



Shaping Tomorrow's
Built Environment Today

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Ronald E. Jarnagin
President

March 30, 2012

Michael L. White
Acting Executive Director
Office of the Federal Register
National Archives and Records Administration

RE: ASHRAE Comments on NARA Incorporation by Reference (NARA 12-0002)

Dear Mr. White:

ASHRAE, founded in 1894, is an international organization of over 52,000 members. The Society and its members focus on building systems, energy efficiency, indoor air quality and sustainability within the industry. Through research, standards writing, publishing and continuing education, ASHRAE shapes tomorrow's built environment today.

ASHRAE is a national and global leader in buildings standards development – a role which is central to the pursuit of ASHRAE's mission of advancing the arts and sciences of heating, ventilating, air-conditioning and refrigerating (HVAC&R) to serve humanity and promote a sustainable world. In recognition of our commitment to consensus, openness, balance of the interests of affected parties, transparency, and due process, ASHRAE has earned a place as one of the very few American National Standards Institute (ANSI) Audited Designators – which means that we have established and maintain a consistent record of successful voluntary standards development.

ASHRAE's standards are currently referenced 130 times in the Code of Federal Regulations¹ (CFR) through several federal laws, including the Energy Conservation and Production Act, American Recovery and Reinvestment Act, Energy Policy Act of 2005, and the Energy Independence and Security Act of 2007. Additionally, ASHRAE's standards are referenced in the building codes of most states and local jurisdictions.

It is with this experience in mind that ASHRAE offers the following comments and recommendations regarding the National Archives and Records Administration's (NARA) announcement of a petition for rulemaking and request for comments on standards incorporated by reference (IBR) into the CFR.

¹ National Institute of Standards and Technology. "Standards Incorporated by Reference Database".
http://standards.gov/sibr/query/index.cfm?fuseaction=rsibr.regulatory_sibr_by_keyword&Keyword_Input=ASHRAE

Summary of Recommendations

- 1) **Define “reasonably available” as making standards incorporated by reference (IBR) into the Code of Federal Regulations available to the public for free, read-only (non-downloadable), viewing online.**
- 2) **ASHRAE recommends that agencies should bear the cost of making IBR standards available for free online in read-only (non-downloadable) format, and should compensate standards development organizations (SDOs) accordingly for providing free-to-the-public online access to their referenced standards. This is consistent with the National Science and Technology Council’s recommendation that federal agencies should consider providing monetary compensation to SDOs for the provision of their standards to all interested parties².**
- 3) **“Class of persons affected” should be broadly defined, to include all affected stakeholders.**
- 4) **ASHRAE recommends that the Office of the Federal Register (OFR) should not have the authority to deny IBR approval requests if the material is not available for free online; rather OFR should work with agencies and SDOs to resolve any outstanding issues related to compensating SDOs for the federal government’s use of their standards and the free provision of their intellectual property to the public.**

Discussion

- 1) **Define “reasonably available” as making standards incorporated by reference (IBR) into the Code of Federal Regulations available to the public for free, read-only (non-downloadable), viewing online.**

ASHRAE stands in general agreement with the Petitioner that IBR standards should be made available to interested individuals for free viewing online in read-only (non-downloadable) format. ASHRAE further agrees that the law and governing regulations concerning the reasonable availability of IBR standards were crafted prior to the Internet age, and that the resulting technological developments have improved access to voluminous documents previously available only in print form.

ASHRAE strongly supports public access to our standards, and currently provides free-to-the-public online public read-only access, in non-downloadable format, to five of our standards. This access is provided through a service called RealRead®. Providing access to these standards is not free to ASHRAE, and we currently bear this cost, which is based on formatting and online hosting costs. Greater access results in higher costs. The CFR incorporates by reference 30 of ASHRAE’s standards and related materials³. The cost to ASHRAE of hosting and providing free-to-the-public online access to these standards would likely be significant.

² Subcommittee on Standards, Nat’l Sci. & Tech. Council, Exec. Office of the President, “Federal Engagement in Standards Activities to Address National Priorities: Background and Proposed Recommendations” (Oct. 10, 2011). http://standards.gov/upload/Federal_Engagement_in_Standards_Activities_October12_final.pdf

³ National Institute of Standards and Technology. “Standards Incorporated by Reference Database”. http://standards.gov/sibr/query/index.cfm?fuseaction=rsibr.regulatory_sibr_by_keyword&Keyword_Input=ASHRAE

The five standards that ASHRAE provides free public online access to are incorporated by reference into the CFR and otherwise used by federal agencies and programs, either in their current or prior editions⁴. These standards are:

- ANSI/ASHRAE/USGBC/IES Standard 189.1-2011 *Standard for the Design of High-Performance Green Buildings Except Low-Rise Residential Buildings*
- ANSI/ASHRAE/IESNA Standard 90.1-2010 *Energy Standard for Buildings Except Low-Rise Residential Buildings*
- ANSI/ASHRAE Standard 90.2-2007 *Energy Efficient Design of Low-Rise Residential Buildings*
- ANSI/ASHRAE Standard 62.1-2010 *Ventilation for Acceptable Indoor Air Quality*
- ANSI/ASHRAE Standard 62.2-2010 *Ventilation and Acceptable Indoor Air Quality in Low-Rise Residential Buildings*

We do not believe the provision of IBR standards to the public for free online, in read-only access, will create a digital divide because about 72 percent of Americans use, and thus have access to the Internet; either at home, work, school, library, or a neighbor's house⁵.

In line with the recommendation of the Administrative Conference of the United States (77 FR 2257), ASHRAE encourages agencies to work with SDOs who hold the copyright to IBR standards to form a partnership wherein SDOs are able to provide public, read-only online access to IBR standards at no cost to the public.

2) ASHRAE recommends that agencies should bear the cost of making IBR standards available for free online in read-only (non-downloadable) format, and should compensate standards development organizations (SDOs) accordingly for providing free-to-the-public online access to their referenced standards. This is consistent with the National Science and Technology Council's recommendation that federal agencies should consider providing monetary compensation to SDOs for the provision of their standards to all interested parties⁶.

ASHRAE believes that IBR standards should be made available to the public for free online, in read-only (non-downloadable) format, however we hold that SDOs should be compensated by the referencing agencies for the provision of the SDOs' standards to the public.

The federal government has recognized the importance of SDOs, and holds that U.S. standards development should continue to be a private sector-led effort. A recent memo to Executive Departments and agencies from the Office of Science and Technology Policy, Office of the United States Trade Representative, and the Office of Management and Budget stated:

"The vibrancy and effectiveness of the U.S. standards system in enabling innovation depend on continued private sector leadership and engagement. Most standards developed and used in U.S. markets are created with little or no government involvement. This approach-reliance on private

⁴ Standards & Guidelines. "Preview Popular ASHRAE Standards". <http://www.ashrae.org/standards-research--technology/standards--guidelines>.

⁵ National Telecommunications and Information Administration, U.S. Department of Commerce. "Digital Nation: Expanding Internet Usage". February 2011. http://www.ntia.doc.gov/files/ntia/publications/ntia_internet_use_report_february_2011.pdf

⁶ Subcommittee on Standards, Nat'l Sci. & Tech. Council, Exec. Office of the President, "Federal Engagement in Standards Activities to Address National Priorities: Background and Proposed Recommendations" (Oct. 10, 2011). http://standards.gov/upload/Federal_Engagement_in_Standards_Activities_October12_final.pdf

sector leadership, supplemented by Federal Government contributions to discrete standardization processes as outlined in OMB Circular A-119, 'Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities' -remains the primary strategy for government engagement in standards development. Consistent with the Administration's commitment to openness, transparency, and multi-stakeholder engagement, all standards activities should involve the private sector.⁷

This enunciation falls in line with a long history of federal laws and regulations that express similar reliance on the private sector to develop standards in the interest of the public and nation⁸. In view of this relationship, ASHRAE holds that it is appropriate for the federal government to support the continued development and improvement of IBR standards through monetary compensation to SDOs whose standards are referenced, and again notes that this view is consistent with the National Science and Technology Council's recommendation that federal agencies should consider providing monetary compensation to SDOs for the provision of their standards to all interested parties.

3) "Class of persons affected" should be broadly defined, to include all affected stakeholders.

ASHRAE encourages OFR to broadly define "class of persons affected" by IBR standards to include anyone who is interested in viewing the standards. The sphere of persons affected by an IBR standard can be very large and at times difficult to accurately determine. We believe that using a very broad definition of "class of persons affected" will help avoid this ambiguity, and that providing online public access to IBR standards will satisfy this requirement.

4) ASHRAE recommends that OFR should not have the authority to deny IBR approval requests if the material is not available for free online; rather OFR should work with agencies and SDOs to resolve any outstanding issues related to compensating SDOs for the federal government's use of their standards and the free provision of their intellectual property to the public.

Both the public and federal government benefit from IBR standards and when the most recent editions of the incorporated standards are used. Rather than inhibit the public from taking full advantage of these benefits when IBR materials are not available for free online, ASHRAE encourages OFR to work with SDOs to resolve outstanding issues that are preventing the free online provision of the materials. Such resolution may involve monetary compensation from incorporating agencies to SDOs.

Conclusion

ASHRAE hopes that these comments and recommendations regarding NARA's announcement of a petition for rulemaking and request for comments on standards incorporated by reference into the CFR assist OFR with the development of guidance and regulations that will ultimately benefit society

⁷ Chopra, Aneesh, Miriam Sapiro, Cass R. Sunstein. "Principles for Federal Engagement in Standards Activities to Address National Priorities". January 17, 2012.

http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-08_1.pdf

⁸ See National Technology Transfer and Advancement Act of 1995, Public Law 104-113 (1996); Office of Management and Budget, Executive Office of the President, OMB Circular A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities (1998).

We look forward to responding to any questions or comments OFR may have on ASHRAE's recommendations. Please feel free to contact Mark Ames, ASHRAE Manager of Federal Government Affairs, at mames@ashrae.org or 202-833-1830.

Sincerely,

A handwritten signature in black ink that reads "Ronald E. Jarnagin". The signature is written in a cursive style with a large, prominent "R" and "J".

Ronald E. Jarnagin
ASHRAE President 2011-2012

REJ/cn