Portland Cement Association

May 30, 2011

VIA Electronic filing: www.regulations.gov re NARA 12-0002

Re: Comments of Portland Cement Association re Office of the Federal Register notice of petition for rulemaking in docket NARA 12-0002, *Incorporation by Reference*

Dear Sir/Madam:

I am writing to offer the comments of the Portland Cement Association (PCA) in response to the above-referenced notice of a petition for rulemaking published by the Office of the Federal Register in the *Federal Register* of February 27, 2012, at 77 Fed. Reg. 11414.

PCA represents 25 cement companies, operating 97 manufacturing plants in 36 states, with distribution centers in all 50 states. PCA members account for 97.1 percent of domestic cement making capacity. As explained below, PCA and its member companies have an interest in this proceeding and, in one way or another, will be affected by its outcome.

The impacts of incorporating voluntary standards and other substantive rulemaking-related documents by reference can be significant. Each year PCA participates in numerous rulemaking proceedings on behalf of its members before a variety of federal agencies. For example, in 2011 PCA submitted rulemaking comments to the Environmental Protection Agency (EPA), Department of Labor (DOL) and DOL's Mine Safety and Health Administration and Occupational Safety and Health Administration, the Department of Energy, and the National Labor Relations Board.

Frequently the rulemakings to which PCA responds involve and/or otherwise implicate voluntary standards which the agency proposing the rulemaking intends to adopt as part of a federal regulation through the process of incorporation by reference (IBR) of all or a portion of the particular standard(s). In many of those instances, the proposing agency does not place a copy of one or more of the relevant standards into the rulemaking docket, citing copyright protection as its reason. Whenever this occurs, the specifics of those particular standards are invariably not otherwise readily available to the public for review and consideration both at the time of formulating comments to be submitted in response to a proposed rule and subsequently for purposes of compliance if the voluntary standard is incorporated into the final rule the agency adopts.[1]

[1] Examples of PCA's experiences with several agencies in this regard are provided in the correspondence appended to these comments.

A similar situation exits when the proposed rules to which PCA is responding involve and/or implicate research studies and other copyrighted documents on which the agency proposing the rulemaking claims to rely to support the proposed rule, but which the agency has declined to insert into the docket citing copyright as its reason. Here again, the incorporation of such documents into the rulemaking record without making them readily available to the affected public deprives the public of its opportunity to review and consider them before formulating comments responding to the proposed rule. Moreover, such instances are not isolated but instead occur quite frequently. During 2011, for example, this occurred in proposed rulemakings issued by the Environmental Protection Agency, National Labor Relations Board, and Department of Labor. [2]

As a general proposition, therefore, PCA agrees with the concerns raised in the petition submitted by Professor Strauss as well as the relief which he seeks. Thus, PCA supports his petition.

Although the *Federal Register* notice appears to seek comment solely with respect to the incorporation by reference of voluntary standards into a final rule, PCA believes that Professor Strauss' petition effectively seeks to address two separate and distinct regulatory phases which the process of IBR can directly affect.

The first phase occurs at the initial rulemaking phase, when IBR can implicate and directly affect the opportunity and ability of the affected community, particularly those who would be subject to compliance, to have a meaningful opportunity to participate in the rulemaking through the submittal of full and meaningful comments in response to the issues and factual contentions asserted by the proposing agency. As we noted above, proposing agencies often seek to support their contentions with studies and other documents which have been incorporated by reference into the docket but which themselves have not been inserted into the docket for access by the public in order that those documents can be analyzed and meaningfully addressed in the public comments submitted to the agency. The second phase occurs after the final rule is adopted and, depending on the outcome of the final rule, implicates the opportunity and ability of the regulated community to implement and comply with requirements which the final rule incorporated by reference into the regulations that were adopted.

As we discuss below, PCA believes that both regulatory phases need to be addressed in this proceeding. However, we believe it is also beneficial to distinguish between these two phases in responding to the questions which the Office of the Federal Register's (OFR) notice has sought comment. The issue of IBR is a complex area and we recognize that one singular solution may not exist. What may be an appropriate form of relief or solution for the rulemaking phase may not be as feasible or appropriate for the post-rule phase or, for that matter, within the legal purview of OFR. Accordingly, we now turn our attention to the questions which OFR has presented in the notice:

Question 1a. *Does "reasonably available" mean that the material should be available for free and to anyone online?"*

[2] Examples of PCA's experiences with several agencies in this regard are provided in the correspondence appended to these comments.

Answer: For purposes of the public's right and ability to participate in the initial rulemaking phase, "reasonably available" should mean that the rulemaking materials are available for free to anyone online. When an agency cites by reference and relies upon standards and other documents to support a proposed rule but does not insert a copy of those standards and documents into the rulemaking docket so that they are readily accessible to the public for review and analysis prior to submitting comments, that agency is effectively denying the public of its ability to participate meaningfully in the rulemaking process. Agencies which engage in such conduct clearly run afoul of the letter and/or spirit of Executive Order 13563.

If an agency believes that a standard should (or needs to) be incorporated by reference into a federal regulation, then a copy of that standard should have to be inserted into the rulemaking docket and provided to the public free of charge online so that the public has a meaningful way to assess the standard's requirements and thereby determine and support, or oppose, the government's use and incorporation of the standard into regulations. Likewise, if any agency is proposing to rely upon scientific, scholarly, and other copyrighted materials to support its rulemaking proposal, then a copy of each such document should also have to be inserted into the rulemaking docket and provided to the public free of charge online.

The fact that a document is copyrighted does not mean that it cannot be republished by an agency. It only means that the agency must first seek the copyright holder's permission to republish, including permission to publish a read-only copy of the document. If an agency cannot obtain such permission from the copyright holder, the agency should not be allowed to use and incorporate by reference, or otherwise rely upon that, copyrighted document for any reason, and all references by the agency to such materials in the notice of proposed rule (or in a related agency publication) should have to be removed by the agency before the notice is published in the *Federal Register*.

For purposes of the second regulatory phase, *i.e.*, the post-rule regulatory compliance phase, "reasonably available" should likewise mean that a copy of the standard which was incorporated by reference is made available for free and online; even if the copyright holder only permits the copy to be provided in a read-only format. In point of fact, if, for the reasons we discussed regarding proposed rules, a federal agency's proposed use of a standard or reliance on other copyrighted documents is conditioned on those documents having to be made available to the public in the rulemaking docket and available online for free through regulations.gov or the agency could not use the standards or other materials, then the issue of whether OFR should approve an agency's request to incorporate a standard into a regulation adopted in a final rule would already be resolved.

PCA recognizes that some standards-making organizations depend upon the sale of their standards for their operating revenue. Many others do not and make their standards available to the public for free. For those which feel the need to charge for a copy of their standard, at the very least, they should be expected to authorize a read-only copy of their standard(s) to be made available to the public online if their standard is to be incorporated. Read-only copies can be extremely inefficient and less functional to use for compliance purposes, especially if the standard is complex and/or long. Thus, it is unlikely that making a read-only copy available to

the public will result in a significant number of lost sales to those standards organization that feel the need to charge for a copy of their standards, especially a loss in sales to the regulated entities that would be required to comply with the standard and would be better served by purchasing a full copy.

At the same time, however, we believe that when the government incorporates a standard by reference into a federal regulation it is likely to increase the standard's use and value, if for no other reason than because of the federal government's tacit endorsement of the standard and the publicity which the standard gains as a result of the incorporation. Clearly, this should be a direct benefit to the organizations whose standards are incorporated by the government. Thus, a standards organization's claim that having to make a copy of their standard available for free would somehow be detrimental to that organization seems remote, if not dubious; especially if the only copy to be provided is "read-only."

We also do not believe that the standards organizations which are currently providing standards for free will change their approach. In any event, a standard's purchase price to the public (and/or the government) and other potential impacts if the standard is not provided are issues that federal agencies should have to consider as a matter of routine during the rulemaking phase before a final decision is made to incorporate a standard by reference.

Question 1b. *Would making materials available for free online "[c]reate a digital divide by excluding people without Internet access?"*

Answer: While it is possible that some people could be excluded because they do not have Internet access, we believe it is unlikely that this would be the people who would have the greatest need to have access to the material which is incorporated. In the case of the rulemaking phases, it is likely that the people who would be the most likely to participate in the rulemaking would have Internet access, or at the very least that their interests would be represented by an organization or individual who would have Internet access. In the case of the compliance phase, it is also likely that those who would have to comply with the requirements of the incorporated standard would have Internet access, as they would most commonly be some form of a business enterprise.

Question 2. *Does "class of persons affected" need to be defined? If so, how should it be defined."*

Answer: PCA believes that defining the term would be beneficial. PCA recommends the following definition: "Class of persons affected" means a business entity, organization, group, or individual who either: (i) would be required to comply with the standard after, or if, it is incorporated; (ii) would be benefitted from the standard's incorporation by reference into a federal regulation; (iii) needs to review and/or analyze the materials proposed to be incorporated and/or being relied upon by a federal agency in a regulatory proceeding, including (but not limited to) a proposed rulemaking, agency guidance, or similar agency publication."

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

Answer: Yes. However, we believe that in the vast majority of cases the cost to an agency would be nominal.

As we discussed above in response to Question 1a, many standards organizations already make their standards available to the public for free, thus there would be no cost to agencies under such circumstances. As we also discussed, standards organizations which do not make their standards available for free nonetheless stand to gain because of the increased value to their standard they receive as a result of the standard's incorporation by reference into a federal regulation. Thus it seems to us that the federal government would be in a good bargaining position to ensure that the cost to provide a downloadable copy of a standard would at most be nominal; especially if the copy to be provided to the public would be read-only. Furthermore, because the federal government's incorporation by reference of a standard will enhance the use and value of the standard being incorporated, and thus provides a benefit to the developing organization, it seems reasonable to expect that those standards organization which do feel a need to charge the government for the publication of their standard will nonetheless see it benefits them to provide the government with a *quid pro quo* for the benefits they receive whenever their standard is incorporated by reference.

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

Answer: As we discussed in response to question 3, we do not believe that requiring agencies to make standards and other rulemaking materials available for free and online will significantly impact their budgets or infrastructure. We believe this will especially be the case if, in the case of materials for which the copyright holder would otherwise require the public or government to purchase, are only provided by the government in a read-only form. We think this would especially be the case when the principal purpose for which specific referenced documents would be required to be made available for free and online would be when the standard or documents are referenced in a proposed rule and the requirement to make them available for free and online is being done in order to give the public the opportunity, means, and ability to comment in response to the specific documents being referenced in the proposed rule. The only that an agency would have to bear during burden the rulemaking phase would be to obtain the copyright holder's permission to publish an accessible copy of the document in the rulemaking docket.

Question 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 at the final rule stage of the rulemaking?*

Answer: We do not believe that OFR review at the proposed rule phase would have any significant impact on agency rulemaking or policy, even if the copyright holder only permits it document(s) to be made available in the docket in a "read-only" format.

While it is possible that an exception could arise, as a general rule the government should not be permitted to use or rely upon standards and other documents to which the public is not given free and ready access. To allow otherwise would contravene the Administrative Procedure Act as well as Executive Order 13563's directive that the public be given a *meaningful opportunity* to participate in rulemakings.

In the course of developing proposed rules, it is expected that agencies will become well aware of which standards they are proposing to incorporate, which will be freely available to the public, and which will not. Agencies should likewise be expected to be aware of which of the documents they are proposing to rely upon and reference to support a proposed rule they can insert into the docket and make available for free and which they cannot. The determination of this should be something undertaken by agencies as a matter of routine when engaged in rulemaking; especially if the standard or documents in question are critical to the outcome of the agency's rulemaking.

Standards and documents which are critical to a rulemaking's outcome should have to be inserted into the docket and made readily available for free and online to the public for review. When standards and comment being relied upon and referenced in a proposed rule cannot be inserted into the docket and an made available online free of charge by the proposing agency, the agency should be required to say so in the proposed rule and discuss why the materials cannot be provided for free online but are nonetheless critical to the outcome of the rulemaking. While this should not place an inordinate time demand on agencies, requiring agencies to provide such information in both the proposed and final rules will benefit not only OFR in its administration of IBR requests, but also aid a court reviewing a challenged final rule in deciding whether the agency's rule was arbitrary or procedurally defective. Although we believe this would go a long way to addressing some of the issues and concerns we have raised in our comments, it is unclear whether OFR has the authority to impose such a requirement through rulemaking or guidance, or whether it would be better for OMB to address this either in an amendment to Circular A-119 or through an executive order issued by the President.

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

Answer: Although the question of the effect that the unavailability of relevant materials has on a class of persons affected in a particular situation may also be an issue that should also be considered and addressed by OMB and the courts, we believe that OFR should have the authority to deny IBR approval requests where the materials in question are not available online for free. As we discussed above in response to Question 5, while there always may be exceptions, as a general rule, the government should not be permitted to use or rely upon standards and other documents to which the public is not given free and ready access. Thus, OFR should have the authority to deny an approval request unless an agency can provide a sufficiently reasonable explanation to OFR as to why the materials in question are not available online for free that would then become part of the rulemaking record.

Question 7. *Should OFR update its guidance on this topic instead of amending its regulations?*

Answer: PCA believes that OFR should do both. Pursuant to our previous discussion, OFR's regulations should be amended to require, among other things, that:

> "An agency requesting IBR approval must in its approval request certify to OFR that:
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> (i) all of the materials are available online for free or,
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> (ii) identify the materials which are not available online for free and explain why they are not and why the materials are nonetheless crucial to the proposed or final rule and the IBR should therefore be granted and insert a copy of the agency's approval request and any responding correspondence from OFR into the rulemaking record."

Additionally, in a guidance document, OFR could explain and recommend that, in a separate section of their proposed and final rules, an agency should identify and discuss any standards, or other materials on which the agency is relying, which the agency is incorporating by reference which are not available online for free and an explanation of why they are not available online for free.

Question 8. *Would the Office of Management and Budget be better placed to determine reasonable ability?*

Answer: As was mentioned above, we believe that OMB has a role to play in this area. What specific role this should be is a matter which best should be discussed between OFR and OMB**.** In this regard, PCA is submitting comments to OMB docket number OMB-12-0003 in response to OMB's March 30, 2012 request for information regarding federal participation in the development and use of voluntary consensus standards and in conformity assessment activities, published at 77 Fed. Reg. 19357. Because of the interrelatedness of the issues being considered in the OMB docket and this docket, PCA's comments to OMB are incorporated by reference herein. Additionally, for OFR's convenience a copy of the comments PCA submitted to the OMB docket has been included as an attachment to these comments.

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

Answer: As we discussed previously, PCA does not believe that the actions which we recommend herein would extend the IBR period at all, but even if it would entail some additional time that additional time would (and should) not be significant. Thus, except for the

fact that an IBR approval request may be denied, or that a final rule may be overturned by a court because materials critical to the outcome of the final rule were not readily available to the public, agencies should not be significantly impacted (if at all) if the relief requested by Professor Strauss in his petition, and by PCA herein, is granted.

Respectfully submitted,

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Attachments (2)

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