

## **Comments on Monitoring, Applicability, Implementation, and Compliance and Other HON Issues.**

### **I. General Comments**

**Eight of the nine potential changes described in section 4 of the Request for Comment section of the preamble to the proposed amendments require rule revision, and the proposed amendments and additional explanation must be published for comment.**

With the exception of the liquid streams from control devices item, the Administrative Procedures Act and section 307 of the Clean Air Act requires rulemaking for the changes outlined in section 4 of the request for comment section of the proposal preamble (71 FR at 34439 - 40). In our view, even those changes that the Agency identifies as clarifications are actually changes to the rule requirements and rulemaking cannot be avoided by labeling them as “clarifications”.

**EPA’s presentation of these issues fails to comply with established law.**

The majority of EPA’s proposed rule notice is devoted to the discussion of Option 2 emission reduction activities that would meet the requirements of both §112(f) and §112(d)(6). To properly solicit informed comment on Option 2, EPA has correctly (1) included detailed proposed regulatory language to indicate how subparts F, G, and H of part 63 would be amended (*Id. at 34442-46*); and (2) assessed cost, economic, paperwork, and other impacts of such new regulatory requirements under various statutory and regulatory mandates such as Executive Order 12866 and the Paperwork Reduction Act (*Id. at 34440-42*, and documents cited therein).

However, in one short portion of the proposed rule notice, EPA takes a totally different tact. In a section entitled “Monitoring, Applicability, Implementation, and Compliance,” EPA summarily discusses nine significant elements of the existing HON rule for which EPA says issues have arisen over the last 14 years. (*Id. at 34439-40.*) For some of these nine issues, EPA states that it is “clarifying” the HON rules. For others, EPA states that it is “proposing” to “codify” certain interpretations or “include” certain “new language” in the upcoming final rule. Yet EPA has not addressed any of these nine issues in the same manner that it addressed the proposed residual risk amendments as described above. That is, for *none* of these nine issues has EPA (1) included any proposed regulatory language to indicate how part 63 would be amended; or (2) assessed cost, economic, paperwork, and other impacts of such new regulatory requirements under various statutory and regulatory mandates such as Executive Order 12866 and the Paperwork Reduction Act.

EPA’s failure to perform these functions for the eight of the nine issues where rule amendment is required renders its actions legally deficient under the requirements of §307(d) of the CAA, the federal Administrative Procedure Act (APA), and well-

established case law in the federal courts. Moreover, as discussed further below, EPA's cursory discussions of these issues fails to satisfy minimum rulemaking notice requirements established under these authorities.

Four basic legal defects are most prominent. First, under §307(d), EPA must include actual proposed regulatory language on an issue. Merely discussing the subjects and issues in the preamble, which may sometimes suffice under the APA, is not allowed under §307(d). Second, EPA cannot purport to "clarify" a significant issue in a manner that has the effect of amending an existing regulation without undertaking a full notice-and-comment process resulting in new codified regulatory language. Third, EPA has not assessed these amendments to its regulations under the Executive Order 12866, Paperwork Reduction, and related assessment requirements. Fourth, EPA's explanations of the basis and purpose of the nine amendments fall far short of §307(d) requirements and generally established APA principles as enunciated in the federal courts.

#### A. Requirement to Include Proposed Regulatory Language

As EPA no doubt knows, under the APA, a notice of proposed rulemaking need not necessarily include actual proposed regulatory language so long as the preamble contains a sufficient description of the "subjects and issues involved." More specifically, the basic rulemaking section of the APA (Section 4) provides that a notice of proposed rulemaking shall include "*either* the terms or substance of the proposed rule *or* a description of the subjects and issues involved." 5 U.S.C. §553(b)(3) (Emphasis added.)

However, with the addition of subsection (d) to §307 of the Clean Air Act in 1977, Congress rejected this and other portions of the APA as being inadequate for CAA rulemaking. As the D.C. Circuit has often emphasized, the requirements of CAA §307(d) are in many respects "more stringent" than those of the APA. *Union Oil v. EPA*, 821 F.2d 678, 681 (D.C. Cir. 1987). And, as the D.C. Circuit stressed in another landmark CAA case, one of the two "major differences" between the APA and the "more stringent" §307(d) is that the latter "requires EPA to issue a 'proposed rule'" while the former does not. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 519 (D.C. Cir. 1983) (hereafter "*Small Refiner*"). In *Small Refiner*, the Court undertook a thorough analysis comparing the language and structure of CAA §307(d) with the APA. In doing so, the Court stressed that Congress had affirmatively rejected the alternative generally provided in the APA whereby an agency might forego actual proposed rule language in a notice of proposed rulemaking. *Id.* at 518-19.

#### B. Need to Subject "Clarifications" to Complete Rulemaking Process

While not totally clear from EPA's brief preamble discussions, it appears that for some of the nine issues, EPA intends to finalize a decision merely based on a preamble "clarification" without publishing any regulatory language (even in the final rulemaking). Yet, as shown below in the issue-by-issue discussions, except for the liquid streams from

control device item, the “clarification” items would in effect constitute amendments to the regulations.

EPA’s “clarifications” go well beyond the bounds of merely interpreting ambiguous terms in the current regulations, and instead seek to impose new requirements and/or prohibitions that could not have been fairly discerned from the words of the existing regulations. Over the last few years, the D.C. Circuit has issued a series of opinions vacating EPA actions under the CAA and other statutes on this very point. *See, Croplife v. EPA*, 329 F.3d 876 (D.C. Cir. 2003); *GE v. EPA*, 290 F.3d 377 (D.C. Cir. 2002); *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).

The *Appalachian Power* opinion is generally regarded as a watershed administrative law opinion and it has been widely cited and followed. The facts in that case are strikingly similar to the situation regarding EPA’s “clarifications” in this proposal.

In 1992, EPA issued regulations for implementation of the CAA Title V permit program. One issue addressed by the regulations was “periodic monitoring” of air pollution sources regarding their compliance with various regulatory standards. The Court found that one would logically conclude from the text of the Title V regulations that where a control regulation (such as a New Source Performance Standard or a MACT standard) already specified a monitoring frequency, that frequency would suffice to meet the Title V requirement for “periodic” monitoring. *Appalachian* at 1018. While the Title V regulations were not totally clear on the issue, certainly nothing in the regulations indicated that Title V permit writers should reach a contrary conclusion and conduct further evaluations to consider whether more aggressive monitoring should be required in a permit in such situations.

In 1998, EPA issued guidance on the periodic monitoring issue. In issuing this guidance, EPA did not follow rulemaking procedures prescribed by §307(d) of the Clean Air Act and the APA, and did not accordingly issue any amendments to the 1992 codified Title V regulations. The guidance provided that the frequency of monitoring specified in a particular regulatory control requirement might *not* be sufficient for Title V purposes. The guidance directed permit writers to consider imposing additional monitoring frequency in Title V permits going beyond the otherwise-applicable regulatory requirements, based on several factors specified in the guidance. *Appalachian* at 1019-20.

The Court found that the “guidance” effectively imposed potential costs and burdens on facilities in a manner that could not be fairly anticipated from the words in the regulation at the time they were issued. The guidance had “significantly broadened” the regulations, and EPA had “in effect” amended the regulations without adhering to the notice-and-comment rulemaking process. *Appalachian* at 1028. The Court therefore vacated the guidance. *Ibid.*

We believe that EPA cannot legally issue a “clarification” in a preamble that has the effect of amending a rule in a manner that would impose costs or burdens that could not have been fairly anticipated from the plain terms of the regulations. This is the clear holding of *Appalachian* and the other recent D.C. Circuit cases cited above. Yet that is exactly what EPA appears to be doing in the HON “clarifications,” as we show in the issue-by-issue discussion below.

ACC notes that the fact that an agency statement might appear in a Federal Register preamble, as opposed to an agency “guidance” document, in no way cures this fundamental legal defect. See, *Barrick Goldstrike Mines v. Browner*, 215 F.3d 45, 47 (D.C. Cir. 2000). For an agency pronouncement to have legal status as a proper rule, it must of course be published in the rules section of the Federal Register for eventual codification into the Code of Federal Regulations. See, *American Portland Cement Alliance v. EPA*, 101 F.3d 772, 776 (D.C. Cir. 1996) and cases and authorities cited therein.

Thus as a legal matter, if EPA seeks to impose costs and burdens relating to the HON rule through a so-called “clarification,” it must first issue a proposed regulation to accomplish this. As discussed elsewhere in this section, the proposed regulation must be accompanied by the statements of basis and purpose, regulatory and statutory analyses, and other accoutrements of the rulemaking process mandated by §307(d) of the CAA and the APA. As shown in the discussion of various issues below, EPA simply has not done this for the items it indicates will be changes or for the items it calls “clarifications” where the clarification is at odds with regulatory language and thus they are accordingly legally invalid.

### C. Requirements to Present Analyses of Impacts for Public Comment

In Section V of this proposed rule notice, EPA explains how it has complied with statutory and executive order requirements to analyze various impacts of the measures it has proposed. (pp. 34440-42) Executive Order 12866 and the Paperwork Reduction Act are perhaps the most significant. Yet our review of the preamble and the backup documents EPA has prepared (and incorporated in Docket EPA-HQ-OAR-2005-0475) show that EPA has performed such required analyses for *none* of the nine issues it has requested comment on.

Moreover, EPA has certified under the Regulatory Flexibility Act (RFA) that the Proposed Rule will not have “a significant economic impact upon a substantial number of small entities.” (71 FR at 34441, col.2.) This conclusion was based in part upon calculations of annualized compliance costs as a percentage of sales. *Id.* As explained below in our issue-by-issue comments, some of the proposed “clarifications” or “codifications” would significantly increase facility compliance costs, so EPA would have to perform additional analysis in order to comply with the RFA requirements.

We also note that EPA cannot cure these defects simply by performing the required analyses to accompany its final rule. Rather, these required analyses must be made available for public comment as part of the Agency's overall basis and purpose supporting the proposed rule, as explained immediately below. Consistent with ACC's position concerning these issues, EPA would be required as a matter of law to issue an entirely new notice of proposed rulemaking in order to proceed with the "clarifications" and "codifications" on eight of the issues.

#### D. The Proposed Changes Are Not Adequately Explained and Justified

Even under general APA caselaw precedent, EPA's explanations of the basis and purpose of its nine codifications or "clarifications" are insufficient. A key purpose of the APA notice-and-comment process is to allow the public to comment on all key aspects of the Agency's data, logic, and policy foundations in support of a proposal. And the bases for the Agency's logic and conclusions must be made part of the rulemaking record that is subject to public comment. For a recent strong statement by the D.C. Circuit on these principles, with an extensive collection of caselaw support, see *Chamber of Commerce v. SEC*, 443 F.3d 890, 899-906 (D.C. Cir. 2006). The D.C. Circuit has consistently and strongly disapproved of agencies playing "hunt the peanut" when facts, data, or other information on which they are basing their conclusions to support a proposed rule are not included in the record for public comment. *Connecticut Light & Power v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982).

The D.C. Circuit has been even more demanding in Clean Air Act rulemakings in this "fulsome notice" regard, and with good reason. As the Court has ruled: "The amended Act [CAA] requires a *much more detailed* notice of proposed rulemaking than does the APA." *Union Oil v. EPA*, 821 F.2d 678, 682 (D.C. Cir. 1987) (Emphasis added.) In reaching this conclusion, the Court stressed the requirements in §307(d) for EPA's full disclosure and explanation in the rulemaking docket of factual data, methods and analysis of data, and underlying legal interpretations and policy considerations to support the agency's conclusions. The Agency's explanations and rulemaking record fall far short of meeting these CAA requirements for 8 of the 9 issues.

Proposed regulatory language associated with the changes suggested in this section of the preamble is critical to understanding the items and the revisions the Agency has in mind and ACC cannot provide full comments until that language is available. Additionally, some of these changes will require significant implementation time and most will require permit revisions and we must also be given an opportunity to comment on the compliance time implications of these changes.

Lastly, we note that on some of the issues EPA has phrased its intent in the present tense, e.g., "EPA clarifies that..." which suggests that EPA may be trying to finalize these clarifications through preamble language, rather than proper rulemaking. We note though that EPA has presented these issues "for comment" in the proposed rule

notice so we assume that the Agency's present tense statements herein are not to be considered "final agency action" for purposes of judicial review.

## **II. Issues Presented for Comment**

### *Liquid Streams from Control Devices*

**Since the HON does include control devices in the CMPU, this proposed "clarification" is unnecessary and would only confuse regulators and the regulated.**

EPA proposes to clarify that liquid streams generated from control devices (e.g., scrubber effluent) can be wastewater. To explain the basis for this clarification EPA states:

"Since the concept of wastewater does not exist until the point of determination (i.e., where the liquid stream exits the CMPU), and a control device (e.g., scrubber) is not specifically defined as part of the CMPU as a control device, there is an inconsistent understanding in the industry as to whether wastewater provisions apply." (71 FR at 34439)

ACC believes there is no need for this clarification, because the Agency is incorrect in saying that a control device is not specifically defined as part of the CMPU. CMPU is defined in both §63.100 and §63.111 of the HON. That definition is as follows:

*Chemical manufacturing process unit* means the equipment assembled and connected by pipes or ducts to process raw materials and to manufacture an intended product. A chemical manufacturing process unit consists of more than one unit operation. For the purpose of this subpart, chemical manufacturing process unit includes air oxidation reactors and their associated product separators and recovery devices; reactors and their associated product separators and recovery devices; distillation units and their associated distillate receivers and recovery devices; associated unit operations; associated recovery devices; and any feed, intermediate and product storage vessels, product transfer racks, and connected ducts and piping. A chemical manufacturing process unit includes pumps, compressors, agitators, pressure relief devices, sampling connection systems, open-ended valves or lines, valves, connectors, instrumentation systems, and control devices or systems. A chemical manufacturing process unit is identified by its primary product. (Emphasis added.)

~~Thus, control devices are a defined part of a HON CMPU and no clarification is needed.~~

### *Non-continuous Gas Streams from Continuous Operations*

EPA proposes to clarify that non-continuous vents from continuous HON unit operations (i.e., reactors, distillation units, and air oxidation units) are subject to the

HON if they are generated during the course of startup, shutdown, or malfunction. The Agency states that these are currently not specifically defined as subject by either the HON or the MON since they are generated from continuous operations and are not batch process vents as defined in §63.101 or covered by §63.100(j)(4). (71 FR at 34439)

Since there are no standards in the HON that apply to non-continuous vents from continuous operations, this clarification is presumably meant to require that such streams be addressed in the start-up, shutdown and malfunction plan (SSMP) required by §63.6(e)(3) (as referenced from the definition of SSMP in §63.101 and indicated in Table 3 of subpart F). However, §63.6(e)(3)(i) was amended on April 20, 2006 (71 FR 20446) and now reads:

§63.6(e)(3)(i) The owner or operator of an affected source must develop a written startup, shutdown, and malfunction plan that describes, in detail, procedures for operating and maintaining the source during periods of startup, shutdown, and malfunction; and a program of corrective action for malfunctioning process, air pollution control, and monitoring equipment used to comply with the relevant standard. The startup, shutdown, and malfunction plan does not need to address any scenario that would not cause the source to exceed an applicable emission limitation in the relevant standard. [emphasis added]

We believe this new, final sentence excludes non-continuous vents from HON continuous operations from the SSMP, since such vents ~~clearly cannot exceed~~ an applicable emission limitation (given that the HON does not regulate such vents). This is also consistent with the HON provisions that specifically exclude Group 2 vents from the SSMP requirements (e.g. the §63.6(e) item in Table 3 of subpart F). Thus, we believe the only way the Agency can institute the change suggested here is to amend the HON to override §63.6(e)(3)(i) and we see no benefits to the environment by such an action. Furthermore, expanding the coverage of SSMPs would be precedent setting for all part 63 standards since virtually all require SSMPs and follow the HON model for content. Thus this change should be noticed and reviewed with that consideration clearly identified.

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#### *Boiler Requirements versus Fuel Gas System Requirements*

EPA solicits comment as to whether the need exists to have both the exclusion for boilers and the exclusion for fuel gas systems in the HON. The Agency also “proposes to include monitoring provisions and/or certifications that the boilers are compliant.”

**ACC believes both exclusions are needed.**

We assume the Agency is asking whether it is necessary for the HON to contain performance test and monitoring exclusions for both boilers and for fuel gas systems. ACC believes, as we did during the HON and related rulemakings, that both exemptions are needed. In some cases, regulated streams are sent to a single boiler or

process heater or even a single burner. If the regulated stream is handled as primary fuel to that combustion device or burner or as secondary fuel to a combustion device that exceeds 44 Megawatt (MW) capacity, essentially complete destruction of the organics in the stream will occur and the boiler exclusions are justified. In other cases, regulated streams are sent to "fuel gas systems" as defined in the rule.<sup>74</sup> Again the exclusions are justified because destruction of organic HAP is assured because gas from fuel gas systems is used as primary fuel in combustion devices.

We believe some permitting authorities and inspectors would not consider routing regulated streams to individual boilers as primary fuel as meeting the fuel gas system definition. Nor would the routing to fuel gas system exclusion cover streams routed to a large boiler (> 44 MW) as secondary fuel. We, therefore, continue to believe that both situations must continue to be addressed in the HON and in the other air regulations.

Furthermore, these two exclusions are already intricately imbedded in source permits and notice of compliance status reports and it would be very burdensome and wasteful on EPA, permitting authorities and sources to require revision of all those documents.

Finally, it is important to realize that both of these exclusions are present in a multitude of Part 60, 63 and 65 rules, so any change would have much broader impacts than just the HON. Such a precedent setting change should only be made through notice and comment rulemaking that calls the broad, regulated community's attention to the precedent setting nature of the proposal and not buried in a HON specific notice.

**No new monitoring is needed or justified.**

Currently, the HON provides for both boilers and "routing to fuel gas systems" as compliance options<sup>75</sup> and specifies compliance requirements for each situation. In cases where essentially complete combustion is assured<sup>76</sup>, no monitoring or performance testing is required. These exclusions from compliance testing and monitoring were developed over many rulemakings and are now found throughout the Part 60, 63 and 65 rules. Any change to the monitoring provisions in the HON would put it at odds with the treatment of such systems in most of the other air rules. Furthermore, such a change would impose new burdens for no benefit or reason. The basis for the current exclusions is EPA's recognition of the basic laws of physics that assure destruction of organic HAP introduced into the flame zone of fired equipment. Thus, introduction of

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<sup>74</sup> Fuel gas system means the offsite and onsite piping and control system that gathers gaseous stream(s) generated by onsite operations, may blend them with other sources of gas, and transports the gaseous stream for use as fuel gas in combustion devices, or in-process combustion equipment such as furnaces and gas turbines, either singly or in combination.

<sup>75</sup> Except for continuous gas streams from continuous distillations and reactors that are routed to fuel gas. These streams are excluded from the process vent definition and thus routing to fuel gas is not a compliance option, but rather an applicability test, for process vents.

<sup>76</sup> Boilers above 44MW heat input and where the vent gas will be combusted as or with primary fuel.

monitoring provisions would serve no purpose and set unacceptable precedents for all air regulations.

As EPA stated in the 1994 HON Background Information Document:<sup>77</sup>

The initial performance test exemption is appropriate for a boiler or process heater with heat input capacity of 44 MW (150 million Btu/hr) or greater in which all process vent streams are introduced into the flame zone and for all boilers or process heaters in which the process vent streams are introduced with or as the primary fuel. Emission factor calculations (AP-42), submitted test results, and temperature and residence time calculations indicate that the expected DRE [Destruction and Removal Efficiency] for boilers and process heaters with heat input capacities greater than 44 MW would be greater than 98 percent. The EPA references "Reactor Processes in the Synthetic Organic Chemical Manufacturing Industry - Background Information for Promulgated Standards," EPA-450/3-90-016b, March 1993 to support the decision. When the vent stream passes through the flame front it would, on average, be combusted at higher temperatures and longer residence times than if introduced with combustion air. This information indicates that a process vent stream would achieve combustion efficiency greater than the required 98 percent level. For this reason, it is not necessary to establish the emission reduction of these boilers and process heaters through initial performance testing. [Page 2-33]

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Combustion devices which do not require a performance test (such as boilers and process heaters with a heat capacity design greater than 44 megawatts and a vent stream that is introduced with the combustion air or a vent stream introduced as or with the primary fuel) also do not require monitoring of the combustion device, because the temperature and residence time of these devices exceed the levels needed to achieve at least a 98 percent reduction. [Page 2-35]

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No monitoring or testing is required of boilers 44 MW or greater, or of those boilers below 44 MW that introduce the process vent stream as the primary fuel or that mix the vent stream with the primary fuel and introduce it through the same burner. The EPA decided that monitoring of these units was not necessary because their burning characteristics would ensure a 98 percent reduction in the organic content of the process vent stream. Monitoring for all other boilers below 44 MW is described in §63.114. [Page 2-36]

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<sup>77</sup> HON Final Background Information Document, Vol. I, March 9, 1994, <http://www.epa.gov/ttn/oarpg/t3bid.html>

The EPA agrees that there would be technical and cost incentives to maintain the equipment properly because boilers are usually used to generate heat and energy needed for the process. Sources must keep such boilers operating properly in order to run their processes, especially if the vent stream is used as or introduced with the primary fuel. Therefore, by reducing the monitoring requirements, the burden on the facilities is also reduced. [Page 2-38]

As concluded in the HON rulemaking and borne out by the test of time, monitoring in these situations is unnecessary, costly and provides no environmental benefit.

If the Agency persists in this wasteful endeavor, specific regulatory language must be proposed, the Agency must demonstrate a benefit, and the EPA must meet the requirements of the Paperwork Reduction Act and other applicable laws and executive orders. Given the precedent setting nature of such a change to all of the air regulations, such a change should be considered a major rulemaking under OMB guidelines and be presented as such when proposed.

**No new certifications are needed or justified.**

The request for comment also suggests a need for a "certification" as an alternate or in addition to new monitoring requirements. It is unclear why EPA believes these exclusions should be treated differently than all other requirements in the HON. No special certifications are required for other exclusions (e.g., storage tank is < 5,000 gallons capacity, vent contains < 50 ppm organic HAP). Site records to support these conclusions have always been an adequate basis for the reporting and certifications already required by the HON and Title V.

The entire basis for these particular exclusions is that the destruction of regulated molecules will exceed the 98% destruction requirement of the regulation when the exclusion criteria are met and no testing or monitoring is necessary to prove that level of destruction is achieved. This was recognized in developing the HON compliance provisions and thus all that is necessary to assure compliance is certification that the regulated stream meets the exclusion requirements (burned as primary fuel or in a > 44 MW combustion device). Certification of compliance with these disposition requirements occurred with the submission of the HON Notice of Compliance Status (NCS), is confirmed via the periodic reports (where changes to NCS information must be submitted) and through the Title V annual certification. Since combustion source firing capacity is typically specifically permitted, those permits are another confirmation that a particular combustion device exceeds the 44 MW criteria. Any attempt to require a new, additional certification would be duplicative of the NCS/Title V certifications, serve no purpose, and only add confusion. Once again, any such change must not be instituted without an opportunity for the regulated community to review and comment on the specific regulatory language.

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*Group Status Changes for Wastewater*

The Agency proposes to include language similar to 40 CFR §63.115(e), which requires a redetermination of TRE of process vents if process or operational changes occur, for wastewater. They state that “although §63.100(m) generally applies to Group 2 wastewater streams becoming Group 1, explicit language similar to §63.115(e) that would require redetermination of group status for wastewater does not exist.”  
[Page 34439-40]

**ACC believes §63.100(l)(4)(B) and (m) already cover the situation EPA is proposing to address and thus no new language is needed.**

Under §63.100(l)(4)(B) and (m), any time a process change makes a Group 2 stream into a Group 1 stream compliance with the Group 1 requirements for that stream type is required on start-up of the process change. Obviously, this means that whenever a process change is made that would impact a Group 2 wastewater stream an evaluation is made to identify whether there is a possibility that the stream could become Group 1 and, if so, then a group determination is done and Group 1 requirements applied if the wastewater is found to be Group 1. The Title V annual certification process serves to confirm that Group 2 streams have not become Group 1. We see no compliance or environmental benefit to duplicating a requirement that already exists in the HON.

**§63.115(e) and the associated recordkeeping and reporting requirements of the HON should be deleted.**

In fact, in hindsight, we do not see why the process vent provisions are different from all the other provisions in the HON and recommend §63.115(e) and the associated recordkeeping and reporting be deleted, since it is redundant with §63.100(l) and (m). This would also avoid this same issue arising over other process change impacts (e.g. storage tanks or transfer racks changing from Group 2 to Group 1).

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*Leaking Components Found Outside of Regularly Scheduled Monitoring Periods*

Page 34440 of the preamble states:

“On October 12, 2004, the EPA issued a formal determination to Louisiana Department of Environmental Quality clarifying that subpart H of the HON requires that leaks found outside of the regularly scheduled monitoring period must be repaired, recorded, and reported as leaking components. The EPA proposes to incorporate clarifying edits to subpart H to make this explicit in the regulation.”

### **Comments on the determination provided to Louisiana.**

The October 12, 2004 letter from M.S. Alushin of the Office of Compliance to Billy Eakin of the Louisiana DEQ is specific to the question of visible leaks from pumps in light liquid service which are observed between the weekly visual inspections required by subpart H of the HON. The heart of the conclusion in the letter that such observations are leaks subject to the subpart H requirements for pump leaks is:

“Section 63.163(b)(3) defines detection of a leak as “indications of liquids dripping from the pump seal.” Detection frequency is not part of the definition of what constitutes detection of a leak. Therefore, the Agency believes that a leak is considered a leak regardless of when it is found, and all applicable procedures specified in Sections 63.163, 63.181 and 63.182 must be followed.”

Paragraph §63.163(b)(3), cited in the determination, states:

(3) Each pump shall be checked by visual inspection each calendar week for indications of liquids dripping from the pump seal. If there are indications of liquids dripping from the pump seal, a leak is detected.

We believe the two sentences in this paragraph are intrinsically linked and that the second sentence is simply indicating that if liquids are observed to be dripping from the pump seal during the weekly visual inspection required by the first sentence, that observation indicates a leak that is subject to the provisions of subpart H applicable to leaking pumps. It is unclear to us how you can read those two sentences to apply anytime other than during the weekly visual inspection. In fact, we see this paragraph as supporting our argument, made below, that subpart H only applies to leaks, however defined, found during monitoring periods specified within the subpart.

While any leakage from pumps found at any time will be addressed and the leak corrected, we do not believe the HON requires such occurrences to be treated as “leaks” or that HON recordkeeping and reporting requirements are triggered. We explain our logic for this conclusion generically below. Additionally, we do not see how this determination has bearing on leaks from other component types, since it is based on wording specific to pumps.

We believe the interpretation represented in this determination and the more general one presented for comment in the HON proposal are in conflict with the plain language of subpart H and require rule amendment to implement and we request that the Agency reconsider this determination as well as their general proposal in light of our comments.

**We strongly agree with the Agency's 2003 position that issuance of a determination does not apply nation-wide without rule amendment.**

As EPA stated relative to site specific determinations at 68 FR 7373 (February 13, 2003):

EPA has received questions regarding the applicability of the documents [determinations] whose availability was noticed in the November 15, 2001 Notice of Availability (66 FR 57453). EPA has reviewed those documents, and through today's notice clarifies that to the extent any of those documents constituted "final action of the Administrator" for purposes of section 307(b)(1) of the Clean Air Act, they were not "nationally applicable" actions within the meaning of section 307(b)(1). For purposes of establishing venue for judicial review of any such document, the document may be considered a "local or regionally applicable" action as that phrase is employed in section 307(b)(1).

We concur with EPA's recognition that rule amendment is needed to apply determinations broadly.

**The Agency must propose rule language for comment.**

EPA must propose the changes discussed in this request for comment as a formal proposed set of amendments. It is impossible to tell from this brief discussion what the impacts of this proposal will be without seeing exactly how the Agency would amend subpart H. This will also provide the Agency the opportunity to explain what benefits would be obtained, how the overlap with other regulatory requirements would be resolved, what compliance time will be provided and to obtain approval under the various laws and executive orders applicable to increasing burdens and amending requirements.

ACC members report that at a minimum current LDAR systems would need to be modified to reflect this change, additional recordkeeping implemented and employees trained. In some cases, data systems will need revision and field procedures will need to be modified to identify which leaks meet HON leak definitions. Specific rule language is need for us to determine just what additional effort will be needed, its cost and how long it would take to implement.

**ACC believes this new interpretation was not the basis for subpart H and is not required by subpart H language.**

It is clear that EPA and the regulatory negotiating committee that developed subpart H intended the determination of leaks and leak rates to be done periodically and not be an ongoing activity. Throughout subpart H, leak determinations are inextricably linked to the monitoring schedules required by the subpart, for example in §63.163(b)(3) for the

weekly visual check of pump seals discussed above and in §63.168(b)<sup>78</sup> for valves and monitoring is always referred to as “periodic”.

For valves and connectors, the most populous component types, periodic monitoring frequency is a function of leak rate, but annual monitoring is common for valves and is the minimum interval for connector monitoring. These specified monitoring frequencies are certainly significantly different than the de facto continuous monitoring suggested by this revision.

In the preamble to the HON proposal, EPA also makes this point clear when they state:

“The LDAR program involves a periodic check for organic vapor leaks with a portable instrument; ...” (57 FR Section III.C.1.a, December 31, 1992)

Obviously, “a periodic check” is different than ongoing monitoring, which this proposed new requirement would effectively establish.

**Subpart H does not require “ongoing” monitoring or apply the leak provisions to all component types. Nor does it provide for visual, audible or olfactory detection for all component types.**

Where appropriate, “ongoing” and visual, audible and olfactory monitoring and associated application of the leak provisions was specified in subpart H. Thus, §63.169(a) of subpart H specifies:

Pumps, valves, connectors, and agitators in heavy liquid service, pressure relief devices in light liquid or heavy liquid service, and instrumentation systems shall be monitored within 5 calendar days by the method specified in §63.180(b) of this subpart if evidence of a potential leak to the atmosphere is found by visual, audible, olfactory, or any other detection method. If such a potential leak is repaired as required in paragraphs (c) and (d) of this section, it is not necessary to monitor the system for leaks by the method specified in §63.180(b) of this subpart.

However, there are no similar provisions in subpart H for other types of components (e.g., valves in light liquid service) and thus there is no requirement under subpart H that potential leaks found outside of scheduled HON monitoring be addressed under HON

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<sup>78</sup> The owner or operator of a source subject to this subpart shall monitor all valves, except as provided in §63.162(b) of this subpart and paragraphs (h) and (i) of this section, at the intervals specified in paragraphs (c) and (d) of this section and shall comply with all other provisions of this section, except as provided in §63.171, §63.177, §63.178, and §63.179 of this subpart. [emphasis added]

leak repair and remonitoring provisions. For pumps, as discussed above, there is a visual leak criterion, but as we indicated it is not an ongoing requirement, but a weekly one.

**ACC has serious reservations about incorporating such leaking components into the subpart H leak percentage calculations and applying a second set of requirements to those leaks covered by other regulations.**

Leaks from equipment regulated by the HON that are found outside HON periodic monitoring rounds are repaired as required by other federal rules, state rules, the general duty requirements of parts 60, 61 and 63 and by Responsible Care. Thus ACC has no conceptual concern about making these situations subject to some type of repair requirement, in those instances where they are not already subject to such requirements under another regulation, as long as there is no change to what subpart H defines as a leak or what repair and remonitoring is required. For instance, Method 21 monitoring to confirm repair is only required where the leak was identified by Method 21 (otherwise elimination of the sensory indication is the remonitoring basis).

In most cases, including for “leaks” found through sensory means, leaks from subpart H regulated components that are identified outside of subpart H monitoring are found during periodic monitoring required by NSPS and State RACT and SIP rules, which already have similar repair requirements to subpart H. In these cases, it would seem this proposal imposes a second set of potentially conflicting requirements and a second set of records and reports for those situations and thus causes confusion and wasteful duplication.

Additionally, in some cases valve and connector “leaks” are found by sensory means and the repair is confirmed by sensory means. In such cases, there is no data on whether these leaks meet the HON leak definition and no basis for including them as HON leaks. We also note that §63.169(a) quoted above, which does impose continuous leak detection requirements for certain component types, does not require determining whether the leak meets the criteria that would make it a “leak” under subpart H.

We have major concerns about any attempt to include these leaks into the percent leaker calculations required by subpart H for valves, connectors and pumps, since this would bias those calculations unfairly and, in most cases, they already were considered in the percent leaker calculations under other rules. The current subpart H language is clear that only leaks found during periodic monitoring is to be included in the calculation. For instance, for valves, §63.168(e)(1) gives the formula for calculating the percent leaking valves,  $V_L$ . It defines  $V_L$  as “Percent leaking valves as determined through periodic monitoring required in paragraphs (b) through (d) of this section.” (Emphasis added.) Paragraph (d) specifies monitoring frequency and requires monitoring “once” per month, per quarter, per 2 quarters or per 4 quarters. Thus, monitoring done in addition to once per specified time period is not to be included in the percent leaker calculation.

Incorporating leaking components found outside of the periodic monitoring into the percent leaker calculation would significantly bias the calculation results and impact monitoring frequency requirements and Quality Improvement Program requirements unfairly. Such a change violates the basis for the subpart H monitoring frequency tables and the floor determination that is the basis for subpart H requirements.

Incorporating monitoring done to comply with VOC rules is a de facto change in subpart H monitoring frequencies and thus violates the HON rule and the burden approvals provided by OMB under the Paperwork Reduction Act. For instance, if a source need only monitor valves annually under subpart H, but quarterly monitoring is required by State rules, the proposed change would seem to make quarterly monitoring the requirement. Requiring quarterly monitoring, where subpart H specifies annual, does not comport with the MACT floor, the negotiated rulemaking agreement under which subpart H was developed, the HON rulemaking, or the Paperwork Reduction Act approval for the HON.

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#### *Redetermination of Primary Product*

On page 34440 EPA states:

Unlike other rules, such as the NESHAP for Polymers and Resins IV (40 CFR part 63, subpart JJJ), the HON does not have specific provisions for performing a periodic redetermination for a primary product. The EPA has issued formal applicability determinations for site specific situations clarifying that, at the point that a facility meets the applicability of the rule, they would be subject to the rule regardless of the lack of specific provisions for periodic redeterminations. The EPA proposes to codify procedures and compliance schedules for flexible operating units which have a change in primary product. The EPA intends to model the HON provisions after the NESHAP for Polymers and Resins IV which requires annual redetermination of a primary product for equipment which is not originally designated as part of a HON CMPU, but which produces HON products. Therefore, compliance with the HON for a flexible operating unit which previously produced a non-HON primary product would be required to be in compliance with the HON immediately upon determination that the primary product is a HON product.

We strongly agree that the Agency's previous conclusion that issuance of a determination does not apply nation-wide without rule amendment. As EPA stated relative to site specific determinations at 68 FR 7373 (February 13, 2003) a rule amendment would be needed for this change.

**We do not see a need for any redetermination, since sources in the SOCOMI industry not subject to the HON are subject to the MON or other NESHAPs.**

While redetermination of primary product may have been an issue prior to November 10, 2003 (the promulgation date of the Miscellaneous Organic NESHAP (MON)), it no longer is an issue. If a process at a major source makes organic chemical products and is under NAICS 325 and it is not subject to the HON or another NESHAP, it is subject to the MON. Thus, flexible operations units that are not subject to the HON because the HON products are not primary are now subject to the MON, including for the non-primary HON products. There is no gap in NESHAP coverage and redetermination of HON status would only serve to impose the large and wasteful burdens associated with changing requirements and permits.

**Regardless of whether a redetermination requirement is imposed, EPA should exclude processes covered by other part 63 regulations in the HON.**

If a process unit produces HON products, but they are not primary, the process unit will be subject to other part 63 rules, particularly the MON. If a redetermination concludes that HON products are now primary, there is an immediate conflict with other applicable MACT rules because the HON does not currently exclude sources subject to other part 63 rules from its applicability.<sup>79</sup> To clarify the current situation and particularly if a redetermination requirement is imposed, §63.100(j) should include an exclusion for processes subject to other part 63 standards.

If the Agency decides not to provide such an exclusion, any new redetermination provisions will need to address how much time will be provided for the repermitting of the process and for achieving compliance. Because there are vast differences between the HON and the MON, in particular, we believe capital expenditures will often be needed and sources must be provided up to three years to make these transitions as provided in §112(i) and to change the applicable permits.

If on redetermination, HON products are no longer the primary products of a process unit, that unit is presumably no longer subject to the HON. It will likely become subject to the MON, Pesticide Active Ingredient (PAI) MACT or some other Part 63 standard. The HON redetermination provisions will also need to also address this situation and provide adequate compliance and repermitting time.

**Annual redetermination of primary product is at odds with the five year window used in the HON.**

The HON uses a five year historical or outlook basis (*See*, §63.100(d)) for deciding if a flexible process unit produces HON products as the primary product. Five years was established because some flexible operation units change products frequently and one

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<sup>79</sup> §63.100(j) does exclude petroleum refining sources and ethylene sources.

year's operation is not representative. Thus, any redetermination requirement should be based on five years of data not one year of data as discussed in this proposal. One year review would result in some CMPUs having to change their status and permits every year. Furthermore, as discussed above, a year is not enough time to make the required permit revisions and to install any needed capital equipment.

**Requiring sources to change which NESHAP applies is a major, precedent setting rulemaking and must be reviewed under the Regulatory Flexibility Act and Executive Order 18322 as such.**

Forcing sources to change from the MON or other Part 63 rule applicability to HON applicability or vice-versa is precedent setting and must be treated as such. Costs and burdens will be very high for no environmental benefit. None of the part 63 rules address the mechanics of such a transition since they contain language to avoid such situations. To implement such a change the Agency must propose regulatory language and provide an explanation for this change from precedent, cite CAA authority and provide the analyses required by the Regulatory Flexibility Act, Paperwork Reduction Act, etc. Since many part 63 regulations are impacted, we suggest the Agency consider addressing such rule transitions in the part 63 General Provisions.

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*Common Recovery Devices for Wastewater*

On page 34440, EPA states;

“The EPA clarifies that liquid streams routed to a recovery device receiving streams from multiple CMPUs would be wastewater. Under the HON, the concept of recovery is tied integrally to a specific CMPU. Additionally, a common recovery device serving multiple CMPUs would, by definition, be outside the CMPU. Therefore, streams routed to it would be considered wastewater discharged from the CMPU.”

**If EPA intends to amend the HON through this preamble statement, it must state that this is final action of the Administrator for the purposes of section 307(b)(1), so the action may be judicially reviewed.**

Use of the present tense in this statement indicates it is an attempt to amend the meaning of the HON through preamble language, without notice and comment. As we indicate below, we believe this “clarification” is in direct conflict with the HON rule language and thus the indicated position can only be achieved through amendment of the HON. Making “clarifying” statements (or providing clarifying guidance) cannot be used in place of rulemaking to avoid notice and comment, the requirements of §307 of the Clean Air Act, the Administrative Procedures Act, or judicial challenge.

**EPA's suggested interpretation is in direct conflict with HON rule language.**

Per its definition,<sup>80</sup> the point of determination for process wastewater is the point at which the wastewater exits the HON CMPU. The question then is whether a wastewater recovery device is part of the CMPU, even though it is shared among HON and non-HON processes.

CMPU is defined in §63.101 and in §63.111 to include:

“...air oxidation reactors and their associated product separators and recovery devices; reactors and their associated product separators and recovery devices; distillation units and their associated distillate receivers and recovery devices; associated unit operations; associated recovery devices; ...”

This last phrase, “associated recovery devices” does not link recovery to reactor or distillation operations and was specifically included in the definition to bring wastewater recovery devices into the CMPU in the wastewater amendments of 1997 (62 FR 2726, January 17, 1997).<sup>81</sup> At the same time the definition of recovery device<sup>82</sup> was amended to specifically include devices that recover organics from water (as well as from process vents). Thus wastewater recovery devices are part of the HON CMPUs from which they receive water.

This reading is further confirmed by the definition of waste management unit,<sup>83</sup> also amended at the same time, which specifically states that any device which is operated as a recovery device is part of the CMPU and it specifically identifies strippers and oil-water separators as examples of such devices. Thus, by definition, shared recovery devices

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<sup>80</sup> Point of determination means each point where process wastewater exits the chemical manufacturing process unit.

Note to definition for point of determination: The regulation allows determination of the characteristics of a wastewater stream (1) at the point of determination or (2) downstream of the point of determination if corrections are made for changes in flow rate and annual average concentration of Table 8 or Table 9 compounds as determined in §63.144 of this subpart. Such changes include losses by air emissions; reduction of annual average concentration or changes in flow rate by mixing with other water or wastewater streams; and reduction in flow rate or annual average concentration by treating or otherwise handling the wastewater stream to remove or destroy hazardous air pollutants. [§63.111]

<sup>81</sup> The history of the wastewater changes, including the litigation settlement history is summarized at 61 FR 43699-700 (August 26, 1996) and 62 FR 2722 (January 17, 1997).

<sup>82</sup> Recovery device means an individual unit of equipment capable of and normally used for the purpose of recovering chemicals for fuel value (i.e., net positive heating value), use, reuse or for sale for fuel value, use, or reuse. Examples of equipment that may be recovery devices include absorbers, carbon adsorbers, condensers, oil-water separators or organic-water separators, or organic removal devices such as decanters, strippers, or thin-film evaporation units. For purposes of the monitoring, recordkeeping, and reporting requirements of subpart G of this part, recapture devices are considered recovery devices. [§63.101 and §63.111]

<sup>83</sup> Waste management unit means the equipment, structure(s), and/or device(s) used to convey, store, treat, or dispose of wastewater streams or residuals. Examples of waste management units include: Wastewater tanks, surface impoundments, individual drain systems, and biological wastewater treatment units. Examples of equipment that may be waste management units include containers, air flotation units, oil-water separators or organic-water separators, or organic removal devices such as decanters, strippers, or thin-film evaporation units. If such equipment is used for recovery then it is part of a chemical manufacturing process unit and is not a waste management unit. [§63.101]

cannot be waste management units, as EPA proposes, and must be part of each CMPU that send its water streams for recovery. Additionally, the definition of “residual”<sup>84</sup> specifies that to be a residual, a liquid or solid must be removed from wastewater by a waste management unit or treatment device. Since, 1) the waste management unit definition specifically excludes recovery devices and 2) streams within a CMPU cannot be “wastewater,” liquids and solids recovered from water streams using recovery devices cannot be residuals. The preamble to the 1997 wastewater amendments makes clear EPA’s intent that any device which recovers chemicals for use at the facility or for sale is a recovery device and thus streams fed to such a device are not wastewaters (i.e., they have not left the CMPU) and supports our plain reading of the regulatory language.

Nothing in the HON specifies that wastewater recovery devices must be dedicated. Where equipment must be assigned to a particular CMPU the HON provides procedures for that assignment (i.e., for storage tanks, loading arms and distillation units). Since no such procedures are provided for wastewater recovery devices, vent recovery devices, control devices, closed vent systems, or other equipment types these systems can be shared between CMPUs and with non-HON processes. This conclusion is further supported by the fact that it was industry practice to use shared control and recovery device systems before the HON was developed. For wastewater recovery devices specifically, the benzene NESHAP strippers were already in place and considered when the HON and the wastewater amendments were developed, proposed and finalized. Recovery of organics from wastewater is a very expensive operation and shared collection and recovery systems are always the most cost effective solution where the organics are compatible. This was already clear when the HON wastewater provisions were developed (as a litigation settlement) and are reflected in the rule. As we point out in our comments on the liquid streams from control devices item, the HON has specified that control devices are part of the CMPU since it was first promulgated in 1994. It is even more common for control devices to be shared than it is for wastewater recovery systems. Thus, the HON clearly recognizes and accepts that shared equipment can be part of multiple CMPUs and it is not surprising that the Agency didn’t see a need to be more specific about this point when it added associated recovery devices to the CMPU definition.

Furthermore, the HON is and always has been clear that recovered materials need not be returned to the CMPU where they were generated.<sup>85</sup> The definition of recovery device in

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<sup>84</sup> Residual means any liquid or solid material containing Table 9 compounds that is removed from a wastewater stream by a waste management unit or treatment process that does not destroy organics (nondestructive unit). Examples of residuals from nondestructive wastewater management units are: the organic layer and bottom residue removed by a decanter or organic-water separator and the overheads from a steam stripper or air stripper. Examples of materials which are not residuals are: silt; mud; leaves; bottoms from a steam stripper or air stripper; and sludges, ash, or other materials removed from wastewater being treated by destructive devices such as biological treatment units and incinerators.

<sup>85</sup> The preamble to the final wastewater amendments (62 FR 2726, January 17, 1997) says “If the recovered materials are then used for the same general purpose for which chemicals are utilized within the facility (i.e., used for the chemical properties of the material or for use as a fuel), then the equipment would be considered a recovery device.” (Emphasis added)

the original HON always included sales dispositions and the 1997 amendments even broadened that definition to specifically include recovery to onsite or sale fuel dispositions. Thus it is clear from the plain reading of the HON language and from its history that recovery need not be to the CMPU from which the recovered material originated.

As EPA explained in the preamble to the final HON wastewater amendments, it is the disposition of recovered HAP that distinguishes strippers that are recovery devices from strippers that are treatment devices.

The EPA's intent in developing the POD approach was to have a decision criterion that is replicable and clearly specifies the location for evaluation of a wastewater stream for the purposes of control. All equipment prior to the POD is considered to be part of the process and equipment downstream of the POD is not considered to be part of the process. The POD is defined as each point where process wastewater exits the chemical manufacturing process unit. To understand the POD approach, other portions of the rule must be understood, especially the definitions of wastewater, recovery device, and treatment process and the provisions in §63.149.

“Wastewater” is defined, inter alia, as water that is discarded from a chemical manufacturing process unit. Under the revised approach for defining wastewater, a stream does not become wastewater until it exits the last recovery device. At that point, because the stream is no longer being processed or used, it is considered to be discarded. “Recovery device” is defined as an individual unit of equipment capable of and normally used for the purpose of recovering chemicals for fuel value, use, or reuse or for sale for one of these purposes.

A “treatment process” is defined in the HON as a specific technique that removes or destroys organics in a wastewater stream or residual. Examples of treatment processes are a steam stripper (which separate the organic material from the water) and a biological treatment process (which destroys the organic compounds). The EPA recognizes that the same categories of equipment, such as oil-water separators or organic removal devices such as decanters or strippers, may be recovery devices or treatment devices depending upon the specific application in a particular process' operations. To determine whether a particular item of equipment should be considered a recovery device or a treatment process, it is necessary to consider the subsequent utilization or disposition of the materials that pass through the item of equipment. If the recovered materials are then used for the same general purpose for which chemicals are utilized within the facility (i.e., used for the chemical properties of the material or for use as a fuel), then the equipment would be considered a recovery device. If the material is not recovered for use, reuse, or fuel value or for sale for use, reuse, or fuel value (under normal circumstances), the equipment can not be considered a recovery device. For example, an organic water separator, such as a steam

stripper could not be considered to be a recovery device if the separated organic material is later sent to an incinerator for disposal. However, if the separated organic material were used in a process or incorporated into product, the steam stripper would be considered part of the process. (62 FR 2726, January 17, 1997)

This reading of the rule comports with the history of the current HON wastewater provisions. These provisions purposely established a wastewater regime that would allow use of the existing benzene NESHAP (BWON) systems, minimize additional burdens and encourage the removal of HAP from as many water streams as possible, particularly to useful dispositions (i.e. use or reuse for their chemical value or for fuel value) and the rule language was tailored to accomplish that goal. It was concluded that this approach best reflected the MACT floor (i.e., what was actually being done by many HON sources to comply with BWON) and that the environment was best served by encouraging the use of the available BWON recovery systems (which were the model for the HON Group 1 wastewater treatment requirements). The latter being accomplished by the addition of §63.149 to the rule, which minimizes the burdens associated with using recovery, while assuring streams with Group 1 characteristics are handled in closed systems.

**The proposed change discourages pollution prevention and may result in increased emissions.**

Part of the reason for the 1997 wastewater revisions was to encourage recovery of HAPs and other organics, and the HON wastewater provisions were structured to accomplish that environmentally beneficial goal. To avoid the burdens associated with the wastewater group determination and because large, efficient<sup>86</sup> recovery systems were already in place as the result of the BWON rule, the HON structure has, as expected, encouraged pollution prevention and resulted in sources sending many streams with Group 2 wastewater characteristics to the benzene NESHAP stripper systems and other shared recovery devices. The HON structure thereby results in more removal of HAPs from the environment than would be the case if use of shared recovery devices was not encouraged.

It should also be noted that because of the high cost of recovering low levels of organics from water, sources are always striving to share such equipment. Thus imposing large burdens on any shared recovery system discourages its use for all but the highest value recovery situations.

The environmental benefit of recovering material versus destroying it and of handling Group 2 streams in closed, recovery systems is put at risk by this new proposal. By forcing sources to do a Group determination upstream of their recovery devices and

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<sup>86</sup> BWON strippers must achieve 10 ppm benzene in their effluent or 99% benzene removal. Since this was the model reference stripper for the HON, any stream processed in a BWON stripper system is likely to meet HON requirements.

forcing performance tests for multiple HAPs rather than just benzene, this change would provide incentives for removing some water streams with Group 2 characteristics from BWON recovery systems and sending them to the sewer.

**EPA's new interpretation is inconsistent with the way these streams are permitted.**

The use of shared wastewater recovery systems began with the BWON rule and were reflected in the Notices of Compliance Status and the Title V permit applications of those HON sources with those or similar systems. Thus, when the HON requirements were promulgated sources reflected the use of the shared recovery systems in the NCS reports and Title V permits. As far as we can determine, those conclusions have never been challenged by the public or the Administrator during NCS or Title V reviews.

**This change imposes significant costs and burdens that must be appropriately addressed. Up to three years will be needed to comply with this change to the rule.**

There will be significant new burdens on sources, EPA and permitting authorities associated with this change (performance testing, monitoring, inspection, recordkeeping, reporting and permit modifications) that will need to be considered, during rulemaking, under the Administrative Procedures Act, the Paperwork Reduction Act, executive orders, etc. Several years will be needed to revise permits and meet the performance test and other newly imposed requirements associated with this change and thus any revision must include provision of up to three years of compliance time.

*Net Positive Heating Value*

The EPA proposes to redefine "net positive heating value" to incorporate the concept that, for fuel value, the stream must provide useful energy by using less energy to combust and produce a stable flame than would be derived from it. This difference must have a positive value when used in the context of "recovering chemicals for fuel value" (e.g., in the definition of "recovery device"). (71 FR at 34440)

**This proposal seems to misunderstand "net heating value".**

Heating value is a thermodynamic value that defines the amount of heat released during the combustion of a fuel. It is measured in units of energy per amount of material. Heating value is commonly determined by use of a bomb calorimeter.

Net heating value already accounts for the energy needed to raise the fuel to combustion temperature, activate the combustion process and return the produced water to the liquid state (heat of condensation). Thus, it already accounts for the "energy to combust" and the EPA proposal would appear to want to double count this energy.

Creation of a stable flame, the other issue mentioned in the EPA proposal is inherent in use of a material as a fuel and there is no energy impact associated with having a stable

flame, nor is that an issue addressed thermodynamically. Rather, it is a function of burner design and fuel heat content. Even streams that do not contain enough heating value to support combustion are best handled as part of a fuel stream because of the heat recovery and beneficial use obtained.

**It is unclear what issue the Agency is trying to address, but we believe this change would negatively impact the environment.**

EPA does not indicate that there has been a problem with the use of this criterion over the ten plus years since the HON compliance date. We assume, then, the intent of this change is to cause some streams be treated as regulated streams (e.g., process vents) rather than as fuels. In some cases, sources will accept the burdens this imposes on the combustion device(s) receiving the streams or on the handling of the streams as hazardous waste. In other case, those burdens will be unacceptable and streams will be routed to other, likely less environmentally beneficial dispositions (e.g., sent to flares). This will directionally reduce the amount of recovery and beneficial use occurring in the industry. In this situation, the environment is worse off and more energy is likely expended than in the current situation, since there is no heat recovery associated with these alternate dispositions. Furthermore, such a change would be in direct conflict with the pollution prevention goals of the Agency and the Clean Air Act.

**Changing stream fuels to regulated vents and changing equipment from being recovery devices to being control or treatment devices, incurs large burdens and requires compliance time.**

Changing the meaning of net heating value would result in some recovery devices becoming control devices or treatment devices. This would require permit amendments and possible new testing and monitoring. Several years would be needed to accomplish these changes. Additionally, the Agency would need to get approval for the added burdens from OMB and would need to demonstrate that those burdens are justified by some environmental benefit.

**There are many issues that need to be addressed by the Agency if it proposes this change.**

In order to evaluate this concept, any proposal to change or add additional specifications to this requirement needs to address the measurement procedures that are to be used and the averaging time for the requirement. It also needs to address the use of supplemental fuel to bring such streams to the specified criteria and propose specific monitoring requirements, if any.

#### *Pressure Testing for Equipment Leaks*

The Agency states on page 34440 that, based on field inspections, the Agency has found a poor correlation between the results of batch pressure testing and Method 21

results. It has been the Agency's experience that high leak rates are found by Method 21 on components which routinely pass either a gas or liquid pressure tests. Additionally, they state that the annual pressure test frequency does not adequately address leaking components which are not otherwise disturbed and required to be tested on a more frequent basis. The Agency proposes to change the frequency of the pressure testing to quarterly and supplement the pressure tests with a statistical sample of Method 21 results.

**The Agency should provide their data on this issue for comment.**

EPA provides no data to support their contention that there is a poor correlation between the results of batch pressure testing and Method 21 results. Nor do they demonstrate that changing the frequency of pressure testing or supplementing that testing with a statistical sampling using Method 21 impacts emissions. The Agency must justify these claims if they impose these substantial new burdens.

**This compliance option should not be made inconsistent with other rules.**

The pressure testing option for batch equipment is present in most chemical industry LDAR rules. Thus, the proposed HON change would be precedent setting and have much broader impact than just the HON. Thus, it is critical that the change be fully justified, all implications fully vetted and all potentially impacted parties have a chance to comment.

**Regulatory language is needed to allow comment on the burdens imposed by this change.**

ACC cannot comment on the burdens imposed by this change without understanding how the Agency would implement its proposal for "statistical sampling". Thus, the Agency must provide regulatory language and an explanation and justification prior to implementing this change.

**III. Important Revisions Needed in the HON Rule**

**A. Remove MEK from HON Tables, except Table 1.**

On December 19, 2005 (70 FR 75047) EPA delisted methyl ethyl ketone (MEK) (2-Butanone) (CAS No. 78-93-3) from the HAP list. Thus, it is inappropriate for this compound to be regulated by either the proposed Option 2 or the existing HON. To correct this inequity, ACC requests that the Agency remove this compound from all HON Tables, except Table 1 (the Table of HON processes).