



Department of Energy
Washington, DC 20585
February 25, 2004

OSWER Docket
Environmental Protection Agency
Mail Code: 5305T
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Attention Docket ID No. RCRA-2002-0031

Dear Sir or Madam:

Re: *Revisions to the Definition of Solid Waste; Proposed Rule*

On October 28, 2003 (68 *FR* 61588), the U.S. Environmental Protection Agency (EPA) published a proposed rule that proposes to exclude certain hazardous secondary materials from the Resource Conservation and Recovery Act (RCRA) definition of solid waste. Specifically, certain materials that are generated and reclaimed in a continuous process within the same industry would no longer be regulated as RCRA hazardous wastes. In addition, the proposed rule would establish regulatory criteria for assessing "legitimate recycling" of hazardous secondary materials.

The U.S. Department of Energy (DOE) appreciates the opportunity to comment on this proposed rule. For clarity, the enclosed comments are preceded by a reference to the section of the proposed rule to which they apply and a brief description of the issue to which DOE's comments are directed. If you have any questions or need further clarification of our comments, please contact Jerry Coalgate of my staff at 202-586-6075 or jerry.coalgate@eh.doe.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Traceski".

Thomas T. Traceski
Director
Office of Pollution Prevention
and Resource Conservation

Enclosure



**UNITED STATES
DEPARTMENT OF ENERGY**

Comments On
Revisions to the Definition of Solid Waste: Proposed Rule
(68 FR 61558-61599; October 28, 2003)

Docket ID No. RCRA-2002-0031

U. S. Department of Energy
Comments On
Revisions to the Definition of Solid Waste; Proposed Rule
(68 *FR* 61558-61599; October 28, 2003)

II.A. What is the Intent of Today's Proposed Rule?

1. Page 61560, Column 2: The preamble notes that this regulatory initiative is “consistent with the Agency’s longstanding policy of encouraging the recovery and reuse of valuable resources as an alternative to land disposal. It is also consistent with one of the primary goals of the Congress in enacting the RCRA statute.”

The Department of Energy (DOE) supports the Environmental Protection Agency (EPA) efforts to promote the safe and beneficial recycling of hazardous secondary materials, and agrees that the proposed rule is consistent with the intent of the Resource Conservation and Recovery Act (RCRA) statute and Agency policy in regard to reuse and recycling of materials.

II.F. What Is the Scope of Today's Proposed Rule?

1. Page 61564, Column 2: Under the proposed rule, hazardous secondary materials generated and reclaimed in a continuous process *within the same industry* (emphasis added) would no longer be subject to the RCRA Subtitle C hazardous waste management regulations. As proposed, 40 CFR 261.2(g)(2) would require that reclamation of excluded materials within the generating industry must produce a product or ingredient that can be used or reused without any further reclamation. The preamble notes that this requirement “is intended to prevent situations where excluded materials might be only partially reclaimed within the generating industry, and then sent to a different industry for one or more “final” reclamation steps.”

The DOE suggests that there are situations where additional reclamation in another “industry” (based on the North American Industry Classification System, NAICS, as discussed in the proposed rule) would be appropriate. An originating facility might not have the capability to completely reclaim a material for reuse, while another facility that has a different industrial classification under the NAICS could safely finish reclaiming the material. For example, many types of hazardous materials are generated during decommissioning and deactivation of formerly used facilities, and recycling of these materials is conducted for waste minimization and to decrease disposal costs. Recyclables are generated and may be “partially reclaimed” during decommissioning and deactivation. Normally these recyclables are not reintroduced into a process within the same generating industry; typically they are turned over to a commercial recycler who then sorts and reclaims or finds reusers for these materials. As another example, various DOE research facilities may partially reclaim laboratory solvents that are not reagent grade, and then provide these solvents for further reclamation (e.g., solvent recovery still) to a different facility at the same site (or to a different DOE site) for use in parts cleaning, vehicle service, or painting. Other “industry” and multi-phase reclamation processes should be encouraged whenever there is no indication or evidence of endangerment to human health and

the environment, and should not depend on whether the reclaimed material originated from a different site or whether industries with different NAICS classifications are involved in the reclamation.

III.A.4. What is Meant by a “Continuous Process Within the Same Industry?”

1. Page 61565, Column 3 – Page 51566, Column 1: Under Co-Proposal Option #1, “hazardous secondary materials would have to be generated and reclaimed within a single industry in order to qualify for the exclusion.” Under Option #2, “hazardous secondary materials that are generated and reclaimed in a continuous process within the same industry would not be eligible for the exclusion if the reclamation takes place at a facility that also recycles regulated hazardous wastes generated in a different industry.”

Both options appear to unduly restrict reclamation between facilities with different NAICS classifications. Under either option, reclamation activities at larger, complex sites, such as those operated by DOE, would not qualify for exclusion if the reclaimed materials were not reused within a single industry. DOE recommends that rather than restricting these activities, reclamation across industries should be encouraged, provided that proper management techniques are followed and waste releases, sham recycling, and other inappropriate practices are not occurring.

Furthermore, Option 2 is the least preferred as it appears to discourage using commercial recycling facilities that handle wastes from multiple industries (regardless of potential similarities in reclamation processes or materials reclaimed). Instead, this option would tend to promote many specialized reclamation centers (either on- or off-site), each one focusing on a single industry classification. Limiting the proposed exclusion as stated would be a disincentive to centralized waste reclamation facilities. Such facilities are likely to be easier to monitor and oversee, and (through associations, insurance carriers, and government oversight) tend to be better financed and positioned to support generators seeking recyclers. Economically, it may make little sense to encourage (as Option 2 does) devoted reclaimers for each type of industry when different industries may generate very similar wastes with common reclamation techniques that commercial reclaimers can often provide.

III.A.6. How is EPA Proposing To Define “Industry?”

1. Page 61567, Column 3: The proposed rule relies on using the NAICS to define industries for determining whether recycling is occurring within the same generating industry. The preamble also notes that the NAICS should be used because “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.”

The DOE is concerned that the NAICS does not provide adequate classifications, or guidance on making such classifications, to cover the range of activities conducted within the DOE complex. The following is only a sample of four-digit NAICS classifications that might apply to activities conducted at various DOE facilities:

2211 Electric Power Generation, Transmission and Distribution
 5415 Computer Systems Design and Related Services
 5417 Scientific Research and Development Services
 5622 Waste Treatment and Disposal
 5629 Remediation and Other Waste Management Services
 9241 Administration of Environmental Quality Programs
 9261 Administration of Economic Programs
 9281 National Security and International Affairs

While the preamble recognizes that there are cases where distinctly different and potentially significant activities may occur at one location (Page 61572), the proposed rule does not address the best manner in which to deal with hazardous secondary materials generated at these locations. As indicated in the preamble (Page 61572, Column 2), 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.” At many DOE sites there are two or more facilities dedicated to completely different “industries” as classified under the NAICS. Depending on how these activities are classified, using the NAICS (as the sole discriminator for defining the “same generating industry”) may discourage recycling within the DOE complex, or between DOE and commercial facilities.

For example, under the proposed rule spent solvents from research laboratories (NAICS 5417) could not be reclaimed and reused in the motor vehicle shop of a power generation facility (NAICS 2211), even if these activities occur within a few miles of each other on the same DOE site. Such an example would probably not be unique to DOE. As a second example, essentially any secondary materials produced within the Public Administration classification (NAICS Sector 92) could not be excluded for reclamation and reuse by any commercial enterprise. Thus, the exclusions under the proposed rule would not apply if the facilities maintenance for a NAICS Sector 92 government entity (e.g., air national guard, Federal Aviation Administration) at an airport, and the entity responsible for operating the airport (NAICS classification 4881), co-reclaimed essentially identical secondary materials (such as degreasers and paint solvents) at the same airport. Many federal facilities and large commercial industrial facilities could reasonably be expected to encounter similar problems with assigning NAICS classifications that effectively prevent inter-industry recycling even at the same location. The DOE believes that while the NAICS approach to defining “within the same industry” may be relevant for moderate to small industries, it is not particularly useful for large, complex, and/or highly integrated federal or commercial sites. The proposed approach will likely discourage reclamation of materials within large or complex industries (both federal and commercial establishments).

2. Page 61571, Column 2: Waste Management and Remediation Services (NAICS 562) would be excluded from taking advantage of the recycling provisions in the proposed rule. The preamble indicates the basis for excluding NAICS 562 is “that this industry is in the business to manage waste, and presents different legal and policy issues than do traditional manufacturing industries”, and “that most if not all materials reclaimed in waste

management operations are first discarded by another entity that has no further use for them.”

Waste management and environmental remediation industrial activities are a significant aspect of the work at a number of DOE sites. Depending on how the term “establishment” is applied (see the next comment) and whether multiple NAICS classifications may apply at a given site, many DOE sites could be in the NAICS 562 Sub-sector. Substantial opportunities exist for recycling wastes at these sites and many of these opportunities are being pursued, but under the auspices of the hazardous waste recycling regulations that add costs to the work performed by site contractors for DOE. DOE believes that a blanket elimination of the NAICS 562 Sub-sector is not warranted for federal facilities at which environmental remediation and cleanup are primary activities. Allowing the proposed exclusion to be applied would act as an incentive to reclamation, and would further encourage recycling over disposal options. DOE recommends that the final rule allow federal facilities to implement the recycling exclusions even though NAICS Codes 5621, 5622, and 5629 may be the sole or primary industrial classifications. The final rule could accomplish this through a footnote to Appendix X to Part 261, or by including a provision allowing EPA to make site-specific exceptions on a case-by-case basis.

3. Page 61572, Column 3: The NAICS (and associated guidance) provides a system for classifying establishments into particular industry groups and categories. Because the proposal relies on the NAICS, and the concept of establishment is considered to be critical to correctly applying the NAICS classification system, a definition for “establishment” is included in the proposed rule, 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 information on the cost of resources, materials, labor, and capital employed to produce the units of output.”

Under the proposed definition of “establishment,” most DOE sites would be a single establishment and thus would need to identify a single NAICS classification for the entire site. Yet, as noted above, at many DOE sites there are numerous distinct “industries” that could be ongoing at the same time, and new industries will arise in response to new missions, even as old industries come to an end. As proposed, the definition of “establishment” does not provide clear enough criteria to enable an entity responsible for complex sites, or that oversees multiple sites within a single complex, to consistently determine a NAICS classification for its site(s). DOE suggests that an alternative definition of “establishment” be included in the final rule for large, multiple-facility sites. The alternative definition could both: 1) allow the assignment of multiple NAICS classifications at any single site; and, 2) consider all assigned classifications to be beneath a single “umbrella” establishment (site office) which would be considered as “the same generating industry” for purposes of the reclamation exclusion. This approach would simultaneously encourage on-site reclamation of excluded materials (even if multiple NAICS classifications are applicable at a single site), while also allowing wastes generated within identical NAICS classifications to be reclaimed at one or more different locations or facilities within the DOE complex.

III.A.7. How is EPA Proposing to Define “Continuous Process?”

1. Page 61575, Column 3 through Page 61576, Column 1: The preamble notes that a continuous process requires some limitations on timing of the reclamation and reuse of the reclaimed material. The proposed rule proposes using RCRA’s existing “speculative accumulation” provisions (see 40 CFR 261.1(c)(8)) to distinguish between processes that are continuous and those that are not. Under the proposed rule, “the person accumulating the material must show that during a calendar year (beginning January 1) the amount of material that is recycled, or transferred to a different site for recycling, must equal at least 75 percent by weight or volume of the amount of that material at the beginning of the period.”

The DOE is concerned that simply applying the speculative accumulation definition may be overly prescriptive. Many industrial processes are not run on a continual basis with a consistent level of output. Seasonal or cyclical production, planned or unplanned periods of shutdown, readjusted budgets, and fluctuating market conditions can affect production levels and the generation of secondary materials. Each of these factors can potentially impact a generating industry’s ability to achieve the speculative accumulation standard, especially the requirement that at least 75% must be recycled in one year. DOE recommends that the final rule provide increased flexibility about the use of speculative accumulation for distinguishing continuous processes. For instance, the final rule should be clarified to ensure that the same year-by-year variance available for speculative accumulation of recyclable materials (under 40 CFR 260.31(a)) would be available for continuous processes that encounter impediments to achieving the 75% annual limit.

III.A.8. What Type of Notification Would Be Required?

1. Page 61577, Column 1 and Column 3: The proposed rule “would require generators who wish to use the 40 CFR 261.2(g) exclusion to submit a one-time notice to EPA or the authorized state” that would include information on “the type of material(s) that would be subject to the exclusion, and the industry that generated the material”. The preamble indicates that “as proposed, providing this notification would not be required more than once,” then requests comment on an alternative notification option under which “generators would be required to submit revised notices if certain information on the original notice were to change.”

The DOE considers the approach in the proposed rule to be sufficient for purposes of notifying EPA or an authorized state that a person is reclaiming and reusing secondary materials in a manner that is excluded from RCRA regulations. The Department concurs that such notification is essential to EPA’s (and the state’s) ability to ensure that sham recycling, unsafe reclamation activities, and other illegitimate practices are not occurring.

2. Page 61577, Column 3: The proposed rule does not include a reporting requirement for persons using the 40 CFR 261.2(g) exclusion. The preamble invites comments on an option being considered that would require submittal of periodic (e.g., annual) reports detailing “recycling activities, to provide information on the types and volumes of materials recycled, where off-site shipments were sent, the types of reclamation processes used, the

types of products produced from the reclamation processes, how residuals from reclamation processes were managed, and other relevant information.”

If the final rule requires mandatory reporting, any such requirement should be no more burdensome than, and should be integrated with, current reporting obligations. For instance, reports should not be required any more frequently than hazardous waste reporting (e.g., biennial and not annual as suggested), and should include essentially the same information and detail that a facility would maintain to evidence/demonstrate legitimate recycling.

III.A.10. How Would the Proposal Be Implemented and Enforced?

1. Page 61581, Column 1 and Column 2: Under the discussion of *Enforcement*, the preamble indicates that if a hazardous secondary material loses its exclusion, each person who manages that material “would have to manage it consistently with hazardous waste management requirements from the point when the material was first generated, regardless of whether the person is the one who actually causes the loss of the exclusion.” Thus, no matter where or how a material is not managed within the boundaries of the reclamation/reuse exclusion, “EPA and an authorized state could choose to bring an enforcement action against the reclaimer, transporter, and/or generator, for violations of applicable RCRA hazardous waste requirements.”

The proposed enforcement position appears overly broad, and DOE is concerned that the approach as stated may create some unnecessary difficulties for the regulated community and, ultimately, the regulating agency. For instance, a transporter should not be expected to be held liable for errors made by either the generator or the receiving facility. A transporter would not be able to conduct evaluations of proper assignment of NAICS codes and/or whether the receiving facility accepts the same waste from other generators having different NAICS codes. Therefore, an enforcement action against a transporter (if different from the generator or the receiving facility) should not be pursued simply because a material loses its exclusion. The DOE also suggests that some limitation on enforceability against generators be considered. The Department agrees that a generator should be responsible for verifying how their secondary materials will be recycled at the receiving facility. However, if the generator ships materials in good faith to a receiving facility and the exclusion is subsequently lost (e.g., for errors solely caused by the receiving facility), enforcement against that generator should not be pursued. The DOE suggests that EPA provide further guidance regarding intent and clarifying how enforcement discretion will be exercised.

III.B.1. What is Legitimate Recycling?

1. Page 61582, Column 1: Guidance has been included in earlier preambles and other materials about what constitutes legitimate recycling under RCRA, but to date this guidance has not been codified. The preamble indicates that the proposed rule provides “a good opportunity to establish RCRA’s recycling legitimacy criteria in regulations, and at the same time to make clarifying revisions to them.” The preamble also expresses the belief “that the new codified regulatory criteria will, when applied to actual recycling scenarios, result in determinations that are consistent with those based on current guidance.”

The DOE supports the proposal to define legitimate recycling within the hazardous waste regulations, and generally favors the criteria as proposed. A few suggested clarifications to the criteria are provided below. Further (as noted also in DOE's response to preamble section "IV. Request for Comment on a Broader Exclusion for Legitimate Recycling", Page 61588), DOE recommends that these criteria be promulgated in lieu of the "continuous process within the same industry" approach set forth in the proposed rule.

III.B.3. Today's Proposed Criteria for Legitimate Recycling.

1. Page 61583, Column 3: "1. Criterion #1: The secondary material to be recycled is managed as a valuable commodity. Where there is an analogous raw material, the secondary material should be managed in a manner consistent with the management of the raw material. Where there is no analogous raw material, the secondary material should be managed to minimize the potential for releases into the environment."

The Department suggests this criterion should be clarified in several ways. First, the criterion (as proposed) involves a comparison of secondary material to be recycled to analogous raw materials. DOE recommends that the scope of this criterion be expanded to include comparisons against analogous raw materials or products. In some cases, the secondary material to be recycled may more closely resemble an analogous product (such as an intermediate product) than a raw material. Second, the criterion as stated interjects a significant ambiguity when no analogous material (or product) exists, by requiring that the secondary material "be managed to minimize the potential for releases to the environment". The proposed rule includes no basis for the regulated community to evaluate or interpret the "managed to minimize" element of this criterion. The DOE suggests the criterion could be clarified by replacing the last sentence with the following or equivalent wording: "Where there is no analogous material, the secondary material should be managed in a manner consistent with its use as a valuable raw material or product and with generally accepted industrial management practices for comparable materials or products." This alternative reduces the uncertainty of how to "minimize" releases, and clarifies that the management of secondary materials prior to recycling will be evaluated against the same standard as any other comparable material or product.

2. Page 61584, Column 2: "2. Criterion #2: The secondary material provides a useful contribution to the recycling process or to a product of the recycling process and evaluating this criterion should include consideration of the economics of the recycling transaction. The recycling process itself may involve reclamation, or direct reuse without reclamation."

As indicated in the preamble, Criterion #2 "expresses the fundamental principle that secondary materials should actually be useful (i.e., contribute value) to a recycling process." The preamble also explains that the evaluation (against Criterion #2) relates to whether the recovered material is of sufficient value to "justify" the recycling. This appears to contrast with the preamble discussion under Criterion #3 which indicates "a recycled product could be sold at a loss ... and nevertheless be considered a valuable product" (Page 61585, column 3). It is reasonable to conclude that in some situations the value of the recycled product will not cover the costs of recycling, but nonetheless, the secondary material would have provided a useful contribution to

the product of the recycling process. With the above discussion in mind, DOE requests that EPA clarify any ambiguity between the role economic considerations play in determining whether a specific recycling activity meets Criterion #2 and #3.

3. Page 61585, Column 2 and Column 3: “3. Criterion #3: The recycling process yields a valuable product or intermediate that is: (i) Sold to a third party: or (ii) Used by the recycler or the generator as an effective substitute for a commercial product or as a useful ingredient in an industrial process. ... A recycler that has not yet arranged for a sale of its product to a third party could establish the value by demonstrating that it can replace another product or intermediate (process input) that is available in the marketplace.”

The DOE is concerned that, as written in the proposed rule, Criterion #3 implies that a product needs to actually be sold or used as a condition of meeting the criterion. This does not appear to be consistent with the intent as discussed in the preamble (and with which DOE agrees) that recyclers who have not yet arranged for sale to a third party or have not yet used the material could still demonstrate they meet the criterion. DOE suggests revising the Criterion #3 language to clarify this intent, for example: “(3) The recycling process yields a valuable product or intermediate that is, or can be shown to have a replacement value equivalent to a product or intermediate that will be: (i) ...” (underlining indicates suggested additional text for section 261.2(h)(3)).

IV. Request for Comment on a Broader Exclusion for Legitimate Recycling

Page 61588, Column 1: The preamble introduces another option that could further encourage recycling and reuse and solicits comment on the option and its possible inclusion in the final rule. As presented in the preamble, this option “would provide a broader regulatory conditional exclusion from RCRA regulation for essentially all materials that are legitimately recycled by reclamation, whether the recycling is done within the generating industry, or between industries.” The preamble indicates that the four “legitimacy criteria” (discussion beginning at page 61582, Column 2) would form the basis for evaluating whether a particular recycling practice is legitimate under this broader exclusion approach.

The Department supports this option and encourages EPA to pursue this regulatory approach. This proposed broader exclusion would do away with the confusion regarding the assignment of NAICS classifications and recycling in a “continuous process within the same industry.” This approach would provide added flexibility to both generators and recyclers while ensuring adequate protection of human health and the environment. DOE also believes this approach would further reduce the potential for misinterpreting or misapplying the recycling exclusion.

2. Page 61589, Column 2: The preamble expressed interest “in whether a case-by-case variance mechanism...would be a more appropriate means of providing the type of regulatory relief for reclaimed materials that would flow from a broader exclusion based on legitimate recycling. ”

Because of the administrative burden of developing, filing and processing case-by-case variances, DOE does not believe such an approach would be a suitable alternative to the broader exclusion based on legitimate recycling. DOE believes that with the legitimacy criteria, other regulatory provisions, and general oversight authorities already in place, EPA would have sufficient ability to ensure protection of human health and the environment without relying solely on a variance mechanism for generators and recyclers.

V. Effect of Today’s Proposal on Other Programs; and VII. Statutory and Executive Order Reviews

1. General observation related to Sections V and VII of the preamble.

As indicated earlier in these comments, DOE supports efforts to promote the safe and beneficial recycling of hazardous secondary materials, and agrees that the proposed rule is consistent with the intent of the RCRA statute and EPA policy. Another associated objective identified by RCRA and EPA policy is to encourage product substitution or process change [RCRA 1003(a)(6)]. DOE observes that there may be generators who choose to rely on the proposed exclusion and who will continue their existing hazardous secondary materials generating practices, rather than consider and implement product substitutions or process changes that would result in a net hazard reduction. Yet preamble discussions about the effects of the proposal on other programs (such as pollution prevention and toxics reduction), and about the economic impacts and benefits of the proposal, do not appear to address the potential that it may be more convenient for some generators to use the proposed exclusion than to change to less hazardous products. DOE suggests that these potentially unintended impacts of the proposal be addressed in the final rule preamble to ensure the benefits and tradeoffs have been fully considered in encouraging recycling and promoting other desirable goals, such as using “green” product substitution to replace or minimize hazardous materials in industrial processes.

Proposed Amended Regulation, Part 261

1. Page 61597, Column 2: In Appendix X of the proposed rule, paragraph (d) would require that “All other industries are classified using the following categories; these classifications must be made in accordance with the reference document “North American Industry Classification System” or NAICS, effective January 1, 2002.” Paragraph (d) is followed by several footnoted pages listing the NAICS industry classifications for purposes of implementing the proposed 40 CFR 261.2(g).

If the NAICS approach (for determining if reclamation and reuse is within the same industry) is retained in the final rule, DOE recommends that the extensive Appendix X list of four-digit NAICS classifications not be included in the regulations. DOE suggests that Appendix X only reference the NAICS Manual, list the specific codes that are disallowed from or otherwise limited in qualifying for waste recycling exclusions under the rule, and include other instructive guidance as may be appropriate for applying the NAICS. This approach would offer a more inclusive standard, allowing generators to presumptively qualify for the exclusion unless specifically excluded through rule changes. Further, DOE is concerned that the NAICS list is

subject to periodic revision, and in such cases Appendix X could be reflecting an outdated list. This may create problems for generators and/or receiving facilities that keep current with the revised NAICS classifications, but find they are not covered by an Appendix X listed code.