

Petroleum Industry. EPA has previously promulgated exclusions related to the recycling of oil and oil-bearing hazardous secondary materials. See July 28, 1994 **Federal Register** (59 FR 38536); see also August 6, 1998 **Federal Register** (63 FR 42110). In those rules, EPA identified the various industry sectors related to petroleum (e.g., exploration and production, transportation and storage, refining and marketing, etc.) that collectively were defined as the petroleum industry for purposes of excluding recovered oil, when such oil is returned to the petroleum refinery for insertion. (We note that this particular “intra-industry” exclusion is uni-directional, that is, it is conditioned on the recovered oil being sent from facilities at any point within the industry, back to a petroleum refinery.) In order to avoid any confusion between this existing definition, and the approach being proposed in today’s rule for defining “industry,” we would like to make several clarifications, and request comment on specific questions.

First, we reiterate that in today’s notice we are not proposing to change the definition of petroleum industry as it is used in the exclusions already mentioned, specifically, 40 CFR 261.4(a)(12)⁶. See Section A.III.7. of today’s preamble for additional discussion of conforming changes to the regulatory framework. Second, because the reuse of secondary materials by burning for energy recovery or the manufacture of fuels is not within the scope of today’s proposal (as mentioned elsewhere in today’s preamble and reiterated in the proposed regulatory text) there may not be any overlap between today’s proposed exclusion, and the existing exclusion that utilizes the broad definition of petroleum industry. However, because there may be some hazardous secondary materials that could be generated and legitimately reclaimed in a continuous process within the petroleum industry, in a manner that does not produce a fuel, to avoid confusion we have proposed to define petroleum industry in today’s rule the same way as described in 40 CFR 261.4(a)(12). Therefore, we have added a clarifying provision in proposed Appendix X to effect this departure from using the NAICS.

⁶ We note that the exclusion for oil-bearing hazardous secondary materials in 40 CFR 261.4(a)(12)(i) is limited only to refinery-generated materials, returned to a refinery; and the exclusion for recovered oil in 40 CFR 261.4(a)(12)(ii) involves the broader definition of petroleum industry. We are not proposing to change the scope of either exclusion in today’s rule.

We request comment on using the definition of petroleum industry from existing 40 CFR 261.4(a)(12) for hazardous secondary materials that are not already excluded under that same provision, or are reclaimed within the petroleum industry for reasons other than making fuels, in lieu of using the 4-digit NAICS approach. We believe that retaining the existing definition of petroleum industry makes the most sense, because we have already looked closely at the recycling of hazardous secondary materials within the petroleum industry, and have already described in various rulemaking documents the types of activities and operations that comprise these industries. We also request comment on whether or not the definition of industry using the 4-digit NAICS Industry Group 3241 (Petroleum and Coal Products Manufacturing) should instead be used for hazardous secondary materials reclaimed within the petroleum industry for reasons other than making fuels.

Waste Management and Remediation Services. We are not including “Waste Management and Remediation Services” (NAICS 562) on the list of industries in Appendix X of today’s proposed rule. We think that this industry is in business to manage waste, and presents different legal and policy issues than do traditional manufacturing industries. Put another way, this type of activity is essentially waste management, as opposed to ongoing manufacturing. We do not think that most materials reclaimed by waste management industries are generated within those industries. On the contrary, we believe that most if not all materials reclaimed in waste management operations are first discarded by another entity that has no further use for them, such as used solvents generated at an automobile repair shop sent to a third-party solvent reclaimer, or lead from spent batteries being reclaimed in a secondary smelter (see *U.S. v. Ilco*, 996 F.2d 1126 (11th Cir. 1993)).

Therefore, we have expressly excluded “Waste Management and Remediation Services” from the scope of today’s proposal. NAICS codes corresponding to these operations do not appear on the list of industries in Appendix X of today’s proposed rule. The NAICS 562 Sub-sector includes the Industry Groups “Waste Collection” (NAICS 5621), “Waste Treatment and Disposal” (NAICS 5622), and “Remediation and Other Waste Management Services” (NAICS 5629).

In addition, we have identified specific activities described within certain NAICS industry categories that

should remain within our Subtitle C jurisdiction under the same logic (that is, they manage materials that have been discarded by another entity that has no further use for them). These are activities that fall within two separate Industry Groups within the Chemical Manufacturing Sector (325). Based upon the NAICS description for these activities, they appear to reclaim secondary materials from facilities that generate them, and unlike the other operations in the same NAICS codes, they do not produce any products made from non-secondary materials, nor do they provide the kinds of services that the other operations provide. Moreover, they are often owned and operated by independent third parties. We are proposing to exclude these activities from the industry classifications as follows:

- 3256 Soap, Cleaning Compound, and Toilet Preparation Manufacturing (except for third-party operations that reclaim drycleaning fluids at sites that do not conduct drycleaning).
- 3259 Other Chemical Product and Preparation Manufacturing (except for third-party operations that reclaim degreasing solvents at sites that do not conduct degreasing operations).

Finally, we assume that identifying facilities properly classified under the Waste Management Services NAICS Industry Group should be relatively straightforward, and that such facilities would not be readily confused with facilities that are recycling secondary materials in a continuous process within the generating industry. Generally speaking, where such waste service facilities are stand-alone operations (i.e., are not physically on-site with respect to industrial or manufacturing operations), and it is clear that virtually all materials reclaimed at such facilities are secondary materials received from off-site generators (in one or more industry categories), then reclamation services are quite obviously the principal activity undertaken at the site, and the secondary materials have been discarded by the generators, as discussed above. In addition to excluding facilities with NAICS Codes 5621, 5622, and 5629 from the list of industries in Appendix X as described above, proposed 40 CFR 261.2(g)(2)(iv) makes clear that materials sent to these waste service industries are not excluded from the definition of solid waste under today’s rule.

Manufacturing Versus Other NAICS Sectors

Today’s proposed rule is incorporating all of the NAICS