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Office of the Federal Register
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740

RE: 1CFR Part 51 [NARA 12-0002] Incorporation by Reference

Dear Sir or Madam:

The American Nuclear Society (ANS) is a professional not-for-profit organization of engineers and scientists devoted to the peaceful applications of nuclear science and technology. ANS has been active in the development of nuclear industry standards since 1957. We very much appreciate the opportunity to comment on the recent petition received by your office to revise the 1 Code of Federal Regulations part 51 to define “reasonably available” in terms of material incorporated by reference (IBR).

We have responded to the nine queries as published in the Federal Register notice on February 27, 2012, below:

1. What does “reasonably available” mean?

a. That the material should be available:

i. For free?

“Reasonably available” and “free” are not congruent. In terms of applicability of these terms to a document, ANS interprets “reasonably available” to refer to a document that is easily accessed either through a web-based application or by telephone to the ANS Order Department for a reasonable cost. Voluntary consensus standards developed by ANS are readily-available for purchase through its website at www.ans.org, or by telephone to ANS headquarters as cited in the foreword of any voluntary consensus standard. Furthermore, it is ANS policy that any document referenced in an ANS voluntary consensus standard and which is required for compliance by some external regulation, etc., will also be made readily available and be reasonably priced. Please note that our staff, the editors, printing, and meeting room charges at hotels are not free during the development of standards, and so therefore it is not sustainable to provide industry standards for “free.”

ii. To anyone online?

ANS standards are available for purchase online through the ANS Store. Standards developed in the past 10 years are available electronically and in print. Older standards that are only in print can be made available electronically by special request.

b. By creating a digital divide by excluding people without Internet access?

Due to recent advances in computer technology, the majority of ANS voluntary consensus standards are purchased through the online ANS Store. These standards, however, may also be purchased by fax or phone order depending on the purchaser’s preference. All ANS voluntary consensus standards are available in print

format and include a list of references at the end of the standard to enable acquisition. The people that would need access to the standards for nuclear science and technology would have the awareness to use a public internet (e.g. library) to gain access to our standards.

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

Yes, it should be defined. ANS would expect that the “class of persons affected” would be defined as “any individual or organization materially affected by the regulation.”

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

If this petition results in a decision that documents IBR are to be available online for free, ANS believes that it is the agency’s responsibility to compensate the standards developing organization (SDO) for its loss of revenue which, in many cases, may still not fully cover its production costs. This compensation would uphold the Office of Management and Budget (OMB) Circular A-119 principle that agencies must observe and protect the rights of copyright holders. Furthermore, by incorporating documents by reference in the CFR, federal agencies benefit by not being required to use its staff resources to provide the means by which the enabling regulations may be satisfied. National voluntary consensus standards currently provide those means and require considerable society staff resources to develop and approve using a strict comprehensive consensus process certified by the American National Standards Institute. This benefit meets the intent of the National Technology Transfer and Advancement Act of 1995. In addition, if SDOs such as ANS are required to make the standards they develop available for free, the promulgation of future standards will stop because the costs of producing them for free will be prohibitively high, resulting in an unsustainable business model for a not-for-profit organization.

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

ANS feels that the ramifications for agencies to compensate developing organizations for usage would significantly impact agencies due to a necessary agency requirement to receive congressional funding to compensate hundreds of national SDOs and to manage the aforementioned compensation program to ensure equitable compensation to all SDOs. Without reliable, timely compensation, SDO budgeting would be difficult. Further study would be needed to gather information and develop a program.

5. How would the Office of the Federal Register’s (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 rule stage of the rulemaking?

If OFR review and approval is required for IBR impact, it should be completed at the proposed rule stage, eliminating denial at the final rules stage.

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

The decision to IBR should be made by qualified technical experts at the agency based upon technical needs and not by legal counsel since this is a technical matter.

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

No comment.

8. Given that the petition raises policy rather than procedural issues, would the OMB be better placed to determine reasonable availability?

Yes. OMB involvement would ensure consistent equitable policy across the entire federal government spectrum.

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

The duplication of approval at both proposed and final rule stages and extended reviews during both stages would impede timely approval of new and revised regulations in response to industry need.

Thank you for the opportunity to comment on this precedence-setting issue.

Respectfully submitted,

A handwritten signature in black ink that reads "Eric P. Loewen". The signature is written in a cursive, flowing style with a large, sweeping flourish at the end.

Eric P. Loewen, Ph.D.
President
American Nuclear Society

Cc: Robert C. Fine, JD, CAE, ANS Executive Director
Donald J. Spellman, ANS Standards Board Chair
Rick Michal, Director, ANS Scientific Publications and Standards