

summarized above, will serve the purpose of a clear and consistent definition of industry.

#### Regulatory Option for On-Site Recycling

As explained in the preceding discussion, today's proposed exclusion would only be available for materials recycled within the same industry in which they are generated, and we are proposing to use the NAICS system as the primary means of identifying and classifying the industries associated with generation and reclamation of recyclable materials. However, as discussed above, we acknowledge that our proposed approach may have certain drawbacks, particularly with regard to situations where the recycling activities all occur on-site. For example, we expect there will be numerous facilities that will have two or more establishments that would be classified as separate industries according to the NAICS system (e.g., a facility that produces petrochemicals as well as pharmaceuticals). As proposed today, materials would not be excluded if the generating and reclaiming establishments were in different industries according to NAICS, even if both establishments were situated at the same site and operated by the same company. In a somewhat different example, a large manufacturer such as an integrated steel production plant may find it advantageous to have a separate, specialized company operate a dedicated reclamation process at the plant site. Under the NAICS system, that reclamation process would likely not be classified as part of the steel making industry, since it could be viewed as a distinct, separate economic unit. We also acknowledge that for large, integrated facilities it could be difficult using the NAICS guidance to easily classify processes that may produce different types of outputs, but are physically or operationally linked. Finally, as discussed previously, a specific unit or process at a facility may be flexibly designed to produce a variety of outputs, and its NAICS classification might thus change relatively often, depending on which products are being produced at any given time.

In developing today's proposal, several stakeholders suggested that an exclusion for on-site recycling could be a more practical and simpler approach to encouraging legitimate recycling while maintaining environmental protections. The Agency believes that such an option may have merit, and in light of the potential difficulties in making clear, definitive NAICS classifications at more complex facilities, we are considering a

regulatory option that could simplify implementation of today's proposed exclusion in situations where materials are all generated and reclaimed in a continuous process on-site.<sup>12</sup> Under this option, the NAICS system would be used to classify generating and reclaiming industries that are located at different sites, consistent with today's proposal. However, materials that are generated and reclaimed in a continuous process at the same site would be excluded, regardless of whether different industries were involved. This option would also involve the same notification requirements that would apply to off-site, intra-industry recycling excluded under today's proposal.

It should be noted that such an on-site recycling exclusion would not be based on the direction of the D.C. Circuit Court (in the opinions discussed in section II.D of this preamble), but rather would rest on the premise that materials recycled on-site in a continuous process are unlikely to be discarded because they would be closely managed and monitored by a single entity who is intimately familiar with both the generation and reclamation of the material, no off-site transport of the material (with its attendant risks) would occur, and there would be few questions as to potential liability in the event of mismanagement or mishap.

We believe that this regulatory option would have the advantage of being somewhat more straightforward to implement, both for industry and regulators, by avoiding many of the uncertainties and complexities of using the NAICS system, particularly at larger facilities. We also believe that it would likely encourage more legitimate recycling than would occur under today's proposed regulatory framework for intra-industry recycling. We request comment on this regulatory option.

#### 7. How Is EPA Proposing to Define "Continuous Process?"

##### What Is a "Continuous Process?"

As explained above, we are proposing today to define "discard" for Subtitle C purposes in the context of the opinions of the D.C. Circuit pertaining to the definition of solid waste. EPA is proposing to exclude from the Subtitle C definition of "solid waste" materials recycled in a continuous process within the generating industry. In this section of the preamble, we propose that generation and reclamation of materials would take place in a "continuous process" only if the materials are

handled exclusively by facilities or entities (except for transporters) that are within the generating industry, and the materials are not "speculatively accumulated" as defined in 40 CFR 261.1(c)(8).

Today's proposed definition for continuous process would not allow a generator to ship excluded materials to a broker or other middleman before it is received at a reclamation facility. While middlemen such as brokers are often better able to find markets for recyclable secondary materials, and thus can facilitate their beneficial reuse, we do not believe that such arrangements are consistent with the idea of recycling in a "continuous process." Brokers do not manufacture the same goods or provide the same type of services as the entities which generate the secondary materials. We do not regard them as falling within the same industry as the generators. Moreover, often a generator who consigns materials to a broker does not know where or how the material will be reclaimed. This suggests that these generators are more likely to be "finished" with a material and to be willing to let the material go to a different industry for reclamation. We also note that brokers have been associated with releases requiring cleanups, though we have not compiled definitive data on any such recent damage cases. In sum, we regard the use of brokers as a significant discontinuity in the use of a secondary material, although we request comment on this issue. Today's proposal would, however, allow the use of independent transporters (who typically would not be in the same industry that generated the secondary material) to ship excluded materials from one facility to another, as long as each facility is within the generating industry.

In addition to requiring materials to be shipped directly between generator and reclaimer, we believe that a continuous process requires some limitations on the timing of the activities in question; *i.e.*, how soon a material is reclaimed and reused after being generated. Obviously, if a secondary material is generated but never reclaimed and reused it must be considered a waste. On the other hand, if a material is generated and subsequently reclaimed and reused more or less immediately (e.g., within a few hours or days), it might easily be concluded that such recycling takes place in a "continuous process."

To address this timing aspect in defining continuous process, we are proposing to use RCRA's existing "speculative accumulation" provisions (see 40 CFR 261.1(c)(8)) to distinguish

<sup>12</sup> "On-site" is defined for RCRA Subtitle C purposes in 40 CFR 260.10.