



**AMERICAN SOCIETY
OF SAFETY ENGINEERS**

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May 31, 2012

Office of the Federal Register
The National Archives and Records Administration
800 North Capitol Street NW, Suite 700
Washington, DC 20001

By email to <http://www.regulations.gov>

RE: ASSE Comment on *Incorporation by
Reference* (NARA-12-0002)

To Whom It May Concern:

The American Society of Safety Engineers (ASSE) represents the interests of more than 34,000 safety, health and environmental (SH&E) professionals who work with employers to help make sure that workers are able to go home safe and healthy to their families each day. Our members join together in seventeen practice specialties to lead the advancement of knowledge and expertise in occupational safety and health. With six international chapters and two more in development, ASSE's impact is increasingly becoming global.

However, nothing is more important to advancing our profession's and industry's ability to protect workers than ASSE's role as a standards development organization (SDO). ASSE sponsors nine Secretariats that are responsible for over 100 occupational safety and health standards. Through

the well-established American National Standards Institute (ANSI) consensus standard development process, our members, other safety and health professionals, industry, trade groups and any other stakeholder are able to come together to develop standards that can readily incorporate the latest knowledge about how to protect workers. These standards are able to reflect current knowledge far beyond the Occupational Safety and Health Administration's (OSHA) ability to do so. The limitations placed on OSHA's ability to develop and update standards in a timely way is well-known and was affirmed in the recent Government Accountability Office study of the issue (<http://www.gao.gov/products/GAO-12-330>). Without the effort, time and investment in financial and staff resources that go into that process, this nation's standards for protecting workers would, in many cases, be based on decades-old minimal standards.

From that perspective, ASSE strongly opposes any action by the Office of the Federal Register (OFR) that would result in rulemaking to amend its current regulations defining "reasonably available" or otherwise change current requirements related to materials incorporated by reference (IBR) in regulations published in the Federal Register. Any reconsideration of current regulations risks overlooking the irreplaceable value voluntary consensus standards play in protecting workers, ignores the positive conversation on this issue that is already changing how voluntary consensus standards are being made available, and, ultimately, threatens the ability of independent SDOs like ASSE from hosting the development of voluntary consensus standards.

The petitioners are not alone in understanding the "changed circumstances brought about by the information age." However, from the list of notable academics and government employees whose incomes presumably derive chiefly from sources other than publication, they may be unique in failing to understand the impact on an SDO like ASSE when its ability to receive minimal levels of income from publication of standards to cover costs for the development of a voluntary consensus standard is eliminated. If an SDO like ASSE is not permitted even to recoup its expenses, then the only SDOs capable of sponsoring standards development will be for-profit interests, most likely industry groups, thereby undercutting existing and successful efforts to assure an open and equitable standards development process through ANSI. If that becomes the reality, voluntary consensus standards in occupational safety and health likely will cease being developed. Without voluntary consensus standards in occupational safety and health, workers will be left subject to what are, in many cases, OSHA's minimal standards that, due to the burdens placed on OSHA's standard-setting process, cannot protect workers at levels safety and health

professionals best know how to protect them. Ultimately, more workers will die, more will be injured, more will develop illnesses.

ASSE and other SDOs provide this nation with a valuable resource that OSHA will not be able to replace. Standards Committees in our Secretariat gather some of the best minds in industry and occupational safety and health to work for free to recommend and develop standards and then continue to work to make sure the standards stay current through periodic updates. We do not see any political scenario where OSHA will be given the needed resources to replace the capability if an SDO like ASSE is no longer able to develop standards due to any effect on their ability to recoup costs for their development. A nominal fee for a voluntary standard paid by what are, in most circumstances, for-profit entities that should be investing in their businesses and the safety and health of their employees is a small price to pay to continue to allow the voluntary consensus process to continue to help protect workers.

The petition should also be denied because it seeks to resolve a complex issue about which an ongoing, positive conversation already is changing the way SDOs make available essential information from their standards. The OFR should not attempt to resolve an issue that the Administrative Conference of the United States (ACUS) itself understood to be an issue outside its purview to determine. Recommendation 2011-5, Incorporation by Reference (<http://www.acus.gov/acus-recommendations/incorporation-by-reference/>), judiciously “does not attempt to resolve the questions of copyright law applicable to materials incorporated by reference into federal regulations.” To do otherwise would replace current law and create in the United States government the ability to take from an SDO without compensation simply by referencing a standard. If that becomes a reality for SDOs, will book publishers have to fear their books being included in school required reading lists so families also can benefit from what the petitioners seemingly view as the free-for-all of published information on the Internet?

Further, as the ACUS report recognizes, reasonable alternatives already exist for the sharing of essential information about voluntary consensus standards. SDOs already provide "read only" standards on line for free. As can be seen at <http://www.asse.org/publications/standards/z359/docs/Z3590CapitalFile.pdf>, the ANSI/ASSE Z359 Committee makes the scope and definitions available at no charge, giving others who want the Committee's in-depth perspective an opportunity to purchase the standard, thereby equitably balancing the interests of both the stakeholder and the SDO. Given that the consensus standards community is already addressing this issue and has not, to our knowledge, made any effort to impede a resolution to this difficult issue, this petition as not timely or appropriate.

When OSHA's standard-setting process is largely broken, the safety and health of this nation's workers benefit from the current voluntary consensus standard process. However intellectually intriguing the questions are about what should or should not be free on the Internet, OFR should not allow itself to be a vehicle for what could very well result in the demise of this inexpensive, well-respected and widely use source of standards on how best to protect workers. Again, ASSE urges OFR to reject this petition.

Sincerely,

A handwritten signature in black ink that reads "Terrie S. Norris". The signature is written in a cursive style with a large, stylized initial "T".

Terrie S. Norris, CSP, ARM
President