hazardous Air Pollutant (NESHAP) for "radon emissions from operating mill tailings" at 40 C.F.R. Part 61 Subpart W. Subpart W includes a requirement at 40 C.F.R. § 61.254 that owners and operators of "operating existing mill impoundments" submit an annual radon test report to demonstrate compliance with the NESHAP standard.

On March 31, 1992, EPA Region VIII filed a complaint pursuant to CAA § 113(d), 42 U.S.C. § 7413(d), charging Umetco with violating section 61.254 of the Subpart W regulations. In particular, the Region alleges that during 1990 Umetco owned and operated an "operating existing mill impoundment," known as the A-9 pit, and that Umetco violated the NESHAP by failing to file a 1990 annual radon test report for the A-9 pit by the regulatory reporting deadline of March 31, 1991. The Region sought a civil penalty of $80,000.[1] Umetco filed an Answer in which it admitted that it had not filed a radon test report for 1990, but alleged that the A-9 pit was not subject to the radon test reporting requirement because it was not an "operating existing mill impoundment" in 1990 and therefore was not covered by section 61.254. Umetco contended that it was instead covered by an alternative NESHAP, 40 C.F.R. Part 61 Subpart T, which has since been rescinded. The presiding officer issued an Order on Cross-Motions for Accelerated Decision on November 23, 1994, dismissing the complaint on the ground that the A-9 pit was not an "operating existing mill impoundment" covered by section 61.254 in 1990. The Region has appealed.

The sole issue before us is whether the A-9 pit was an "operating existing mill impoundment" within the meaning of section 61.254 in 1990. If it was, Umetco was required to file a radon emissions report for the pit by March 31, 1991, and violated 40 C.F.R. § 61.254 by failing to do so. For the reasons set forth below, we conclude that Umetco was required to file the report, and therefore Umetco is liable for violating section 61.254. Accordingly, we are reversing the presiding officer's decision and are remanding the case to the presiding officer for consideration of the penalty to be assessed.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

[1] The Region alleged that failure to report was a continuing violation from March 31, 1991, until the date of the complaint.

Uranium milling is the process of extracting uranium from uranium ore. 51 Fed. Reg. 6382 (Feb. 21, 1986). The process results in large quantities of uranium tailings, which are:

> [S]and-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.

59 Fed. Reg. 36,280 (July 15, 1994). Most of the radon emissions at a uranium milling facility come not from milling operations but from the tailings pile. *Id.*

Radionuclides (including radon) were designated as hazardous air pollutants under Section 112(a) of the Clean Air Act, 42 U.S.C. § 7412(a), in 1979. *See* 44 Fed. Reg. 76738 (Dec. 27, 1979). EPA issued the National Emissions Standards for Operating Mill Tailings, at 40 C.F.R. Part 61 Subpart W, which govern new and existing mill tailings impoundments, on December 15, 1989. These regulations impose an emission limit on existing mill tailings piles of twenty picocuries per square meter per second (20 pCi/m^2-s) of radon-222 and establish certain testing and reporting obligations to ensure compliance with the standard. On the same date, EPA also issued separate requirements for the disposal of mill tailings piles at 40 C.F.R. Part 61 Subpart T (National Emission Standards for Radon Emissions from the Disposal of Uranium Mill Tailings). Subpart T requires that "tailings piles that are no longer operational" shall be disposed of and brought into compliance with an emission standard within two years after they have ceased to be operational.[2] 40 C.F.R. § 61.222. EPA stayed the Subpart T regulations as to NRC-licensed disposal sites,[3] and after extensive negotiations with the Nuclear Regulatory Commission, and industry and several environmental groups, eventually rescinded the regulations as to these sites.[4] To replace them, EPA issued amended mill tailings impoundment disposal regulations under UMTRCA, 40 C.F.R. Part

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[2] Subpart T imposed the same limit on nonoperational piles that Subpart W imposed on operational piles.

[3] *See* 56 Fed. Reg. 67537 (Dec. 31, 1991), staying Subpart T, and 56 Fed. Reg. 67,561 (Dec. 31, 1991), proposing to rescind Subpart T, as to NRC licensees. On the same date, EPA also announced its intent to amend 40 C.F.R. Part 192 to impose enforceable closure deadlines for NRC-licensed tailings disposal sites. *See* 56 Fed. Reg. 67,569 (Dec. 31, 1991).

[4] *See* 59 Fed. Reg. 36,280 (July 15, 1994).

192, and it is Part 192 that now governs radon emissions from "non-operational" uranium mill tailings impoundments.[5]

B. *The Applicable Regulations*

1. *Subpart W Regulations.* Section 61.250, which describes the scope of Subpart W, provides that:

> The provisions of this subpart apply to owners or operators of facilities[6] licensed to manage uranium byproduct materials during and following the processing of uranium ores, commonly referred to as uranium mills and their associated tailings. This subpart does not apply to the disposal of tailings.

Section 61.252 imposes the main substantive requirements of the Subpart. It consists of subsection (a), which imposes a radon emissions limit on "existing uranium mill tailings pile[s]," and subsection (b), which establishes requirements for the construction and management of new piles. Sections 61.254-61.256 impose reporting and recordkeeping requirements relating to the requirements set forth in section 61.252.

Section 61.254(a), which is the regulatory requirement that Umetco allegedly violated, provides in part that:

> The owners or operators of operating existing mill impoundments shall report the results of the compliance calculations required in § 61.253 * * * by March 31 of the following year.

An "existing impoundment" is elsewhere defined as:

> [A]ny uranium mill tailings impoundment which is licensed to accept additional tailings and is in existence as of December 15, 1989.

40 C.F.R. § 61.251(d). "Operation" is defined to mean that:

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[5] The Part 192 definition of an "operational" tailings pile or impoundment is set forth in Section B, *infra.* The Part 192 amendments were finalized in July 1994. *See* 59 Fed. Reg. 36,280 (July 15, 1994).

[6] The preamble to the regulations states that a facility consists of "all the buildings, structures and operations within one contiguous site * * *." 54 Fed. Reg. at 9,628 (Mar. 7, 1989).

> [A]n impoundment is being used for the continued placement of new tailings or is in standby status for such placement. An impoundment is in operation from the day that tailings are first placed in the impoundment until the day that final closure begins.

40 C.F.R. § 61.251(e).[7]

2. *Subpart T Regulations.* Section 61.220(a), which describes the scope of Subpart T, provides in part that:

> The provisions of this subpart apply to the owners and operators of all sites that are used for the disposal of tailings and that managed residual radioactive material or uranium byproduct materials during and following the processing of uranium ores, commonly referred to as uranium mills and their associated tailings * * *.

Section 61.222(a) imposes an emissions standard on uranium mill tailings piles "that are no longer operational." Section 61.222(b) provides in part that:

> 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 or within two years of the day it ceases to be operational whichever is later.

The regulations define an "operational" tailings pile to include:

> [A pile that is] licensed to accept additional tailings, and those tailings can be added without violating subpart W * * *. A pile cannot be considered operational if it is filled to capacity or the mill it accepts tailings from has been dismantled or otherwise decommissioned.

40 C.F.R. § 61.221(b).

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[7] As noted above, EPA eventually amended the UMTRCA Part 192 regulations as part of the Subpart T settlement. The definition of "operational" in section 192.31(p) is nearly identical to the definition of "operation" in Subpart W and provides that "operational" means:

> [A] uranium mill tailings pile or impoundment is being used for the continued placement of uranium byproduct material or is in standby status for such placement. A tailings pile or impoundment is operational from the day that uranium byproduct material is first placed in the pile or impoundment until the day final closure begins.

C. *Factual Background*

Umetco holds Source Material License SUA-648 from the Nuclear Regulatory Commission, which authorizes it to mine uranium at its facility in East Gas Hills, Natrona County, Wyoming, and to manage uranium waste tailings. In 1980, Umetco obtained an amendment to the license that authorized it to place tailings generated by the East Gas Hills mill into the A-9 pit, an area which it had previously mined for uranium.[8] Umetco pumped tailings from the mill into the pit from 1980 until mid-December, 1984, when it stopped operating the mill.[9] In 1987, Umetco's license was further amended to authorize Umetco to place waste materials into the A-9 pit from other licensed mill operators.[10]

Umetco began to dismantle the East Gas Hills Mill in 1988. The mill was still in the process of being dismantled in 1990.[11] Umetco's license was amended on July 26, 1990, to add a provision directing Umetco to decommission the East Gas Hills mill in accordance with plans Umetco had previously submitted to the NRC on May 2 and June 18, 1990.[12] Umetco began the decommissioning process shortly thereafter and completed decommissioning of the mill in November 1991. *See* Affidavit of Patrick J.L. Lyons, General Superintendent, Umetco (Dec. 7, 1992).

Although the East Gas Hills mill was undergoing decommissioning in 1990 and 1991, the A-9 pit continued to accept mill tailings and other uranium byproduct material from other mills until 1992.[13] The

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[8] *See* Jack C. Moore, Annual Report (July 29, 1991) ("Moore Report").

[9] *See* Affidavit of Patrick J. L. Lyons, General Superintendent, East Gas Hills Operations, Umetco Minerals Corporation (Dec. 7, 1992). *See also* Moore Report.

[10] *See* Source Material License SUA-648 Amendment 19, Para. 58, authorizing Umetco to:

> [R]eceive and dispose of a quantity of wastes in the A-9 pit * * * consist[ing] of 1,793,801 yards originating from the Riverton [Wyoming] processing site and up to 10,000 cubic yards from other licensed in-situ uranium recovery operations.

See Letters from Umetco to Region VIII, March 25, 1991, and June 12, 1991.

[11] According to Umetco, the dismantling process "continued until NRC approved formal decommissioning during 1990." Umetco Reply Brief at 16 (Jan. 3, 1995).

[12] Decommissioning of a facility is the process of "remov[ing it] safely from service and reduc[ing] residual radioactivity to a level that permits release of the property for unrestricted use and termination of license." 40 C.F.R. § 40.4.

[13] Umetco accepted buildings and tailings from the Susquehanna mill in Riverton, Wyoming, between 1987 and February 1990. It was still authorized to accept and was awaiting

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A-9 pit was originally scheduled to be closed by the end of 1992. However, the date was extended and a final cover placement is not due until December 31, 1995.[14]

On March 11, 1990, Region VIII notified Umetco that its tailings piles, including the A-9 pit, may be subject either to Subpart W or Subpart T.[15] Umetco's Environmental Coordinator, Jack C. Moore, sent a letter to Region VIII dated June 12, 1991, describing the A-9 pit as a Subpart W facility. The letter stated that:

> We are planning to proceed with a program of measuring radon flux * * * on the A-9 sub-grade tailings area, *a Subpart W area*, commencing on June 20, 1991.

(Emphasis added.) The letter further stated that:

> *This NESHAP program is to be done beginning June 30, 1991 to fulfill Subpart W reporting requirements for 1990 which were due to EPA by March 31, 1991.* We were unable to do the required sampling of radon flux on this area in 1990 * * *. Mr. Dale [of EPA] expressed the belief that * * * an extension would probably be granted.

(Emphasis added.) Umetco sent EPA a memorandum titled "Annual Report for 1990, NESHAP-Subpart W, A-9 Below-grade Tailings Area," dated July 29, 1991, in which it stated that:

> [T]he A-9 pit is under license to the NRC for use as a facility for disposal of low-level radioactive materials. Materials now deposited in the A-9 pit are tailings generated by UMETCO's Title 2 mill located at the East Gas Hills Mill facility, * * * tailings and mill buildings formerly located in Riverton, Wyoming (Susquehanna Mill) and a quantity of waste from in situ mine operations. The A-9 pit is still authorized to dispose of a

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tailings as of July 29, 1991. *See* Memorandum from Umetco to Region VIII, at 2 (July 29, 1991). *See also* Memorandum from R.K. Jones, Umetco, to J.F. Frost, Umetco (June 20, 1990).

[14] 57 Fed. Reg. 33,529 (July 29, 1992).

[15] Letter from Irwin L. Dickstein, Director, Air and Toxics Division, to Earl Shortridge, Manager, Umetco Minerals Corp. (Mar. 11, 1990). The letter stated that Subpart W "applies to operating uranium mill tailings piles" while Subpart T "applies to disposal of existing uranium mill tailings piles."

> remaining 8,800 yards of in situ waste under the current license condition and is therefore considered as a subpart W of the NESHAP program.

EPA Region VIII filed a complaint against Umetco on March 31, 1992, pursuant to Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), alleging that the A-9 pit was an "operating existing mill impoundment" in calendar year 1990 for which Umetco had failed to conduct radon emissions testing in 1990 and had failed to file a radon-222 test report by March 31, 1991, as required by 40 C.F.R. § 61.254(a). The Region sought a civil penalty of $80,000 for the violation.

Umetco filed an answer to the complaint on April 24, 1992, in which it denied that it had violated the Subpart W regulations. Umetco acknowledged that it had not performed radon testing in 1990 nor had it filed an annual radon report for 1990. However, it contended that it was not subject to Subpart W. Umetco argued that the Subpart W regulations only applied to tailings piles associated with *operating existing mills.*[16] It asserted that the East Gas Hills mill was "in decommissioned status" and no longer operational in 1990, and therefore the "East Gas Hills millsite," including the A-9 pit, was not subject to Subpart W. Answer at 2. Umetco further alleged that even if it were a Subpart W facility, it had not violated Subpart W because it had obtained EPA's agreement that it could use monitoring data it collected in 1991 to satisfy the 1990 reporting requirement. *Id.*

Both parties filed motions for accelerated decision on October 9, 1992, pursuant to 40 C.F.R. § 22.20(a).[17] Umetco moved for an order dismissing the complaint. Region VIII moved for a decision in its favor both on liability and on the penalty amount.[18] The presiding officer

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[16] Umetco initially admitted that the A-9 pit was an "operating existing mill impoundment" within the meaning of 40 C.F.R. § 61.254. Answer at Para. 2. The presiding officer granted Umetco's motion to amend its answer to clarify that it did not intend to admit that the A-9 pit was an "operating existing mill impoundment." *See* Order on Cross-Motions for Accelerated Decision at 3.

[17] Section 22.20(a) provides that:

> The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding * * * if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding.

[18] Umetco filed a response to the Region's motion for accelerated decision on October 23, 1992, and a memorandum supporting its own motion on June 8, 1993. Region VIII filed a sup-

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issued an Order on Cross-Motions for Accelerated Decision ("Accelerated Decision" or "Order") on November 23, 1994, granting Umetco's motion and dismissing Region VIII's complaint on the ground that Umetco's A-9 pit was not subject to the Subpart W regulations in 1990. Region VIII filed a timely appeal on December 19, 1994.

D. *The Accelerated Decision*

The presiding officer's Order held that Subpart W applies only to tailings impoundments associated with *operating uranium mills* and that it has "no application after the mill at the facility ceased operation * * *." Accelerated Decision at 9. He determined that the East Gas Hills mill was not operational in 1990, and concluded, therefore, that section 61.254 did not apply to the A-9 pit for that year. Accordingly, he dismissed the complaint.

The presiding officer ruled that even though the A-9 pit was "an active subgrade uranium mill tailings pile" in 1990, it was not an "operating existing mill impoundment," and therefore did not fall within the class of impoundments subject to the reporting requirement. He found that the A-9 pit was an "existing" impoundment but that it was not an "operating" impoundment in that year. Order at 12. He reasoned that the definition of "operating" in the phrase "operating existing mill impoundment":

> [R]equires that an impoundment be used for the continued placement of 'new tailings' or is in standby status for such placement.

Id. at 12. He stated that the phrase "'continued placement of new tailings' * * * carr[ies] with it the implication of continued operation of the associated mill." *Id.* He further concluded that "standby * * * refers to the status of the mill rather than the impoundment."[19] *Id.* Based on his interpretation of the regulatory language, he determined that the A-9 pit was not an operating impoundment because it was not used for tailings from the East Gas Hills mill in 1990. Additionally, the presiding officer concluded that the A-9 pit is a "non-operational pile" as defined in the Subpart T regulations at 40 C.F.R. § 61.221(b), which state that a pile cannot be considered operational if "it is filled to

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plemental brief in support of its motion on April 26, 1994, to which Umetco filed a reply brief on May 18, 1994.

[19] The presiding officer stated that he concluded that "standby" applies to the mill and not the pile because "it was a regulatory purpose to 'phase out' the use of existing impoundments." He did not explain how his interpretation of the regulatory language served that purpose.

capacity or the mill it accepts tailings from has been dismantled or otherwise decommissioned." Order at 15. He concluded that the "the mill [the A-9 pit] accepts tailings from" is the East Gas Hills mill, and that the East Gas Hills mill had been "dismantled or otherwise decommissioned" in 1990. Therefore, he ruled that the A-9 impoundment cannot be considered operational either for purposes of Subpart W or Subpart T.

E. *Region VIII's Appeal*

On appeal, the parties expand upon the arguments they made in their motions for accelerated decision. Region VIII argues that the presiding officer's conclusion that the Subpart W regulations did not apply to the A-9 pit in 1990 was based on an erroneous interpretation of those regulations. The Region contends that section 61.254 applies to any tailings pile for "as long as tailings were being placed in it and final closure has not begun," regardless of whether the mill associated with the tailings pile is operational. Region VIII Appeal at 12-13. The Region further contends that the presiding officer erred when he relied on the definition of "operational" in Subpart T because the definitions in Subpart T do not apply to Subpart W. The Region also argues that even under the Subpart T definition, the A-9 pit was "operational" in 1990 because the East Gas Hills mill had not been "dismantled or otherwise decommissioned" by 1990.

Umetco responds that the presiding officer properly concluded that section 61.254 does not apply to the A-9 pit. It claims that "the key" to whether Subpart W or Subpart T applies to a particular mill and associated pile is the operating status of the mill, not the tailings pile. It argues that "the regulatory status of the A-9 pit is controlled by the Subpart T definition of 'operational' at 40 C.F.R. section 61.221(b)," which provides that:

> A pile cannot be considered operational if it is filled to capacity or the mill it accepts tailings from has been dismantled or otherwise decommissioned.

40 C.F.R. § 61.221(b). It contends that "the A-9 pit at the Gas Hills facility was not 'operational' * * * because at all times relevant to this proceeding the Gas Hills mill was in the process of being dismantled." Umetco Supplemental Memorandum at 2. Umetco acknowledges that "completion of all decommissioning activity [at the mill] did not occur until 1991" but argues that "mill decommissioning was well under way in 1990 * * *." Umetco further argues that EPA acted inconsistently when it classified the A-9 pit as a Subpart W impoundment but classified an impoundment owned by the American Nuclear Corporation (ANC) as a

Subpart T impoundment, since both impoundments are active tailings piles associated with nonoperational mills. Finally, Umetco argues that even if it was subject to Subpart W in 1990, it did not violate the regulations because EPA agreed to accept the results of radon testing it conducted in 1991 in fulfillment of the 1990 testing requirement.

The Region filed a reply brief in which it stated that it had classified both impoundments based on the information they had submitted to EPA regarding their activities. The Region denied that it had authorized Umetco to submit the results of 1991 radon testing in satisfaction of the 1990 reporting requirement.

II. *DISCUSSION*

We have carefully considered the language and regulatory history of Subpart W, the presiding officer's accelerated decision, and the briefs. Although it takes patience to plow through the relevant regulations, we find no basis for the presiding officer's interpretation of these regulations either in their language or their history. To the contrary, we find that the A-9 pit was clearly an "operational existing mill impoundment" in 1990 and that Umetco, as the owner and operator of that impoundment, had the clear obligation to comply with the requirements of Subpart W. Since Umetco failed to file a timely report for 1990, it violated 40 C.F.R. § 61.254, and is liable for a civil penalty. Accordingly, we are reversing the accelerated decision and remanding this matter for the presiding officer to conduct a penalty hearing.

We begin with an analysis of section 61.254, which imposes a reporting requirement on the owner or operator of an "operating existing mill impoundment."[20] It is not disputed that the A-9 pit was an "existing" impoundment in 1990.[21] The only issue is whether the A-9 pit was also an "operating" impoundment in 1990. Section 61.251 defines "operation" to mean that:

> [A]n impoundment is being used for the continued placement of new tailings or is in standby status for such placement. An impoundment is in operation from

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[20] It is undisputed that the adjectives "operating" and "existing" apply to the impoundment not the mill.

[21] *See* 40 C.F.R. § 61.251 (An existing uranium mill tailings pile is one which is licensed to accept additional tailings and is in existence as of December 15, 1989.). Umetco acknowledges that it was "accepted" as a site for tailings in 1980. Att. 2, p. 2.

> the day that tailings are first placed in the impoundment until the day that final closure begins.[22]

The A-9 pit met the regulatory criteria in 1990 since it was "being used for * * * or [was] in standby status" for the "continued placement of new tailings" in 1990. The pit was licensed to receive new tailings and new tailings were expected as late as July 29, 1991. We give the word "continued" its ordinary meaning, which is "to go on with a particular action."[23] In this context, the A-9 pit was going on with the activity of accepting new tailings or was on standby pending the receipt of these additional tailings.[24] Section 61.251 further states that an impoundment is in operation "until the day that *final* closure begins." There is no dispute with the presiding officer's conclusion that final closure refers to the obligation imposed on a nonoperational impoundment to "place[] an earthen cover so as to permanently limit radon emissions to no more than [the regulatory limit] as expeditiously as possible * * *." Order at 16.[25] In addition, neither the presiding officer nor Umetco has suggested that *final* closure of the A-9 pit had begun in 1990. To the contrary, Umetco specifically states that the site was awaiting approval of Umetco's 1991 cover design. Moreover, final closure of the A-9 pit is not required until December 1995. Accordingly, under the plain terms of section 61.254, Umetco, as an owner and operator of an "operating existing mill impoundment," was required to submit a radon test report for 1990.

Contrary to Umetco's contentions, we find nothing in Subpart W to suggest that Subpart W only applies when the mill that is associat-

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[22] The draftsmen use "tailings pile" and "impoundment" interchangeably.

[23] Webster's II New Riverside University Dictionary (1988). We can find no basis for the presiding officer's conclusion that the word continued "carr[ies] with it the implication of continued operation of the associated mill." *See* Order at 12. We also disagree with the presiding officer that his interpretation of "continued placement" accords with the definitions of "continuous disposal" and "dewatered" in section 61.251(b). *See Id.* at 12-13. The definitions of "continuous disposal" and "dewatered" describe methods of managing and disposing of tailings and do not refer to the status of an associated mill.

[24] We can find no support for the presiding officer's contention that the word "standby" in section 61.254 applies to the *mill* not to the impoundment. Section 61.254 states that "[o]peration means that *an impoundment* is being used * * * or is in standby status * * *." The sentence structure itself does not permit the presiding officer's interpretation. We note that EPA specifically stated in a December 31, 1991 Federal Register notice that "Subpart W * * * relates to radionuclide emissions from uranium mill tailings piles that are operational or in standby status." 54 Fed. Reg. 67,561 (Dec. 31, 1991).

[25] *See also* Proposed Rule, 56 Fed. Reg. 67,561 (Dec. 31, 1991), describing the "final closure requirement" as "emplacement of a final earthen cover to limit radon emissions * * *."

ed with the impoundment is also operational. Section 61.250 states that Subpart W applies to:

> [O]wners or operators of facilities licensed to manage uranium byproduct materials during and following the processing of uranium ores, commonly referred to as uranium mills and their associated tailings. This section does not apply to the disposal of tailings.

As we read section 61.250, it provides generally that Subpart W applies to any entity which holds a license that authorizes it both to process uranium ores and to manage the tailings it generates. It says nothing about whether the mill covered by the license is operational. Umetco holds a license from the NRC that authorizes it both to process uranium and to manage tailings. Therefore, it falls squarely within the class of entities described in the regulation. Moreover, section 61.254 specifically states that Subpart W applies *following* the processing of ores, which certainly suggests that the Subpart applies even after uranium processing at the mill has ceased.

Further, contrary to the presiding officer's conclusion, we find nothing in the second sentence of section 61.250 ("This section does not apply to the disposal of tailings.") that would exclude the A-9 pit from the coverage of Subpart W. The presiding officer concluded, based on that sentence, that Subpart T rather than Subpart W applied to the A-9 pit in 1990 in part because "Subpart W is expressly inapplicable to disposal." Order at 9. We disagree. It seems obvious to us that the sentence should not be taken literally to mean that Subpart W does not apply to the disposal of *tailings* (as opposed to tailings piles) since the main purpose of Subpart W is to impose a work standard for the disposal of tailings. *See* 40 C.F.R. § 61.252(b). Thus, we take the sentence in section 61.250 to mean that Subpart W does not impose requirements governing the disposal (*i.e.*, final closure) of tailings *impoundments*. The preamble to the Subpart W and Subpart T regulations supports this view, making it clear that EPA generally intended to regulate the management of operational tailings piles in Subpart W and to impose deadlines for the disposal of non-operational tailings piles in Subpart T.[26]

[26] The table of contents for the preamble to the final Subpart T and Subpart W regulations contains a section "IV, K," which is titled "Radon Releases From Operating Uranium Mill Tailings Piles," in which the Agency explains its purpose to impose a radon emissions limitation on existing tailings piles and to impose construction standards for new piles. It also contains a section "IV, L," which is titled "Radon Releases from the Disposal of Uranium Mill Tailings Piles," in

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Umetco's contention that the section 61.254 reporting requirement only applies if the facility's associated mill is operational is contradicted by the language of sections 61.252 and 61.253. Section 61.252 imposes a radon emissions standard on uranium mill tailings *piles*. Section 61.253 establishes a method for determining compliance with that emissions standard. Since the purpose of the reporting requirement in section 61.254 is to "report the results of the compliance calculations required in § 61.253," section 61.254 is clearly focused on the status of the tailings pile *not* the mill.

Our interpretation of Subpart W effectuates the purposes for which the Subpart W reporting requirement was imposed. Subpart W was promulgated to protect the public from radon emissions from active tailings impoundments that were not yet undergoing final closure.[27] To that end, the Subpart W regulations require the owners and operators of active impoundments to implement work practices that will keep radon emissions from the impoundment within a safe range

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which the Agency explains its intent to impose deadlines for "the disposal of uranium mill tailings *impoundments*." *See* 54 Fed. Reg. 51,654, 51,681. We attach no significance to the fact that the word "pile" does not appear in the actual regulations.

[27] *See* Final Rule, 54 Fed. Reg. 51,654, 51,679 (Dec. 15, 1989):

> This final rule announces the Administrator's final decision for the * * * operation and disposal of Uranium Mill Tailings Piles.
>
> K. *Operating Uranium Mill Tailings Piles*
>
> * * *
>
> [Uranium mill tailings] * * * emit large quantities of radon. There are 26 NRC-licensed uranium mills in the western United States. Due to the depressed state of the uranium industry, most of these mills are not currently operating.
>
> The Uranium Fuel Cycle standard, 40 CFR 190, does not regulate radon emissions from the tailings piles. Radon emissions during [mill] operations are currently regulated by a NESHAP 40 CFR Part 61, * * *, which is a work practice standard * * *. The piles must ultimately be disposed of in accordance with * * * 40 CFR part 192.
>
> This rule [new subpart W] will have the practical effect of requiring the mill operators to keep their piles wet or covered.
>
> L. Disposal of Uranium Mill Tailings Piles [new subpart T]
>
> * * *
>
> After uranium mill tailings impoundments can be no longer used, they must be disposed of. * * * The existing UMTRCA
>
> Continued

before emplacement of a final cover on the impoundment. The fact that the East Gas Hills mill was not operating in 1990 is irrelevant to the risks posed by emissions from the still-operational A-9 tailings impoundment and is therefore irrelevant to whether Umetco should have been monitoring those emissions. Thus, Subpart W makes it clear that as long as the tailings impoundment was not closed or undergoing final closure in 1990, a radon test report was required.

Finally, we address several additional bases for the presiding officer's decision that were not discussed above and our reasons for rejecting them.

First, the presiding officer concluded that the language of an earlier version of 40 C.F.R. § 61.250 supports his interpretation that the current version of Subpart W only applies during the period when the associated uranium mill is in operation. His conclusion is unfounded. The version to which the presiding officer referred provided that:

> This subpart applies to licensed sites that manage [tailings] during and following the processing of uranium ores, commonly referred to as uranium mills and their associated tailings. *This subpart applies during the period of operation.*

(Emphasis added.) To begin with, we believe that the presiding officer erred in relying on earlier versions of the Subpart W regulations. The Agency made it clear in the preamble to the proposed 1989 Subpart W regulations that:

> [I]t intends to take a 'fresh look' at the risks and issues involved in regulating or not regulating radionuclide emissions under section 112 of the Act. This means that the Agency is not bound by previous statements, positions or decisions.

54 Fed. Reg. 9612 (March 7, 1989). In addition, we do not read the earlier version as being necessarily limited to the period of operation of *the mill*, rather than the entire facility.

> regulations set no time limits for the disposal of the piles * * * when they are no longer used for the disposition of new tailings. [This new rule sets a 2-year time limit for disposal of the piles.]

Second, the presiding officer concluded that the A-9 pit did not fall within Subpart W because it fell within Subpart T. The presiding officer relied on the definition of "operational" in Subpart T at 40 C.F.R. § 61.221(b) to support his view. As noted above, section 61.221(b) provides that:

> A pile cannot be considered operational if * * * the mill it accepts tailings from has been dismantled or otherwise decommissioned.

The presiding officer's reasoning is not persuasive for several reasons. As the Region points out, Subparts W and T each have their own definitions of "operation." Subpart T specifically states that the definitions apply to the terms "used in this Subpart." Therefore, since the Region alleged a violation of Subpart W, the presiding officer should have focused on the plain language of Subpart W and erred in applying the Subpart T definition. Moreover, even if the Subpart T definition were to apply, it would not cover the Umetco site in 1990. The presiding officer's assumption that this language means that an impoundment is not operational if *its associated mill* has been dismantled or otherwise decommissioned is not warranted: The definition merely states that "the mill it accepts tailings from" has been dismantled or decommissioned. In this case, the A-9 pit was either accepting tailings or was on standby status to accept tailings from mills that had been neither dismantled nor decommissioned. Accordingly, Umetco's impoundment was not non-operational under Subpart T. In such circumstances, Subpart T did not apply. Additionally, we are not persuaded by Umetco's contention that the East Gas Hills mill could be considered "dismantled or otherwise decommissioned" in 1990. Umetco conceded that dismantling continued into 1990 and that "completion of all decommissioning activity did not occur until 1991 * * *," a year after the reporting obligation took effect.

Finally, we think that an examination of the revised Part 192 removes any doubt that the A-9 pit was operational in 1990, and that Umetco's obligation to dispose of the A-9 tailings pile was not yet triggered. Under Part 192 an impoundment is operational so long as it is available for receiving uranium byproduct wastes. As noted above (*see supra* n. 7), the definition of operational under § 192.31(p) is virtually identical to the definition in Subpart W. Whereas Subpart W is aimed at securing compliance with the radon standard until a final cover is placed over the impoundment, Part 192 is aimed at maintaining that same radon standard by requiring the proper disposal of the impoundment through the expeditious "emplacement of a permanent cover" and subsequent monitoring of its efficacy.

Contrary to Umetco's and the presiding officer's suggestions, we do not think that the above-described regulatory scheme is duplicative or confusing. As the owner and operator of the A-9 pit, Umetco was obligated to comply with Subpart W until the A-9 pit ceased to accept uranium wastes and began final closure. Not until that time did the obligations of rescinded Subpart T and now Part 192.31 come into play.[28]

III. *CONCLUSION*

For the reasons stated above, the presiding officer's accelerated decision is reversed, Umetco is found to have violated 40 C.F.R. § 61.254, and the case is remanded to the presiding officer for consideration of the penalty to be assessed.[29]

So ordered.

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[28] Umetco argues that a settlement agreement resolving litigation between EPA and various environmental and industry groups regarding the rescission of Subpart T (*see* Notice of Settlement Agreement at 58 Fed. Reg. 17,230, April 1, 1993), provides that NRC authorization for a pile to accept additional tailings "during the mill closure period does not cause the mill to become a * * * Subpart W facility." Umetco Supplemental Memorandum, at 3 (June 8, 1993). Umetco has inaccurately paraphrased the settlement agreement. The agreement provides that accepting additional tailings during the closure period will not cause a nonoperational disposal site to revert to operational status. Since Umetco's A-9 pit had not become nonoperational as of 1990, the statement in the settlement agreement is inapplicable.

Umetco's reliance on EPA's inclusion of the East Gas Hills site on a list of sites nonoperational covered by the 1991 Subpart T settlement agreement is misplaced. The issue is whether the A-9 pit was operational in 1990.

Finally, Umetco contends that the Region acted inconsistently by determining that the A-9 pit was a Subpart W impoundment but determining that an operational impoundment owned by the American Nuclear Corporation (ANC) was a Subpart T impoundment. It is irrelevant whether the Agency misclassified the ANC facility. Even if the Agency had erred in determining that the ANC impoundment was not subject to Subpart W, Umetco has not alleged any legal basis for its contention that such an error should excuse Umetco from a penalty for its own violation.

[29] In assessing a penalty the presiding officer should consider Umetco's alleged understanding with the Region regarding the use of its 1991 test results to satisfy its 1990 testing obligation and the Region's response to Umetco's allegations.