



**CREDIBLE. INDEPENDENT.
IN THE PUBLIC INTEREST.**

Subject: Incorporation by Reference
Agency/Docket No. NARA 12-0002
Document No. 2012-4399

Comments on a petition submitted by Peter L. Strauss to the Office of Federal Register (“OFR”) on February 13, 2012 requesting that the OFR amend its regulations governing the approval of agency requests to incorporate material by reference into the Code of Federal Regulations.

Provided by E-mail to: Fedreg.legal@nara.gov

And by overnight to: The Office of the Federal Register (NF)
800 North Capitol Street NW Suite 700
Washington DC 20001

Due: No later than June 1, 2012

To: Michael L. White, Acting Director
Office of the Federal Register

I am writing on behalf of the Pipeline Safety Trust (the “Trust”) to comment in strong support of the above petition. These comments will provide some background about the Trust, explain its previous advocacy to Congress on the subject of incorporating standards by reference, provide the Trust’s analysis of the legal foundations of notice and comment rulemaking as it relates to incorporation of standards by reference, and respond to each of the questions posed by the Office of the Federal Register.

I. Background about the Pipeline Safety Trust

The Pipeline Safety Trust came into being when a tragedy taught residents of Bellingham, Washington, and eventually the nation, that the regulatory structure that was supposed to protect the public from unsafe, mismanaged pipelines was woefully inadequate. Whatcom Creek, a popular, classic northwest salmon stream, wanders and falls through Whatcom Falls Park in Bellingham on its way past the city’s water treatment plant, through downtown, and to the Pacific Ocean.

On June 10th, 1999, at 3:28 p.m., a gasoline pipeline near Whatcom Creek ruptured, draining 237,000 gallons of unleaded gasoline into Whatcom Creek. An hour and half later, it ignited, leaving three young people dead, wiping out every living thing in the stream, and causing millions of dollars of economic disruption. After investigating this tragedy, the U.S. Department of Justice (DOJ) recognized the need for an independent organization that would provide informed comment and advice to both pipeline companies and government regulators, and would provide the public with an independent clearinghouse of pipeline safety information.

The broadly held opinion of pipeline safety regulation in 1999 is summarized in a brief the DOJ filed in its criminal prosecution coming out of the Bellingham tragedy, quoting various officials commenting about the U.S. Department of Transportation Office of Pipeline Safety: “not doing an adequate job of regulating,” “a poorly managed program that needs a reevaluation of its direction,” “[t]here is little or no enforcement of existing regulations...it is enough to make me wonder if there is collusion going on behind the scenes. Why else would an agency be so lax in enforcing its own regulations?” “Unfortunately, the Office of Pipeline Safety has had a poor history of regulation and enforcement.” Government’s Memorandum in Opposition to Equilon’s Motion to Stay Criminal Case Based on Primary Jurisdiction, No. CR01-0338R (Feb. 15, 2002) [internal citations omitted].

A plea bargain was filed to resolve the criminal allegations and a large criminal fine proposed. The federal trial court agreed with the DOJ’s recommendation that a portion of the fine (\$4 million dollars) should be used as an initial endowment to form the Pipeline Safety Trust for long-term support of the Trust’s mission:

The Pipeline Safety Trust promotes fuel transportation safety through education and advocacy, by increasing access to information, and by building partnerships with residents, safety advocates, government, and industry, that results in safer communities and a healthier environment.

Today, thirteen years after the Bellingham tragedy, the Trust is a vigorous independent public advocate for safer pipelines overseen by nine board members who come from all over the United States—Alaska, Florida, Washington, DC, Louisiana, New Mexico, Oregon, and, Washington State. The Trust’s current Treasurer is the stepfather of one of the young people killed in the Bellingham pipeline tragedy.

By way of illustration, the Trust’s activities include:

- A comprehensive and informative web site, www.pstrust.org, with a large library of pipeline safety information, including technical papers the Trust participated in developing or funded, e.g., *Tar Sands Pipeline Safety Risks*, *The State of Natural Gas Pipelines in Fort Worth*, *Observations on Practical Leak Detection for Transmission Pipelines*, and *A Simple Perspective on Excess Flow Valve Effectiveness in Gas Distribution System Service Lines*. The Trust also manages

- several active listservs dealing with various pipeline safety topics and reaching hundreds of participants every day.
- The Trust holds annual national conferences bringing together members of the public with government regulators from local, state and federal levels and industry representatives for educational presentations about timely pipeline safety issues. See, <http://www.pstrust.org/conference/index.htm>.
 - The Trust has prepared many non-technical documents for persons affected by the pipelines in their communities that explain pipeline safety in clear and understandable language. See, e.g., *Landowner's Guide to Pipelines; Whatcom Creek Pipeline Explosion*. Since it was founded, the Trust has testified repeatedly to Congress to advocate for stronger pipeline safety laws, most recently in 2010 and 2011, including testimony relating our concerns about incorporation by reference of industry-developed standards.
 - And perhaps most importantly, the Trust serves as a key resource for communities facing pipeline tragedies like the one that happened in Bellingham in 1999 and continue to happen all too frequently. In the last two years, the Trust has provided outreach and advocacy for communities like San Bruno, California where eight people died and thirty-seven houses burned down when a natural gas transmission pipeline exploded; Marshall, Michigan where a pipeline carrying tar sands oil ruptured spilling 800,000 gallons into a tributary of the Kalamazoo River; and Allentown, Pennsylvania where an entire city block exploded due to ancient cast iron natural gas distribution lines that the NTSB had recommended replacing nineteen years earlier, and to countless individuals with concerns about new and existing pipelines in their neighborhoods.

To carry out its mission, the Trust needs to know, and to be able to disseminate what law applies. A key source of information is industry standards incorporated into federal pipeline safety regulations.

II. Previous Trust Advocacy Regarding Incorporating Standards by Reference

The Trust has had a continuing concern with the incorporation of industry standards by reference. On June 24, 2010, the Trust testified before the Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security of the Commerce, Science & Transportation Committee of the United States Senate in a Hearing titled, "Ensuring the Safety of our Nation's Pipelines." The Trust's testimony shows how incorporating standards by reference, the way it is done now, has turned notice and comment rulemaking into a caricature of what it was intended to be. Because it is directly relevant to the petition before the OFR and presents a real life, current example of the problems with incorporation by reference, the Trust's entire June 24, 2010 testimony on incorporation by reference is below:

Concerns with industry developed standards being incorporated into federal regulations

There has been increasing attention because of the Gulf of Mexico tragedy to the practice by federal agencies of incorporating into their regulations standards that outside organizations developed. Like MMS, PHMSA has incorporated by reference into its regulations standards developed by organizations made up in whole or in part of industry representatives. A review of the Code of Federal Regulations under which PHMSA operates finds the following numbers of incorporated standards:

**Standards Incorporated by Reference in 49 CFR Parts 192, 193, 195
(As of 6/9/2010)**

CFR Part	Topic	Standards*
192	Natural and Other Gas	39
193	Liquefied Natural Gas	8
195	Hazardous Liquids	38

Total 85

*Note: Some standards may be incorporated by reference in more than one CFR Part.

These standards were developed by the following organizations:

- American Gas Association (AGA)
- American Petroleum Institute (API)
- American Society for Testing and Materials (ASTM)
- American Society of Civil Engineers (ASCE)
- ASME International (ASME)
- Gas Technology Institute (GTI)
- Manufacturers Standardization Society of the Valve and Fittings Industry, Inc. (MSS)
- NACE International (NACE)
- National Fire Protection Association (NFPA)
- Pipeline Research Council International, Inc. (PRCI)
- Plastics Pipe Institute, Inc. (PPI)

While the Pipeline Safety Trust has not done an extensive review of these organizations or their standard setting practices, it is of great concern to us—and we believe it should be to Congress as well—whenever an organization whose mission is to represent the regulated industry is—in essence—writing regulations that members of the organization must follow. A very quick review of the mission statements of some of these organizations reveals statements like these below that show, at a minimum, a conflict between the best possible regulations for the entire public and the economic interests of the industry.

API – “We speak for the oil and natural gas industry to the public, Congress and the Executive Branch, state governments and the media. We negotiate with regulatory agencies, represent the industry in legal proceedings, participate in

coalitions and work in partnership with other associations to achieve our members' public policy goals."

AGA – "Focuses on the advocacy of natural gas issues that are priorities for the membership and that are achievable in a cost-effective way." "Delivers measurable value to AGA members."

PPI – "PPI members share a common interest in broadening awareness and creating opportunities that expand market share and extend the use of plastics pipe in all its many applications." "the mission of The Plastics Pipe Institute is to make plastics the material of choice for all piping applications."

PRCI – "PRCI is a community of the world's leading pipeline companies, and the vendors, service providers, equipment manufacturers, and other organizations supporting our industry."

The pipeline industry has considerable knowledge and expertise that needs to be tapped to draft standards that are technically correct and that can be implemented efficiently. But we also know the industry's standard setting practices exclude experts and stakeholders who can bring a broader "public good" view to standard setting. We also know that when a regulatory agency needs to adopt industry-developed standards it is a "red flag" that the agency lacks the resources and expertise to develop these standards on its own.

It should be noted that the development of such standards is not an open process where interested members of the public or experts outside the industry (such as those in universities and colleges) can review the material and comment. One of the most ridiculous examples of this one sided process was the development of the Public Awareness standard (API RP 1162) which now governs how pipeline companies have to communicate with the affected public. The process was controlled by industry, even though industry has no particular expertise in this type of public awareness or communication. The many possible independent experts and organizations in the field of communications and education were not sought and ultimately were not a part of the development of this standard.

Even once the standards are incorporated by reference into federal regulations the standards remain the property of the standard setting organization and are not provided by PHMSA in their published regulations. If the public, state regulators, or academic institutions want to review the standards they have to purchase a copy from the organization that drafted them. In many cases, this further removes review of the standards from those outside of the industry. Below are just a handful of examples of

the cost to purchase for review the standards that are part of the federal pipeline regulations:

Sample Cost of Pipeline Safety Standards Incorporated by Reference into Federal Regulations (as of 6/8/2010)

Standard	Organization	Code of Federal Regulations (Incorporated by Reference)	Cost
ANSI/API Spec 5L/ISO 3183 "Specification for Line Pipe"	API	49 CFR §192.55, §192.112, §192.113, §195.106	\$245.00
ASME B31.4 -2002 "Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids"	ASME	49 CFR §195.452	\$129.00
GRI 02/0057 (2002) "Internal Corrosion Direct Assessment of Gas Transmission Pipelines Methodology"	GTI	49 CFR §192.927	\$295.00
NACE Standard RP0502-2002 "Pipeline External Corrosion Direct Assessment Methodology"	NACE	49 CFR §192.923, §192.925, §192.931, §192.935, §192.939, §195.588	\$83.00
A Modified Criterion for Evaluating the Remaining Strength of Corroded Pipe,"	PRCI	49 CFR §192.933, §192.485, §195.452	\$995.00

The Pipeline Safety Trust asks that Congress carefully review the use of industry developed standards in minimum federal pipeline safety regulations, as well as the development of risk-based programs that are not required to go through any sort of public review.

The Trust's testimony was part of the Congressional pipeline safety reauthorization process. On January 3, 2012, President Obama signed into law the *Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011*, Pub. L. 112-90 (the "Act"). Section 24 of the Act limits incorporation of documents by reference as follows:

Beginning 1 year after the date of enactment of this subsection, the Secretary may not issue guidance or a regulation pursuant to this chapter that incorporates by reference any documents or portions thereof unless the

documents or portions thereof are made available to the public, free of charge, on an Internet Web site.

Thus, Congress has answered the question asked by OFR whether standards that are incorporated by reference should be freely available to anyone on the internet, at least with respect to one agency—the answer is “yes.” The Trust remains concerned about incorporation by reference, since the new bill only requires documents relied on in regulations adopted one year from enactment of the bill to be made freely available to the public. So long as regulations remain unchanged, documents incorporated into them need not be made public under the new reauthorization bill.

III. The History and Legal Foundations of Notice and Comment Rulemaking as It Relates to Incorporation of Standards by Reference

Secret Laws and Knowledge in Democracy

From its inception, a central purpose of the Administrative Procedures Act and the Federal Register Act is to prevent the development of secret laws and to bar their enforcement. *Cervase v. Office of the Federal Register*, 580 F.2d 1166, 1169 (3d Cir. 1978); and see *Gatekeeping and the Federal Register: An Analysis of the Publication Requirement of Section 552(a)(1)(D) of the Administrative Procedure Act* by Randy S. Springer, 41 Admin. L. Rev. 533, 533-537 (1989). This is the most basic form of fundamental fairness with roots reaching back as least to Voltaire and the French Enlightenment: government interference with important private interests should be permitted only in accordance with rules known in advance and impartially applied. *The Reformation of American Administrative Law* by Richard B. Stewart, 88 Harv. L. Rev. 1669, 1698 (1975).

Moreover, knowledge is a basic essential in a participatory democracy. As James Madison said more than two hundred years ago:

“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”

Letter from James Madison to W.T. Barry (Aug. 4, 1822) in *The Writings of James Madison* 103 (Gaillard Hunt ed. 1910).

If secret laws are anathema and citizens need information to fully participate in their democracy, it follows that when technology improves and enables making information about law more accessible, that technology ought to be applied.

Federal Policy in Favor of Voluntary Consensus Standards

The federal government has had a policy of promoting the use of standards developed by private consensus standards organizations for many years. *See, e.g.*, National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113 § 12; *and* 1996 U.S.C.C.A.N. 493, 499, 501 and 510-512. It was the intent of Congress to make private-sector developed consensus standards the rule, rather than the exception. 1996 U.S.C.C.A.N. at 512.

In its legislative history, Congress pointed to a report by the National Research Council advocating this policy to support its policy choice. 1996 U.S.C.C.A.N. at 511 *citing* Standards, Conformity Assessment, and Trade: Into the 21st Century (1995). That report used the term “standard” to refer to a wide range of very different concepts, to illustrate:

- Commercial communication, e.g., standard dimensions and strengths, etc.
- Technology diffusion, e.g., IBM compatible
- Production efficiency, e.g., McDonald’s food and restaurant style
- Enhanced competition, e.g., gasoline octane ratings allow consumers to compare similar products on the basis of price
- Compatibility, e.g., internet communication protocol for sending and receiving messages
- Process management, e.g., quality assurance using ISO 9000 standards
- Public welfare, e.g., health codes such as restaurant sanitation standards, etc. automobile air bags, seat restraints, and bumpers

Id. at p. 12 Table 1-1 *available at:*

http://www.nap.edu/catalog.php?record_id=4921#toc.

It is not clear that Congress intended the breadth of incorporation by reference that occurs today. Congress defined the technical standards whose incorporation it intended to encourage as, “performance-based or design-specific technical specifications and related management systems practices.” Pub. L. 104-113 § 12, 1996 HR 2196, 110 Stat. 775. That language appears not to have been codified. The Trust could find no evidence that Congress ever repealed it. Yet today, standards that are incorporated by reference frequently have no relation to “performance-based or design-specific technical specification or related management systems practices.”

One does not have to be a lawyer to understand that the legal significance of a policy encouraging adoption of a voluntary consensus standard for gasoline octane or a voluntary consensus standard for internet communication protocol is a wholly different concept from abdicating an agency’s rulemaking authority to private bodies. That is what has occurred at PHMSA under the rubric of incorporating voluntary consensus standards by reference.

Incorporation of Standards by Reference at PHMSA

In 2002, Congress required pipeline owners and operators to have a public education program which would include advising the public of pipeline facility locations and possible hazards from unintended releases and what steps should be taken for public

safety in the event of a release; Congress also authorized PHMSA to issue standards prescribing the elements of an effective public education program. H.R. 3609 § 5, Pub. L. 107-355 (2002). Rather than PHMSA developing standards, or PHMSA asking an entity with expertise in public education and outreach to develop standards, the American Petroleum Institute (“API”) developed a “standard” RP 1162 which PHMSA then incorporated by reference in 2005. *See*, <http://mycommittees.api.org/standards/pipeline/1162%20Links/1162nonprintable.pdf>; 49 C.F.R. § 192.616 and 49 C.F.R. § 195.440.

In the case of RP 1162, API made some attempts to communicate with stakeholders and API made the standard available for free on the web, although the public cannot print it or download it. *See* <http://mycommittees.api.org/standards/pipeline/1162%20Links/1162nonprintable.pdf>. API deserves credit for recognizing the irony of developing a standard about how to educate the public in a non-public process, and for making it available to the public without cost (but also without the ability to print or download it). But there are significant problems.

To illustrate, this is not a “voluntary **consensus** standard”—this is an industry standard developed by and for industry. Nor is it a “technical standard” as that term was defined by Congress in the NTTA: “a performance-based or design-specific technical specification or related management systems practices.” RP 1162 is a 50+ page long set of recommendations, options, considerations and possibilities. It is not prescriptive, nor is it realistically enforceable, with the possible exception of failing to adequately document public awareness efforts and make that documentation available to federal inspectors should they choose to ask to see it. RP 1162 should never have been approved by the OFR for incorporation, since it does not meet the statutory definition of those technical specifications Congress was encouraging agencies to incorporate. How many other standards developed by industry has the OFR approved for incorporation, despite their non-technical, non-specific nature, in addition to their lack of reasonable availability?

Second, this process deprived the public of any meaningful opportunity to “comment” in the sense that the APA intended. It does little good to “comment” in a PHMSA rulemaking after the so-called “voluntary consensus standard” is already developed by industry; after all, federal policy is that “voluntary consensus standards” are the rule rather than the exception. 1996 U.S.C.C.A.N. at 512. Nonetheless, the public doesn’t elect any representatives to API and, to be fair, API doesn’t represent the public; it represents the oil and gas industry. The public should not have to ask an industry group to write adequate public awareness standards to protect the public when Congress has provided a pipeline safety regulatory program and empowered it to do so. It seems highly doubtful that Congress intended that notice and comment rulemaking should be reduced to the perfunctory, vestigial level it has reached at PHMSA through incorporation of industry standards by reference.

Third, in most cases (other than those published by API, which has agreed to limited access for incorporated standards), PHMSA IBR standards are not available to the public unless the pays dearly for it. The total cost for acquiring the standards incorporated into pipeline safety regulations exceeds \$2000. The public should not have to buy a copy of a standard in order to participate in an APA notice and comment rulemaking or to learn what the law is so that the public can petition for changes. Thus, at present, these standards are not “reasonably” available as Congress required.

Standards setting organizations may argue that they are entitled to copyright their works, it costs money to develop these standards, and if people want them they should pay for them. There is some doubt whether this contention is legally sound. *Veeck v. Southern Building Code Congress Intn'l*, 293 F.3d 791 (5th Cir. 2002).

In *Veeck*, the Fifth Circuit considered a plaintiff who had purchased an electronic copy of a building code that had been adopted by two nearby towns. He cut and pasted the portions that the two nearby towns had adopted and posted it on the web. He sought a declaratory judgment that the code, as law, could not be copyrighted, that law was merely facts which are not subject to copyright, as well as other legal theories. The code developer sued him for copyright infringement. The Fifth Circuit agreed with the plaintiff that law could not be copyrighted. The court explained,

Lawmaking bodies in this country enact rules and regulations only with the consent of the governed. The very process of lawmaking demands and incorporates contributions by “the people,” in an infinite variety of individual and organizational capacities. Even when a governmental body consciously decides to enact proposed model building codes, it does so based on various legislative considerations, the sum of which produce its version of “the law.” In performing their function, the lawmakers represent the public will, and the public are the final “authors” of the law. ... [P]ublic ownership of the law means precisely that “the law” is in the “public domain” for whatever use the citizens choose to make of it. Citizens may reproduce copies of the law for many purposes, not only to guide their actions but to influence future legislation, educate their neighborhood association, or simply to amuse. If a citizen wanted to place an advertisement in a newspaper quoting the Anna, Texas building code in order to indicate his dissatisfaction with its complexities, it would seem that he could do so.

Veeck, 293 F.3d at 799.

The *Veeck* court struggled to differentiate two cases in the Second and Ninth Circuit that had reached the opposite result for “standards” rather than “codes.” The facts in those cases were distinct from those in *Veeck*.

In one, a New York statute required insurance companies to use a private code for valuing automobiles for the purpose of total loss calculation. *CCC Info. Services v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994). CCC contended that the standard had entered the public domain. The Second Circuit disagreed stating, “we are not prepared to hold that a state’s reference to a copyrighted work as a legal standard for valuation results in loss of the copyright.” *CCC Info. Services*, 44 F.3d at 74.

In the other case, the American Medical Association (“AMA”) had created a coding system for reporting physician’s services and medical procedures. *Practice Management Info. Corp. v. American Medical Ass’n*, 121 F.3d 516 (9th Cir. 1997). The Federal Health Care Financing Administration adopted regulations requiring the use of the AMA coding system. There were no restrictions on the government’s right to reproduce or distribute the codes. The *Practice Management* court feared that invalidating the AMA’s copyright might equally well invalidate the copyright for the BlueBook because federal court rules require its use. *Practice Management* 121 F.3d at 519 n. 5. In the end, the *Practice Management* court found that the agency’s incorporation did not invalidate the copyright.

The *Veeck* court differentiated these two cases on several fronts. First, *CCC Info. Services* and *Practice Management* dealt with a reference to an extrinsic standard, not to a wholesale adoption of a model code promoted by its author expressly for use as legislation. *Veeck*, 293 F.3d at 804. A copyright treatise analyzing the issue had also differentiated the two cases as involving compilations of data that had received government approval, not content that had been enacted into positive law. *Id.* at 805. The *CCC Info. Services* and *Practice Management* codes had been developed by the private groups for reasons other than incorporation into law, on the other hand, a model code serves no purpose other than to become law. *Id.* at 805.

Finally, the *Veeck* court evaluated several policy arguments offered by the copyright holder. Importantly in the context of the petition before OFR, the Southern Building Code Congress argued that without full copyright protection it would lack the revenue to continue its public service of code drafting. The *Veeck* court cited the analysis of a copyright treatise:

...it is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less. Trade organizations have powerful reasons stemming from industry standardization, quality control, and self-regulation to produce these model codes; it is unlikely that, without copyright, they will cease producing them.

Veeck, 293 F.3d at 806 (internal citations omitted).

The *Veeck* court concluded that codes that were enacted into law were no longer entitled to copyright protection and that extending such protection would dissuade the purpose of “the Progress of Science and the useful Arts.” U.S. Const. art. I § 8, cl. 8.

Today many copyrighted works are far more “available” through the use of modern technology than what OFR requires for standards incorporated by reference into the Code of Federal Regulations. Residents can download copyrighted audio books at home for limited periods for free from local libraries. Westlaw (which is copyrighted) is available for free public use at law libraries. While it is true that these libraries pay to have these materials available for their patrons, this demonstrates that government entities as modest as a local library can use the Internet to make copyrighted material available for public use without doing away with the notion of copyright.

IV. Questions posed by the OFR

1. *Does “reasonably available”*
 - a. *Mean that material should be available*
 - i. *For free and*
 - ii. *To anyone online?*
 - b. *Create a digital divide by excluding people without Internet access?*

“Reasonably available” can be achieved in a number of ways. In pre-internet days it might have been achieved by having a copy of the document available in the libraries of government publications in the states. Today, material available on line for free is reasonably available.

Using the Internet to make material available does not “create” a digital divide. That divide already exists for people who do not have Internet access but it has not stopped the OFR from using the Internet for other purposes. That said, public libraries often have Internet access for patrons so even those who do not have Internet access at home can often obtain it at local libraries.

Finally, the APA requires that the standards incorporated by reference be “reasonably available,” not universally available. And imagine if years ago, the federal government declined to use telephones until everyone had them in a misguided notion of avoiding the “telephonic divide”—to this day, the federal government would still be using the telegraph because not everyone has a telephone, even today. In short, the OFR should promulgate a regulation requiring that “reasonably available” means making a standard available free for anyone to view it online.

2. *Does “class of people affected” need to be defined? If so, how should it be defined?*

No, it does not need to be defined. The class of people affected by a rule would be identical to the class of people who have standing to challenge a rule or to intervene in a

rulemaking proceeding. It has been well established for many years that the class of people with standing includes those who can show that they have suffered an “injury in fact,” that the injury is “fairly traceable” to the defendant’s actions and that a favorable judicial ruling will likely redress the plaintiff’s injury. *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 431 (D.C. Cir. 1998). In addition, a plaintiff’s injury must fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit. *Id.*

In *Glickman*, the plaintiffs challenged the United States Department of Agriculture (“USDA”) rules adopted under the Animal Welfare Act (“AWA”). Plaintiff Marc Jurnove (“Mr. Jurnove”) had submitted an affidavit stating that he enjoyed going to zoos, had worked or volunteered for numerous animal welfare organizations, and that when he visited zoos, he suffered direct, concrete, and particularized injury to his aesthetic interests in seeing animals living under humane conditions. The court found that he had adequately alleged an injury in fact for standing purposes.

Mr. Jurnove complained that the AWA required the USDA to adopt minimum standards to govern the humane treatment of primates and that USDA had not done so. For example, the USDA had required only that the zoo establish a “plan” that “addresses” the social needs of primates. *Id.* at 438-440. This was sufficient to show that the injury complained of was caused by the USDA’s alleged illegal action. The court found that the challenged agency action authorized or allowed the conduct causing the plaintiff’s alleged injuries. *Id.* at 440. Hence, it “caused” the injury for standing purposes.

Mr. Jurnove alleged that he intended to continue to visit the zoo and more stringent regulations would prohibit the inhumane conditions that caused him injury in the past. The court found that was sufficient to show that Mr. Jurnove’s injury was redressable if he received a favorable judicial ruling.

Finally, the court found that Mr. Jurnove fell within the zone of interests protected by the AWA. *Id.* at 444. This test is undemanding because it asks only whether the plaintiff is *arguably* within the zone of interests to be protected by the statute. The court explained that this analysis focuses not on those who might be benefited from the statute but on those who in practice could be expected to police the interests the statute protects. *Id.*

In the petition before the OFR, it is difficult to imagine a scenario where someone with standing to challenge a rule incorporating a standard by reference would not be in the class affected by that standard. The converse is equally true, it is difficult to imagine how someone could be in a class affected by the incorporation of a standard by reference but not have standing to challenge the rule incorporating it. Thus, the “class affected” does not have to be defined—it is the same as the class that would have standing to challenge a rule.

Clearly a pipeline incident can affect many persons beyond the regulated entity. On September 9, 2010, when a Pacific Gas & Electric Company 30” natural gas transmission pipeline ruptured in a residential area in San Bruno, California, eight people were killed,

many were injured, many more were evacuated, thirty-eight (38) homes were destroyed and another 70 were damaged. *Pacific Gas & Electric Company Natural Gas Transmission Pipeline Rupture and Fire, San Bruno, California, September 9, 2010*, National Transportation Safety Board Accident Report NTSB/PAR-11/01 (Aug. 30, 2011) [“San Bruno NTSB Report”]. Six hundred firefighters and 325 law enforcement officers responded. *Id.* at p. 18. It took 95 minutes to manually turn off the 30” pipeline that was incinerating the San Bruno community and holding firefighters at bay. The fire fighters were on scene for fifty hours, *id.* at p. 18. The fire damage extended 600 feet from the pipeline and 300 homes were evacuated. *Id.* at 18-19. The San Bruno incident illustrates how far beyond the regulated industry the “class of people affected” by a set of regulations can extend.

The NTSB report following the incident concluded that the enforcement and oversight of the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) was ineffective, *id.* at 125-26. As a majority of the NTSB found, “We identified regulators that placed a blind trust in the companies that they were charged with overseeing—to the detriment of public safety.” NTSB San Bruno Report at 135.

The regulators that put blind trust in industry are the same ones that choose to incorporate standards by reference produced by that same industry without making them “reasonably available” to the public. Agencies created for the purpose of protecting the public and the environment from harm resulting from a regulated industry bear a particular responsibility to be transparent when interacting with that industry. It is essential that the Internet be used to make those standards reasonably available so that the public can learn what the law is and be empowered to argue for stronger laws without having to pay for the privilege.

3. *Should agencies bear the cost of making the material available for free online?*

The OFR’s question assumes that there would be a significant cost to making the material available for free online. Experience with the American Petroleum Institute and its incorporated standards shows that assumption may be incorrect. Similarly, the *Practice Management* case cited earlier resulted in AMA granting the Health Care Financing Administration a royalty free license. 121 F.3d at 517. As mentioned previously, local libraries manage to make copyrighted audio books available for free without undue burden. Thus, the OFR should not assume that the cost of making materials available for free on line will necessarily be an issue.

Furthermore, if there is a cost, perhaps that should influence the agency’s decision whether to incorporate that particular standard. In any event, if there is a cost, yes, the agency should bear that cost of making the standard “reasonably available,” the same way the agency bears other rulemaking costs.

4. *How would this impact agencies’ budget and infrastructure, for example?*

In the case of RP 1162, API has made the standard available on its web site for free viewing, although the public cannot print or download it. Thus, it appears that there is no impact to PHMSA's budget and infrastructure as the result of incorporating a reference that is "reasonably available." Similarly, in *Practice Management*, AMA granted the Health Care Financing Administration a royalty free license and it is not clear that there was any impact to the agency's infrastructure. And again, local libraries who allow downloading of copyrighted works have not found that the impact to their budget and infrastructure was unmanageable.

OFR should not use fear of budget repercussions to refuse to define "reasonably available" as making the standard available for free online. There is no evidence that making standards incorporated by reference "reasonably available" by making them available for free on the Internet would unduly impact agencies' budget and infrastructure.

5. *How would OFR review of proposed rules for IBR impact agency rulemaking and policy, given the additional time and possibility of denial of an IBR approval request at the final stage of rulemaking?*

Assuming that the OFR responds to this petition by promulgating clear rules for the conditions under which standards may be incorporated into proposed regulations, agencies will have adequate forewarning and a clear pathway to follow in their rulemakings. OFR review of IBR requests should not become burdensome to either OFR or the proposing agency.

6. *Should OFR have the authority to deny IBR approval requests if the material is not available online for free?*

Yes. The current authority requires OFR to ensure that standards are reasonably available. Given the current public access to the Internet, the vast improvement in access to standards that would result from electronic publication of IBR standards, and the ability to publish standards with limited licenses prohibiting printing or downloading, having standards available online for free should be the standard for "reasonably available."

7. *The Administrative Conference of the United States recently issued a Recommendation on IBR. 77 FR 2257 (Jan. 17, 2012). In light of this recommendation, should we update our guidance on this topic instead of amending our regulations?*

The recommendation issued recently by the Administrative Conference of the United States makes clear several aspects of accessibility that the OFR should consider in its review of agency proposals. Additional guidance on these issues will be most beneficial to proposing agencies and to the OFR's ease of review if it comes in the form of rules, rather than another list of items to consider. Further, the recent bipartisan action by Congress in reauthorizing the pipeline safety program, while requiring the Department of Transportation to make available, free to the public, and online, newly incorporated

standards adopted after a year following enactment of the law, gives evidence of the current Congressional mindset in these matters: Industry-developed standards incorporated by reference must be available free to the public, online.

8. *Given that the petition raises policy rather than procedural issues, would the Office of Management and Budget be better placed to determine reasonable availability?*

No. The statute authorizes the Office of Federal Register to adopt rules interpreting the APA and the OFR should do so. In any event, OMB will presumably review the rule prior to adoption as it does for all rules.

9. *How would an extended IBR review period at both the proposed rule and final rule stages impact agencies?*

There is no evidence that it would impact agencies at all. Agencies can determine, before deciding to issue a Notice of Proposed Rulemaking, whether to propose to incorporate a particular standard, what the cost would be to make it reasonably available, and whether the agency can afford that cost (if any). Thus, it would not be necessary to have an extended IBR review period in all cases and possibly not in any cases.

V. Conclusion

The Pipeline Safety Trust appreciates the opportunity to comment on this petition. Incorporation by reference of standards, developed by industries or other trade-dominated standards setting groups, which are then not available to the public, is a failure to make those standards reasonably available. The OFR should promulgate clear rules governing IBR, requiring that agencies make such standards available, free to the public, on their websites or elsewhere on the Internet, as Congress has recently required of the Department of Transportation's pipeline safety regulations.

Sincerely,

Rebecca Craven
Program Director
Pipeline Safety Trust

Cc: Peter L. Straus
Betts Professor of Law
435 West 116th Street
New York, NY 10027