



May 30, 2012

Director
Office of the Federal Register
800 N. Capital St. NW Suite 700
Washington DC 20001

Re: NARA 12-0002 Incorporation by Reference

National Tank Truck Carriers Inc.(NTTC) is the national trade association for the tank truck industry. Our members transport materials in bulk over the highway, including chemicals, petroleum products, gases, dry materials such as cement and plastic pellets, and food products. Our Associate Members provide equipment and services to the tank truck industry.

Our members are required to use various publications that have been “incorporated by reference” (IBR) by various Federal agencies in order to comply with regulations of those agencies. Our members have a significant interest in NARA 12-0002.

National Tank Truck Carriers has many of the same concerns expressed in the petition filed by Professor Peter Strauss that has led to this rulemaking. NTTC strongly supports the efforts to make materials incorporated by reference “reasonably available” to the public that must utilize them to be in compliance with Federal law and urges positive consideration of the proposals to bring this aspect of the regulatory process into the 21st century.

While NTTC does not object to the concept of IBR in very narrow and highly technical areas that impact a limited number of parties, we do believe that the growing use of IBR is a disservice to the regulated public, to the enforcement community, and to the general public.

Most of the material IBR for the tank truck industry involves regulation of the transportation of hazardous materials, especially in the area of the construction, operation, testing and inspection, and repair of those packages. This material is mandatory for compliance with federal

regulations. Parties required to comply with this IBR have no option but to purchase the material at whatever price is set by the body which develops and copyrights the information.

-2-

The potential for abuse of IBR is clearly demonstrated by a petition filed by two private entities to have their publications IBR as a replacement for or in addition to existing regulations found in CFR Title 49. The Director's attention is called to PHMSA-2010-0019-HM-241.

One of the most challenging aspects of this brazen petition was that as published in the Advanced Notice of Proposed Rulemaking, any party wishing to comment on the petition would first have to purchase the publications in order to determine what changes would be made to existing regulations and to determine the impact of the proposal. As NTTC pointed out in a letter to the PHMSA Administrator:

The public's opportunity to address the questions raised in the ANPRM is greatly Restricted by the lack of access to the documents it is asked to review on any public website or government publication. The "Catch 22" nature of this issue is illustrated by the process established in this docket:

"PHMSA asks you to review the publications which it may require you to purchase in the future to remain in compliance with cargo tank regulations, depending on the outcome of this rulemaking. However, you can't review those publications to be able to intelligently comment without purchasing them. And if those documents are changed following this rulemaking, then you will have to purchase new documents. Of course, if this rulemaking does not adopt by reference those documents that you purchased to be able to provide informed comment, then you really didn't need to purchase them." I am reminded of an old television commercial which ASME and the National Board might wish to adopt—"Pay us now and/or pay us later."

To its credit, PHMSA later required the two private agencies to make portions of their copyrighted publications available electronically while the comment period was open.

One of NTTCs greatest concerns about the use of IBR is the limited opportunity for the regulated public to have access to the regulatory process under which the material adopted is developed. In the case of HM241, an open rulemaking process would be replaced by the need to work through the publication parties to initiate changes. The ability to contact the Department of Transportation for guidance or interpretations on regulations would be restricted since the Department is not the originator of the regulations it adopted.

Again, for very specific and highly technical documents that impact a very small public, NTTC can see limited use of IBR. However, we cite the need for many years for the tank truck industry

to purchase a full publication from the Compressed Gas Association just to find out what the definition of a “dent” was. Using PHMSA’s own numbers, HM241 could impact up to 41,366 parties and the current cost of the publications the two private entities hope to have IBR range from \$600 to \$845. Of course, there is no limit on how much the bodies could charge for their

-3-

publications or how often changes would be made that would require the regulated public to purchase new publications.

This information in these publications which the petitioners hope PHMSA will mandate is now readily available in updated form on several websites, including those of the U. S. Department of Transportation. That information is regularly downloaded by safety professionals, enforcement personnel, trade associations and others for safety compliance and training.

The Director poses a number of questions in the Petition Announcement. We have addressed some of these already and will comment on a few more:

1. If the Federal Government adopts the publication of another body as regulation, that regulation should be available at no cost to the regulated public as would be any regulation developed by the Federal Government.
2. Any material adopted by reference by the Federal Government should be done so within the structure of the existing regulatory process for any regulation. That means the process should be open to the public and should follow the existing Notice and publication steps of any regulation developed by the Federal Government. The same process for submitting petitions for changes to the material IBR and for interpretation of that material should be handled as any other regulation developed by the Federal Government.
3. Any information IBR should be available at no cost for downloading and publication as part of a compliance or training program of the regulated parties and the general public. Any information IBR should be considered the same as information developed through the open regulatory process. Regulatory compliance should not be impacted by the need to purchase copyrighted publications from non-government entities.
4. If the Federal Government decides that it cannot develop information itself, it should consider issuing Request for Proposals for that information and follow contracting procedures rather than awarding the IBR to a single entity in a no-bid process. The Federal Government and the provider of the material IBR should negotiate a payment for the information as it would any other consulting service.

5. IBR for the use of regulation should be used only when the government is unable or unwilling to develop a regulation through the established regulatory process.
6. The entire concept of IBR should be reviewed in light of the instant demand for information by the regulated public and the general public and in recognition of the many electronic means by which that information is now available.

-4-

NTTC was pleased to see the issue of adoption by reference addressed in two recent pieces of Congressional Legislation, one bill which became law and the other which passed out of the House Committee. We also appreciate the comments of the Chairman of the National Transportation Safety Board (NTSB) regarding the IBR of regulations currently available at no cost to the public. This information was included in a letter NTTC wrote to the Secretary of Transportation and which is presented here:

February 24, 2012

*The Honorable Ray LaHood
Secretary of Transportation
Washington, DC 20590*

Dear Secretary LaHood:

I am writing to you regarding Pipeline Hazardous Materials Safety Administration (PHMSA) HM-241 which is currently in the regulatory process. In that rulemaking, PHMSA would replace its very successful cargo tank regulatory and public communications process by turning this important safety function over to third parties. These organizations would write the regulations which would be then "adopted by reference" and sold to the regulated and regulator publics. The transparent public access to the process that currently exists would be severely damaged.

National Tank Truck Carriers strongly supports the action taken by the Congress in the Pipeline Safety, Regulatory Certainty, and Job Creation Act passed in December 2011 and signed by President Obama on January 3. While the key language in the Act did not

specifically address the issues raised by HM-241, the principle is very much the same and we implore you to ask PHMSA to apply the same sound public and safety policy mandated by the Congress and the President to HM-241.

I have attached appropriate language from the Pipeline Safety, Regulatory Certainty, and Job Creation Act and a section of the Hazardous Materials Transportation Reauthorization (HR7) passed by the House Transportation and Infrastructure Committee on February 3. Both pieces of legislation seek to limit your Department's use of adoption by reference.

In the past, the Department of Transportation and other federal agencies have looked for possible solutions from third parties to address issues that arise. One such case is the

-5-

adoption by reference of Section VIII of the ASME Code for the construction of pressure vessels. NTTC does not quarrel with this approach in narrow instances that will impact a relatively small part of the regulated public.

However, in HM-241 PHMSA would take existing parts of Title 49 that cover the construction, testing and inspection, and operation of cargo tanks and turn them over to the American Society of Mechanical Engineers (ASME) and the National Board of Pressure Vessel Inspectors (the Board.) In essence, this is a short-sighted solution petitioned for by ASME and The Board in search of a problem that does not exist. No safety argument has been made for this drastic abdication of regulatory responsibility by your Department to a third party selected in a no-bid process.

The language in HR7 does not prohibit adoption by reference as does the Pipeline Act, but rather directs the Secretary of Transportation to consider the impact of such an action on the regulated community, including the costs of such an action and the broadness of its applicability. In the case of HM-241, thousands of entities, most of them small businesses, would both have to pay significant amounts for information that is currently available at no cost on PHMSA and FMCSA websites and, more importantly, would find severely limited access to the regulatory process that currently works so well.

We will not review all of our objections to HM-241 here, but are pleased to report that we are joined in our opposition by organizations such as the Commercial Vehicle Safety Alliance, Truck Trailer Manufacturers Association, and the American Trucking Associations. I urge you to also discuss this with your Federal Motor Carrier Safety Administration (FMCSA) as HM241 would have a significant financial, training, and enforcement impact on that agency.

I also have attached relevant pages of the transcript of a hearing conducted by the National Transportation Safety Board (NTSB) in August 2010 regarding a cargo tank crash. At that hearing I engaged in a dialogue with a representative of PHMSA on how

the valuable use of publicly available regulatory language at that hearing would not be allowed by ASME which copyrights its publications. As you will note, Chairman Deborah Hersman commented:

CHAIRMAN HERSMAN: Well, I only had one question and that had to do with how people get access to the standards that might be incorporated by reference. But, Mr. Hochman, I understand that today is your birthday and I think you answered enough of that question from Mr. Conley. So I will let you have a reprieve and turn that question . . . I'm sure you can tell there is a lot of interest in this issue. And so you we will look forward to following it (HM-241) as the rulemaking moves ahead. (NTSB Hearing August 4, 2010 Washington DC)

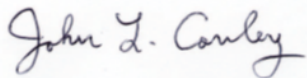
In the interest of safety and to avoid a costly and cumbersome transfer of essential regulatory responsibility to third parties in a no-bid process, we respectfully request that

-6-

you urge PHMSA to withdraw HM-241 in accordance with both the spirit and the letter of law in the Pipeline Safety, Regulatory Certainty, and Job Creation Act.

Thank you for your consideration and your commitment to safety.

Sincerely,



*John L. Conley
President*

**HMTA Reauthorization - H.R. 7, Title 9 to 49 U.S.C. Chapter 51
Section 5103 (Currently awaiting floor action)**

- (6) In considering whether to incorporate by reference any publication in prescribing regulations, the Secretary shall –**
- (A) Consider –**
- (i) the cost of such publication;**
 - (ii) The broadness of its applicability;**
 - (iii) The cost imposed on the public in acquiring such publication; and**
 - (iv) Other alternatives to incorporation by reference; and**
- (B) either incorporate by reference the publication or use the alternative that meets the Department of Transportation's safety objectives in the most cost-effective manner.**

HR2845 Pipeline Safety, Regulatory Certainty, and Job Creation Act. Signed by President Obama on January 3, 2012

SEC. 24. LIMITATION ON INCORPORATION OF DOCUMENTS BY REFERENCE.

Section 60102, as amended by this Act, is further amended

By adding at the end the following:

“(p) LIMITATION ON INCORPORATION OF DOCUMENTS BY REFERENCE.

—
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.”

-7-

CERTIFICATE

This is to certify that the attached proceeding before the NATIONAL TRANSPORTATION SAFETY BOARD IN THE MATTER OF: ROLLOVER AND FIRE OF A TRUCK-TRAILER AND CARGO TANK SEMITRAILER CARRYING LIQUEFIED PETROLEUM GAS IN INDIANAPOLIS, INDIANA, October 22, 2009 DOCKET NUMBER: HWY-10-MH-001 PLACE: Washington, D.C. DATE: August 4, 2010

was held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the recording accomplished at the hearing.

***Timothy J. Atkinson, Jr.
Official Reporter
Free State Reporting, Inc. (410) 974-0947***

NTSB Hearing August 4, 2010 Page 454 to 456;

MR. CONLEY: Thank you very much. I probably have a pretty non-engineering question. Earlier, the technical staff put up a slide that we were all able to look at from 178.345 of the current regulations. That covers the design and construction of cargo tanks. And Mr. Hochman made reference to Part 180, which is the parts of the regulations that govern tests, maintenance, and inspection, which we, as carriers, do in many cases ourselves. This information is currently available, as it just was there on the FMCSA website, to the regulated community, to regulators all across the country, and to the general public. There is a process now if we want to make a change to the regulations, we file a petition. Any member of the public can do it. If I need a clarification and, you know, James Simmons, and Bill Quade, and Charlie Hochman, you get tired of my questions sometimes, what does this mean, I simply call and in most cases you're able to answer. I have no quarrel with the safety equipment efforts that you are trying to do. I have very serious concerns about the safety compliance. And I know it's late in the day and I'm probably the drunk at the Baptist wedding. However, if the design, and construction, and regulation writing function that DOT now has Free State Reporting, Inc. (410) 974-0947 455 is transferred to a third party, private entity, which is what the ASME is, will that access still be available? ASME copyrights everything. How will a member of the public do what we just did a minute ago, put something up on a screen and use it? The FMCSA and National Tank are doing a cargo tank test and

-8-

inspection repair training session today in Denver. We have 68 people there from the regulated industry. These are people that test and inspect cargo tanks every day. We have copied all the regulations and we've handed them out, and we will send them out to anybody who wants them.

My question comes back, and I guess it has to go to Mr. Hochman, and I'm sure it's going to be above his pay grade, what are you doing in Section 12 to ensure that that immediate access to regulations and to the process is still available? And if you are not going to have it, what do you think the impact will be on safety and compliance when people are told, "I can't tell you that; join ASME and go onto a committee"?

MR. HOCHMAN: Thank you for that question, John.

CHAIRMAN HERSMAN: Are you the minister at the wedding?

MR. HOCHMAN: I appreciate your question and I guess the answer will come out as part of the rulemaking process. There is at least one copy of anything we incorporate by reference available for review at the Office of Federal Register. I'm not sure that this discussion is part of the

Free State Reporting, Inc. (410) 974-0947 456 purpose of this hearing. We will have ample opportunity in the rulemaking process to hash that out and there may be ways around your concern.

MR. STEKLER: And I understand, Charlie, I do think it's above your pay grade, but it is a very serious concern. I have no problem with the agency, not have the resources it needs or used to have, farming this out to another third party, private entity. But I am sure concerned about access of the regulated public to the process.

MR. HOCHMAN: I will say that if it makes you feel any better that the ASME process is open to the public. It is not a private process.

UNIDENTIFIED SPEAKER: Copyrighted?

MR. HOCHMAN: I'm sure it is. But participation is not limited. And I would just leave it at that.

CHAIRMAN HERSMAN: Mr. Sims?

MR. SIMS: I would like to echo TTMA has the same concerns as John does on the access to the regulations. We've had conversations about that in the past.

CHAIRMAN HERSMAN: Well, I only had one question and that had to do with how people get access to the standards that might be incorporated by reference. But, Mr. Hochman, I understand today is your birthday and I think you answered enough of that question from Mr. Conley. So I will let you have a reprieve and turn that question –
-9-

MR. HOCHMAN: Even if it is my birthday, any document we incorporate by reference is provided to the Office of the Federal Register, so there is at least one copy at the Office of the Federal Register.

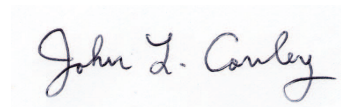
CHAIRMAN HERSMAN: Okay, well, very good. I'm sure you can tell there is a lot of interest in this issue. And so we look forward to following it as the rulemaking moves ahead.

In conclusion, NTTC strongly supports any effort to limit the use of IBR and to make any material IBR available to the public as is any regulation developed through the existing

regulatory process. The utilization of IBR is, at best, outdated in the current information age. Regulatory compliance and safety would be enhanced by the maximum real-time access to all regulatory information by both the regulated and general publics. Immediate access to information deemed essential to safety, as well as open access to the process, are in the public interest..

Thank you for your consideration of National Tank Truck Carriers comments on this very important safety issue.

Sincerely,

A handwritten signature in black ink that reads "John L. Conley". The signature is written in a cursive style with a clear, legible font.

John L. Conley
President
National Tank Truck Carriers
950 N. Glebe Rd.
Arlington VA 22203
703/838-1960

cc: The Honorable Ray LaHood, Secretary of Transportation
The Honorable Cynthia Quarterman, Administrator, Pipeline and Hazardous
Materials Safety Administration

