

11/23/94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Umetco Minerals Corporation,)	Docket No. CAA-VIII-(113)-92-03
)	
Respondent)	

ORDER ON CROSS MOTIONS FOR ACCELERATED DECISION

The United States Environmental Protection Agency, Region VIII, initiated this proceeding by issuing a complaint on March 31, 1992, pursuant to Section 113(d) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d), against Respondent, Umetco Minerals Corporation (Umetco). The complaint charged Umetco with failing to report results of radon emissions testing during 1990 from a uranium mill tailings pile, known as the "A-9 pit."

Umetco is the owner and operator of a uranium mill and the A-9 pit, which is an active subgrade uranium mill tailings pile, located in East Gas Hills, Natrona County, Wyoming. The A-9 pit serves as a disposal site for low-level radioactive waste. The mill ceased operations in 1984 and was dismantled in 1988, but the A-9 pit was authorized by a license issued to Respondent by the Nuclear Regulatory Commission (NRC) to accept additional tailings and radioactive waste materials.

According to the complaint, Umetco was required to report the radon tests results for calendar year 1990 by March 31, 1991, pursuant to 40 C.F.R. § 61.254, which is an annual reporting requirement of the National Emission Standards for Hazardous Air Pollutants (NESHAPs), 40 C.F.R. Part 61, issued pursuant to section

112(d) of the CAA. Complainant alleges that such failure to report is a continuing violation, accruing from March 31, 1991, until the date of issuance of the complaint. A penalty of \$80,000 is proposed to be assessed for the violation.

Umetco answered the complaint, denying the alleged violation, and requested a hearing. The parties each filed motions for accelerated decision contemporaneously with prehearing exchange documents on October 9, 1992.

Complainant moved for an accelerated decision in its favor on issues of both liability and the amount of penalty, asserting that no genuine issues of material fact have been raised. Umetco's motion for accelerated decision requests dismissal of the proceeding on the basis that the regulatory provision which it allegedly violated was not applicable.

On October 15, 1992, Umetco filed a motion to amend its answer and on November 27, 1992, Complainant moved to amend the complaint.

Umetco responded to Complainant's motion for accelerated decision on October 23, 1992, and filed a supplemental memorandum in support of its motion on June 8, 1993. Complainant submitted a supplemental brief in support of its motion, to which Umetco responded on May 18, 1994.

I. MOTIONS TO AMEND

Umetco moved to amend its admission of the second paragraph of the complaint to an admission of only some portions of that paragraph.

The second paragraph of the complaint alleges, in pertinent part:

Respondent is the owner and operator of a uranium mill with an active subgrade uranium mill tailings pile (known as the "A-9 pit") . . . The A-9 pit serves as a disposal site for low-level radioactive waste and is an "operating existing mill impoundment" as that term is used in 40 C.F.R. Section 61.254.

Respondent proposed to amend its answer to that paragraph as follows:

Umetco admits that it is the owner and operator of a uranium mill in East Gas Hills, Natrona County, Wyoming, which includes a subgrade uranium mill tailings pile known as the A-9 Pit. Umetco further admits that the A-9 Pit serves as a disposal site for low-level radioactive waste. The remaining allegations in paragraph 2 state a conclusion of law to which no response is required.

Thus, Respondent sought to clarify that it does not admit to the assertion that the A-9 pit is an "operating existing mill impoundment" as referenced in 40 C.F.R. § 61.254. This assertion is the central issue raised by the parties respective motions for accelerated decision. Complainant did not oppose the motion to amend, and it will be granted.

Complainant's motion to amend addressed paragraph two of the complaint and also was unopposed. Complainant moved for permission to add a reference that the time period at issue in paragraph two is throughout the calendar year 1990. The motion to amend the complaint will be granted.

II. CROSS MOTIONS FOR ACCELERATED DECISION

A. Arguments of the Parties

The central issue presented by the motions for accelerated decision is whether Umetco was required to report annually the results of radon testing for the A-9 pit, pursuant to Subpart W of the NESHAPs, entitled "National Emission Standards for Radon Emissions From Operating Mill Tailings." Section 61.250, entitled "Designation of facilities," defines the scope of Subpart W and provides:

The provisions of this subpart apply to owners 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 subpart does not apply to the disposal of tailings.

Additionally, § 61.251 "Definitions," provides:

(e) Operation means that an 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.

The reporting requirement of Subpart W, § 61.254, provides as follows, in pertinent part:

(a) The owners or operators of operating existing mill impoundments shall report the results of the compliance calculations required in § 61.253 [regarding the Radon-222 emissions standard] and the input parameters used in making the calculation for each calendar year shall be sent to EPA by March 31 of the following year. . . .

The question is whether the A-9 pit is an "operating existing mill impoundment."

1. The Radionuclide NESHAP Regulations

Umetco's position is that during 1990, the A-9 pit was not operational and therefore was not subject to Subpart W, but instead was subject to Subpart T of the NESHAPs, which does not require annual reporting for radon testing.^{1/} Subpart T is entitled "National Emission Standards for Radon Emissions From the Disposal of Uranium Mill Tailings" and provides in § 61.220 "Designation of facilities":

(a) 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, that are listed in, or designated by the Secretary of Energy under title I of the Uranium Mill Tailings Control Act of 1978 or regulated under title II of the Uranium Mill Tailings Control Act of 1978.

Subpart W, on the other hand, applies to operating uranium mills and their associated tailings piles. Umetco asserts that the question of which of the two subparts applies hinges on the definition of "operational," in Subpart T, 40 C.F.R. § 61.221(b), as follows:

^{1/} Subpart T was never enforced insofar as applied to privately owned uranium mill tail disposal sites licensed by the NRC. When Subpart T was promulgated, EPA utilized its authority under CAA §112 to grant a two year waiver of compliance until December 15, 1991. See 56 Fed. 55432, October 25, 1991. EPA subsequently stayed the effectiveness of Subpart T pending consideration of its rescission (56 Fed. Reg 67561 December 31, 1991). Subpart T was ultimately rescinded (59 Fed. Reg. 36280, July 15, 1994).

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

Umetco states that the East Gas Hills uranium mill ceased operations in 1984, was dismantled in 1988, and was undergoing decommissioning in 1990, so it was no longer an "operational" pile during the time at issue, the year 1990. Respondent emphasizes that the operating status of the mill, not the pile, determines whether the site is operational, according to Section 61.221(b). Mills and tailings piles are single entities, Umetco argues, as seen from the fact that none of the radionuclide NESHAPs differentiate between mills and piles, and that 40 C.F.R. §§ 61.220 and 61.250 refer to "sites" and "facilities," respectively, as "mills and their associated tailings." Umetco argues further that the fact that the A-9 pit could accept additional tailings from other sites under its NRC license does not change the status of the tailings pile for application of Subpart T.

Complainant's position is that Umetco is subject to the annual radon testing and reporting requirements of 40 C.F.R. §§ 61.253 and 61.254, because the A-9 pit meets the definitions of "existing impoundment" and "operation" in Subpart W, as follows:

Existing impoundment means any 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 means that an 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).)

Complainant cites correspondence from Umetco which states in part: (t)he A-9 tailing site is a 28-acre below-grade tailing impoundment that has most recently served as the repository for the Riverton UMTRCA Title I Uranium Tailings. This site is also presently licensed to accept in situ uranium materials from other licensed operators under License amendment Nos. 9 and 18 . . . This NESHAP program to be done beginning June 20, 1991, is being done to fulfill Subpart W reporting requirements for 1990 which were due to EPA by March 31, 1991. . . ." (letter, dated June 12, 1991, C's Exh 1). Additionally, Umetco's Annual Report for 1990, dated July 29, 1991 (C's Exh 2) provides in pertinent part: "The A-9 pit is still authorized to dispose of a 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."

As indicated previously, Subpart T applies to "owners and operators of all sites that are used for the disposal of tailings." 40 C.F.R. § 61.220. The disposal provision of Subpart T requires disposal of a tailings pile within two years after the pile ceases to be operational. 40 C.F.R. § 61.222(b). The definition of "operational" in Subpart T is limited by the phrase "as used in this subpart" preceding the definition. Thus, Complainant argues, the definition in section 61.221(b) only applies to Subpart T, and

does not preclude applicability of Subpart W. Complainant suggests that the language in the definition, "cannot be considered operational," merely clarifies when the two year time period starts, so that a pile cannot be considered "operational" indefinitely in avoidance of Subpart T requirements.

Umetco argues that under 40 C.F.R. § 61.222, when the facility ceases to be operational, that is, upon dismantling or decommissioning of the mill, it must enter into an implementation schedule for compliance with the radon standard. Umetco asserts that the A-9 pit is under a compliance agreement with NRC to meet the 40 C.F.R. § 61.222(a) radon standard.^{2/} As will be seen infra, this is in accordance with a memorandum of understanding entered into by EPA, NRC and the States of Colorado and Washington.

Umetco further argues that Subpart W is intended to apply in situations in which continued operation of the mill and associated tailings pile is at least contemplated. In support, Umetco points to the reporting obligations of Subparts T and W. The former requires reporting the name of the facility, and Subpart W requires reporting the name of the mill. 40 C.F.R. §§ 61.223(b)(1) and 61.254(a)(1). Umetco adds that there is no support for concluding that Subparts T and W could apply simultaneously.

^{2/} The emissions standard of 40 C.F.R. § 61.222(a), which is in Subpart T, is the same as that of Subpart W, 40 C.F.R. § 61.252(a), namely, 20 pCi/m²-s (20 picocuries per square meter per second) of radon-222.

DISCUSSION

It is concluded that, as Umetco contends, 40 CFR Part 61, Subpart W applies only to "facilities licensed to manage uranium byproduct materials during and following the processing of uranium ores" (§ 61.250), i.e., operating mills and their associated tailings impoundments. Although "facility" is not defined in Subpart W, an accepted definition is that it includes buildings, structures and operations on one "contiguous site."^{3/} The mill at the facility having ceased operations in 1984, and been dismantled in 1988, the mere fact that Umetco was authorized to accept "additional tailings" from other off-site uranium recovery operations does not mean that the A-9 pit is a "facility" within the meaning of §61.250. Moreover, although Subpart T was never enforced, it rather than Subpart W applied to tailings disposal during the calendar year 1990. Subpart W is expressly inapplicable to disposal. The complaint will be dismissed.

The conclusion that Subpart W applies to processing sites and/or "operating facilities," i.e., operating uranium mills and their associated tailings impoundments, and has no application after the mill at the facility ceased operation is supported by the history of the development of the rule. Former § 61.250 applied to

^{3/} Part 61, Subpart Q, specifying national emission standards for radon emissions from storage or disposal facilities owned or operated by the Department of Energy, defines "facility" as meaning "all buildings, structures and operations on one contiguous site" (§ 61.191(a)). The requirement that a facility be on "contiguous land" is also part of the RCRA definition of the term (40 CFR § 260.10).

"licensed sites," which managed uranium byproduct materials, during the period of operation.^{4/} The ANPR for that rule (51 Fed. Reg. 6382, February 21, 1986) indicated that the intent was "to issue an Advance Notice of Proposed Rulemaking under section 112 of the Clean Air Act to consider controlling radon-222 emissions from uranium mill tailings piles during the operation of a mill" (Id.). Similarly, the preamble to former Subpart W made it clear that EPA had decided "that risk reductions should be reconciled with continuity of mill operations by phasing in the transition to new disposal methods" and that the Agency was generally requiring the cessation of disposal of tailings at existing piles within six years after the promulgation of the regulation.^{5/}

Confining the application of Subpart W to operating mills and their associated "on-site" or "facility" tailings piles or impoundments is consistent with the intent to phase out the use of existing impoundments and to require that as soon as practicable

^{4/} See 51 Fed. Reg. 34066, September 24, 1986, codified 40 CFR § 61.250 (1987) which provided:

§ 61.250 Applicability.

This subpart applies to licensed sites that manage uranium byproduct materials 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.

^{5/} See (51 Fed. Reg. 34056-067, September 24, 1986, at 34061, 34063). See also the preamble to the existing rule (54 Fed. Reg. 51658, December 15, 1989) where the following appears: "On September 24, 1986, EPA promulgated a final rule regulating radion 222 emissions from licensed uranium mill processing sites by establishing work practices for new tailings" (51 FR 34056, September 24, 1986).

disposal of all tailings be accomplished in impoundments conforming to standards deemed more protective of the environment. In line with this objective, former Subpart W defined "existing tailings pile," "new tailings" and "new tailings impoundment" with reference to the effective date of the rule.^{6/} The preamble to the 1989 rule at issue here, supports the view that the regulation did not contemplate separating operating mills from associated impoundments, providing in part that "(r)adon emissions during operations are currently regulated by a NESHAP 40 CFR part 61, subpart W, which is a work practice standard specifying two methods, one of which must be used in the construction of any new tailings impoundment." See Attachment A. Moreover, the preamble provided that "(f)or the current radionuclides NESHAP rulemaking, EPA is promulgating rules for three different subcategories that deal with mill tailings: operating mill tailings-existing piles, operating mill tailings-new technology, and disposal of uranium mill tailings [as a separate source category]" (Id.). "Disposal of

^{6/} Former § 61.251 (51 Fed. Reg. 34066, September 24, 1986), defined these terms as follows:

(f) "Existing tailings pile" means a tailings pile that is in operation on the effective date of this rule.

* * *

(h) "New tailings" means uranium tailings produced after the effective date of this rule.

(i) "New tailings impoundment" means any location or structure at which uranium mill tailings are temporarily or permanently stored and which is placed in operation after the promulgation of this rule.

mill tailings" is covered by Subpart T, which had no counterpart in the prior regulation. The cited preamble specified that the source category "operating mill tailings" has two subcategories: "existing and future mill tailings piles."

The reporting requirement which Umetco is alleged to have violated (§ 61.254(a)) applies to "the owners or operators of operating existing mill impoundments." Because it was licensed to accept "additional tailings" and in existence as of December 15, 1989, there can be no question but that Umetco's A-9 pit is an "existing impoundment" as defined in §61.251(d). It does not follow, however, that the A-9 pit was an "operating" existing impoundment, because "operation" as defined in §61.251(e) requires that an impoundment be used for the continued placement of "new tailings" or is in standby status for such placement. "Continued placement of new tailings" definitely has a more limited scope than "additional tailings," the former carrying with it the implication of continued operation of the associated mill. This is in accord with the definitions of "continuous disposal" and "dewatered" in §61.251.¹⁷ Moreover, it is concluded that "standby" in § 61.251(e)

¹⁷ Section 61.251 (b) and (c) provide:

(b) Continuous disposal means a method of tailings management and disposal in which tailings are dewatered by mechanical methods immediately after generation. The dried tailings are then placed in trenches or other disposal areas and immediately covered to limit emissions consistent with applicable Federal standards.

(c) Dewatered means to remove the water from recently produced tailings by mechanical or evaporative methods such that the water content of the tailings does
(continued...)

refers to the status of the mill rather than the impoundment. This is because as we have seen, one of the purposes of the existing rule was to "phase out" the use of existing impoundments and to impose operating conditions including the use of "liners" on "new impoundments."^{7/}

From the foregoing, it is clear that Subpart W can be considered as applicable to Umetco, under the circumstances present here, only if "facilities" as used in present §61.250 and "sites" as used in former §61.250 are regarded as synonymous, and only if "continued placement of new tailings" as used in §61.251(e) is synonymous with "additional tailings." Moreover, as will be seen, even if Umetco's A-9 pit can be fitted within Subpart W by an expansive reading of the definitions, there is no earthly reason

^{7/}(...continued)

not exceed 30 percent by weight.

^{8/} Section 61.252(b) provides:

(b) After December 15, 1989, no new tailings impoundment can be built unless it is designed, constructed and operated to meet one of the two following work practices:

(1) Phased disposal in lined tailings impoundments that are no more than 40 acres in area and meet the requirements of 40 CFR 192.32(a) as determined by the Nuclear Regulatory Commission. The owner or operator shall have no more than two impoundments, including existing impoundments, in operation at any one time.

(2) Continuous disposal of tailings such that tailings are dewatered and immediately disposed with no more than 10 acres uncovered at any time and operated in accordance with § 192.32(a) as determined by the Nuclear Regulatory Commission.

for doing so, because the Administrator's finding that certain modifications to the UMTRCA regulations would protect public health with an ample margin of safety applies to the A-9 pit.

There appears to be no dispute but that Umetco is the owner and operator of a site "used for the disposal of tailings" and that Umetco "managed residual radio-active material or uranium by product materials during and following the processing of uranium ores, . . . , that are regulated under title II of the Uranium Mill Tailings Radiation Control Act of 1978" within the meaning of §61.220, which defines the scope of Subpart T. Umetco's A-9 pit was and is regulated under Title II of UMTRCA.

EPA promulgated Subpart T in 1989, even though it recognized that the "disposal of uranium mill tailings" was already regulated under 40 CFR, Part 192, because the existing UMTRCA regulations set no time limits for disposal of the piles (54 Fed. Reg. 51883, December 15, 1989). Additionally, the Agency opined that a rule would assure that piles which are not ready for disposal at this time will be disposed of in a timely manner after they are removed from service (Id.) EPA recognized, however, the expense and inconvenience of dual UMTRCA and CAA regulation, first granting a two-year waiver of compliance until December 15, 1991, and ultimately rescinding Subpart T (supra note 1).

Section 61.222 makes it clear that Subpart T applies to "non-operational uranium mill tailings sites" licensed by the NRC or an affected Agreement State and that the site must be brought into compliance with radon emissions limitations (supra note 2) within

two years of the effective date [of the rule] or within two years of the date it ceases to be operational whichever is later. "Non-operational" is defined in Subpart T only with relation to "operation," which is defined to mean "a uranium mill tailing pile that is licensed to accept additional tailings, and those tailings can be added without violating subpart W or any other federal, state or local rule or law" (§61.221(b)). Umetco's A-9 pit prima facie fits within this broad definition. Nevertheless, the A-9 pit must be considered non-operational by virtue of the second sentence of §61.221(b) providing that "(a) pile cannot be considered operational if . . . the mill it accepts tailings from has been dismantled or otherwise discomissioned." While Complainant may be correct that the purpose of the quoted sentence was to set a time for the beginning of the two-year period for compliance, this does not and cannot alter the conclusion that its effect is to render the A-9 pit a non-operational site subject to the plain language of Subpart T.

As indicated (supra note 1), EPA issued a notice of proposed rulemaking to stay the effectiveness of Subpart T on October 25, 1991 (56 Fed. Reg. 55432). The notice indicated that, if finalized, the proposal would stay the effectiveness of Subpart T until EPA completed related rulemaking under §112(d)(9) of the CAA, as amended, and the Atomic Energy Act, as amended. These rulemakings were designed to reduce duplication of regulatory effort between EPA, NRC, and the affected Agreement States, while

at the same time assuring that public health was protected with an ample margin of safety. Attached to the notice was a MOU entered into by EPA, NRC and the States of Colorado and Washington the purpose of which was to ensure that owners and operators of existing uranium mill tailings piles licensed by the NRC or an affected Agreement State, or those that will in the future become non-operational, effect final closure, i.e., placement of an earthen cover so as to permanently limit radon emissions to no more than 20 pCi/m³ as expeditiously as practicable considering technological feasibility. A guiding objective was that this occur as to all current disposal sites by the end of 1997, or within seven years of when existing and standby sites enter disposal status. The proposed stay, implementation of the stay and ultimate rescission of Subpart T were based on findings to the effect that appropriate modifications of the general UMTRCA regulations (40 CFR Part 192) to ensure specific, enforceable closure deadlines and monitoring requirements, and with the performance of NRC and the affected Agreement States as reflected in the MOU, that the NRC's regulatory program for non-operational mill tailings piles would protect public health with an ample margin of safety.^{2/}

Relevant here is Attachment A to the MOU entitled "Non-Operational" Tailings Impoundments" (56 Fed. Red. 55435). Despite its title, Attachment A lists several "operational impoundments" including the Umetco site at Gas fills, Wyoming which is shown as

^{2/} EPA completed the rulemaking insofar as Amendments to Part 192 on November 15, 1993 (58 Fed. Red 60340, November 15, 1993).

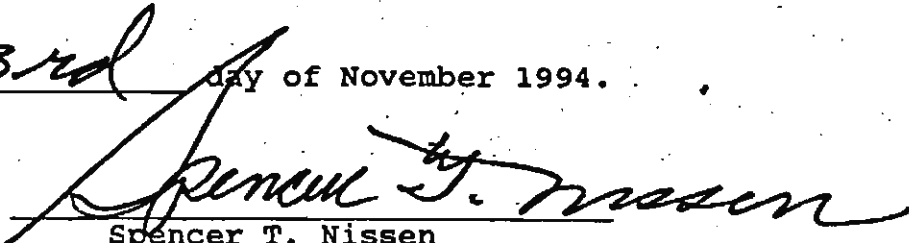
having "one operational impoundment" and "one non-operational impoundment." As the title of Attachment A to the MOU indicates, this merely confirms that tailings impoundments could be operational for some purposes and "non-operational" for other purposes and does not support Complainant herein.

Complainant's reliance on alleged "admissions" by Umetco as to the applicability of Subpart W in correspondence with the Agency (ante at 7) is misplaced, because these are legal conclusions and not necessarily binding. See, e.g., In re Pitt Des Moines, Inc., Docket No. EPCRA-VIII-89-06 (Initial Decision, July 24, 1991) and In re U.S. Aluminum, Docket No. EPCRA-89-0124 (Ruling on Motion for Accelerated Decision, November 26, 1991.)

O R D E R

Umeto's motion to amend its answer and Complainant's motion to amend the complaint are granted. The complaint is dismissed.^{10/}

Dated this 23rd day of November 1994.


Spencer T. Nissen
Administrative Law Judge

Enclosure
Attachment A

^{10/} Inasmuch as this order disposes of all issues in the proceeding, it is an initial decision in accordance with Rule 22.20(b) (40 CFR Part 22), which, unless appealed in accordance with Rule 22.30, or unless the EAB elects to review the same sua sponte as herein provided, will become the final order of the EAB in accordance with Rule 22.27(c).

See 54 Fed. Reg. 51679 (December 15, 1989) providing in pertinent part:

K. Operating Uranium Mill Tailings Piles

I. Introduction

The process of separating uranium from its ore creates waste material called uranium mill tailings. Since uranium ore generally contains less than 1 percent uranium, uranium milling produces large quantities of tailings. These tailings are collected in impoundments that vary in size from 20 to 400 acres. The tailings contain large amounts of radium, and, therefore, they 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 part 190, does not regulate radon emissions from the tailings piles. Radon emissions during operations are currently regulated by a NESHAP 40 CFR part 61, subpart W, which is a work practice standard specifying two methods, one of which must be used in the construction of any new tailings impoundment. The piles must ultimately be disposed of in accordance with an EPA Atomic Energy Act regulation, 40 CFR part 192, which is implemented by the NRC.

For the current radionuclides NESHAP rulemaking, EPA is promulgating rules for three different subcategories that deal with mill tailings: operating mill tailings--existing piles, operating mill tailings--new technology, and disposal of uranium mill tailings (as a separate source category; see section VII.L of this notice).

This source category, operating mill tailings, has two subcategories because existing and future mill tailings piles present different problems. Existing mill tailings piles are large piles of wastes that emit radon. Radon emissions from these piles are retarded by the presence of water. However, if operations cease, and the pit is allowed to dry out, emissions can increase significantly.

New piles can be designed to overcome this problem in one of two ways: (1) Limit the size of the pile, which limits the radon source; or (2) utilize a disposal system, continuous disposal, that does not allow large piles to accumulate. The new technology is not feasible

for old piles, as it is easier and cheaper and releases less radon to simply cover up the existing piles, rather than to break them up into a series of smaller piles and dispose of them separately.