

categories into Appendix X, with the exception of the categories described above for mineral processing, petroleum, and waste management services.

However, because we are relying on the NAICS list, which is designed to capture the entire breadth and scope of the U.S. economy, there may be categories on the list that do not generally generate or recycle hazardous secondary materials. Including such industries on the list used in this regulation makes the list rather large and unwieldy. In addition, for some industries, inclusion on the list in Appendix X may create some confusion and concern as to whether we are implying that a particular industry generates hazardous secondary material by virtue of it appearing on this list in the RCRA regulations (which we are not). We believe that the majority of hazardous secondary materials presently being recycled are generated within traditional manufacturing industry sectors (e.g., NAICS Sectors 31–33). For example, it may be more straightforward to limit the list of industries in Appendix X to mining and manufacturing sectors. We are requesting comment on whether the list of industries in Appendix X should be modified, beyond what is being proposed today, based on the knowledge that certain industry categories do not generate hazardous secondary materials or will not engage in reclamation of hazardous secondary materials.

How Will the Regulated Community Identify Which NAICS Code Applies for Purposes of This Rule?

The 2002 NAICS Manual contains guidelines for using the system, along with fairly detailed descriptions of the industry categories. Individual NAICS categories contain information, such as examples, to help identify an establishment's industry classification. We are proposing today to require the regulated community to use the existing NAICS guidance (NAICS 2002 Edition) to identify what industry their operations fall within for purposes of today's exclusion from the RCRA definition of solid waste. See paragraph (d) in proposed Appendix X.

The NAICS is a "classification system for establishments." As discussed in more detail below, an establishment is a collection of one or more activities, and under NAICS the establishment is what is classified as a particular industry. The introductory text to the 2002 NAICS Manual states that "The establishment as a statistical unit is defined as the smallest operating entity

for which records provide information on the cost of resources, materials, labor, and capital employed to produce the units of output." Establishment is further clarified in the same text as "generally a single physical location, where business is conducted or where services or industrial operations are performed (for example, a factory, a mill, store, hotel, movie theater, mine, farm, airline terminal, sales office, warehouse, or central administrative office)."⁷ In cases where distinctly different and potentially significant activities occur at one location, in determining whether these activities should be classified as a separate establishment, the 2002 NAICS Manual states that an "activity is treated as a separate establishment provided: (1) No one industry description in the classification includes such combined activities; (2) separate reports can be prepared on the number of employees, their wages and salaries, sales or receipts, and expenses; and (3) employment and output are significant for both activities.

Thus, the NAICS system first defines what is an establishment. An establishment is then classified to an industry when its primary activity meets the definition of that industry. In the simplest case, where an establishment consists of one activity, the industry classification for that establishment is that which best describes that single activity. When there are two or more activities, the NAICS Manual describes procedures for identifying the primary activity. The NAICS Manual states:

In most cases, if an establishment is engaged in more than one activity, the industry code is assigned based on the establishment's principal product or group of products produced or distributed, or services rendered. Ideally, the principal good or service should be determined by its relative share of current production costs and capital investment at the establishment. In practice, however, it is often necessary to use other variables such as revenue, shipments, or employment as proxies for measuring significance.⁸

Thus, establishments are classified under NAICS based on the primary activity within that establishment. It should also be pointed out, however, that for certain types of combined activities, the NAICS guidance provides exceptions to this "primary activity" rule approach. For example, vertically-integrated facilities can be described as consecutive stages of production in which the output of one step is the

input to the next. Rather than determining which of these stages of production are the largest (or primary), NAICS would classify this series of activities based on the final process. One example of this is where the NAICS Manual specifies that a physical location with both a Pulp Mill activity and Paper Mill activity, should be classified as a Paper Mill because that is the final stage of production. But there are even exceptions to this, such as where the NAICS Manual specifies that a particular set of vertically-integrated activities should be classified based upon the first stage of the manufacturing process (e.g., a Steel Mill where other activities such as producing Steel Castings occurs, should be classified as a Steel Mill nonetheless). An important point here, other than illustrating how the "primary activity rule" may be superseded by the way in which the NAICS manual defines particular vertically-integrated establishments, is that the NAICS Manual will specify how such an establishment is classified, rather than the owner/operator having to in every case make a judgement (such as determining the primary activity, for example).

Another example of how NAICS may classify certain combined activities, other than via the primary activity rule, is in certain examples of joint production of goods and services. Some establishments may have two activities (e.g., a gasoline station with a convenience store) where the combined activities have been identified in the NAICS as a third, separate industry. Thus, rather than making a determination of which activity (gasoline retail versus convenience store) is primary using receipts/sales and revenue data as a proxy, NAICS provides a category Gasoline Stations with Convenience Stores (NAICS code 44711). In this case, this third category should be used in lieu of determining the "primary activity" for these establishments.

Because today's rule proposes to use the NAICS for classifying establishments (at the 4-digit, or Industry Group level) for determining whether or not the generating industry and the reclaiming industry are the same, the concept of the establishment is important. We are proposing to add a definition of establishment to the RCRA regulations, where establishment means "an economic unit, generally at a single physical location, where business is conducted or where services or industrial operations are performed. An establishment is the smallest such unit for which records provide

⁷ NAICS Manual, 2002, p. 21.

⁸ NAICS Manual, 2002, p. 22.