

solvent were sold to, for example, a semi-conductor manufacturer, the incoming spent solvent would not be covered by the exclusion. This approach would, however, allow metal manufacturers to reclaim metals from excluded metal-bearing secondary materials and sell it to the general public, since metals would be a typical product of the metals industry.

EPA believes that promulgating the exclusion in this way could be a reasonable interpretation of the concept of "continuous process within the generating industry." One important issue that such an approach would raise, however, would be defining what would be considered a "typical product" of the generating industry (*i.e.*, what is a typical product of an industry as identified by a particular 4-digit NAICS code?). We request comment on this alternative generally, and on how to define "typical product of the generating industry."

EPA requests comment on the regulatory alternatives described above, particularly with regard to the need for such additional restrictions, their potential associated benefits, and whether such approaches would be consistent with the general direction given in this area by the D.C. Circuit Court of Appeals.

6. How Is EPA Proposing To Define "Industry?"

Considerations for Defining "Same Generating Industry"

Consistent with the court's language, we are proposing to limit EPA's regulatory jurisdiction in cases where hazardous secondary materials are being generated and legitimately reclaimed in a continuous process within the same industry, because the activity is essentially ongoing manufacturing. In order to draft a regulation that sets out this principle, however, we needed to develop a useful definition of "industry" so that today's proposed exclusion could be implemented across a variety of materials, activities, and industries. In developing a definition of industry for this proposal, we considered (1) whether the definition could be easily identified and readily implemented; (2) whether it was simple (versus unnecessarily complicated); and (3) the degree to which the definition, when used as part of an "intra-industry" exclusion, resulted in outcomes consistent with the principle described above (*i.e.*, that the materials were being continuously used rather than discarded). After consideration of these criteria against several approaches described in more detail below, we

decided to propose using the North American Industry Classification System (NAICS) developed by the Office of Management and Budget (OMB) as the foundation for industry definitions in today's proposed rule.

We considered proposing a narrative definition of industry, using an engineering-oriented approach based on similarity of inputs, processes, and/or outputs (products). Under this comparative approach, industry would first be defined as a set of manufacturing or service activities. Conceptually, two or more industries would be considered the same industry where this set of manufacturing or service activities applies similar processes to input materials (*e.g.*, feedstocks, reagents, catalysts, etc.) having similar composition and/or value, to produce products or services with similar composition and/or value. We would then set out specific criteria, in a regulation, for measuring these similarities and determining when they were similar enough to be considered the same industry.

For example, this regulation could establish that processes are similar if they utilize comparable equipment and/or engineering principles; compositions (of either input materials, or products produced) are similar if concentrations of specific constituents (*e.g.*, hazardous constituents, valuable constituents) are within an order of magnitude; and values (again, of either input materials, or products produced) are similar if they are within some specified amount (*e.g.*, $\pm 30\%$) on a per unit basis. We would also have to consider what the relative importance should be amongst the three elements described (inputs, processes, and outputs). For example, we would need to decide whether we consider similar inputs to be more important than similar outputs, in determining whether two industries would be considered the same.

This approach was initially attractive because it would not require us to evaluate or compile industry categories or lists, it could possibly be tailored to reflect certain principles to help distinguish discard from ongoing production, or it might have been more flexible than a prescriptive industry list. However, we found this approach unworkable for a number of reasons. Primarily, it would leave too much uncertainty about the boundaries of the Agency's jurisdiction. Specifically, it would provide little certainty to the regulated community, and would require regulatory agencies to consider individual reclamation scenarios on a case-by-case basis. Therefore, we decided not to pursue this approach.

We also considered creating our own list of specific industries or industry categories. We found, however, that while there might be some advantages to drafting our own list based on our own institutional knowledge and experience across Agency programs, a large amount of time and resources would be needed to classify many of the diverse types of industrial, service and government operations that produce waste and/or engage in recycling. While we have studied wastes and recycling for some industries in great detail (usually when making hazardous waste listing determinations), we have not studied many others. Another disadvantage to developing our own list would be that such a list would not necessarily reflect standardized, commonly accepted definitions of industry. The most widely-recognized existing industry classification system in the United States is the NAICS. In the past, we have used the Standard Industrial Classification (SIC) system (predecessor to the NAICS) to implement parts of RCRA Subtitle C. EPA has also commonly used the SIC system to implement portions of regulatory programs under other statutes.

We are therefore proposing to use the NAICS as the foundation for the industry definitions in today's proposed rule. We believe that the developers of the NAICS are more familiar with many of these diverse operations, and the NAICS list is also well known and widely accepted by industry. Consequently, we find it to be a reasonable starting point for defining "industry" with regard to identifying materials that are not "discarded" for purposes of RCRA Subtitle C.²

Background of NAICS

NAICS is a new industry classification system that has replaced the Standard Industrial Classification (SIC) system (most recently updated in 1987) that has traditionally been used by government agencies for collecting statistical data and for other administrative and regulatory purposes. Beginning in 1992, NAICS was developed on behalf of the OMB by the Economic Classification Policy Committee (ECPC), which was comprised of representatives of the

² EPA does not assert that all processes classified as the same industry within a single NAICS code are, in fact, so similar that spent materials, by-products and sludges from one process can easily be used by all other processes in the classification. However, given the structure and the purposes of the NAICS, EPA believes that it is reasonable to assume that they are substantially similar. EPA needs to classify broad categories of materials in this rule; it is impracticable to study every factual variation on a case-by-case basis.