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Public Works for a Better Government

May 7, 2015

U.S. Coast Guard
Docket Management Facility (M-30)
U.S. Department of Transportation
West Building Ground Floor, Room W12-140
1200 New Jersey Avenue SE.
Washington, DC 20590-0001.

Re: Comment of Public.Resource.Org and the Undersigned Certified Divers
Notice of Proposed Rulemaking
Docket Number: USCG-1998-3786

Dear Sir or Madam:

Public.Resource.Org (“Public Resource”) and the Undersigned Certified Divers submit this comment to object to one aspect of the proposed U.S. Coast Guard regulation:¹ It proposes to incorporate by reference a number of public safety standards that are not reasonably available to people affected by the rule, as required by law.

It is clear that a revision of commercial diving regulations is long overdue, given the importance of the industry to U.S. commerce, and the need for improved safety in a field that has seen far too many tragedies. What is not clear is why the U.S. Coast Guard believes that it is appropriate, or in the interests of greater safety, to issue a proposed rule, or a final rule, that includes major components that many people, including many interested parties, will not read because of the fees required to read them.

Accordingly, Public Resource and the Undersigned Certified Divers are not commenting on the substantive merits of the proposed rule. Instead, we ask the U.S. Coast Guard to recognize that it has acted illegally and arbitrarily at this Notice of Proposed Rulemaking (NPRM) stage in not making all these standards—which are integral parts of the rule—available to our organizations and other members of the

¹ <https://www.federalregister.gov/articles/2015/02/19/2015-02714/commercial-diving-operations>

public without having to pay for them. This unwarranted action by the U.S. Coast Guard places an unreasonable burden on members of the public who wish to review the entire rule in order to fully understand it and to make appropriate comments.

A final rule that incorporated the standards without making them freely available would be equally invalid. The new regulation would make these standards part of the law, yet the U.S. Coast Guard proposes to exclude the texts of these standards from the text of the regulation. Nor does the U.S. Coast Guard propose to link the online version of the regulation to websites offering free and unrestricted access to the standards. Instead, the U.S. Coast Guard apparently expects people to purchase the standards from various private organizations.

In sum, the U.S. Coast Guard has invited the public to comment on a law, and proposed that citizens be compelled to obey a law, that many affected parties cannot reasonably afford to read.

This failure to make these public safety standards, proposed to be part of the rule, reasonably available denies people basic access to their own laws, the laws they are both bound to obey and dependent upon for protection from serious dangers. In so doing, the proposed rule violates the Freedom of Information Act, the Due Process Clause of the Constitution, and the fundamental principle of responsive governments worldwide for millennia—that people are entitled to read and speak the laws that govern them, with no restrictions.

This failure to make these components of the regulation reasonably available also weakens public safety, because people who need access to the safety rules are less likely to obtain such access if they must pay for it, and then piece together the law from a multitude of documents.

Because it is illegal and arbitrary to publish this proposed rule without making incorporated standards freely available, the U.S. Coast Guard should re-publish the proposed rule with the incorporated standards available online for free without restrictions on use and re-open the comment period. As to any final rule, the U.S. Coast Guard may not lawfully incorporate these standards into its regulation until and unless they are written directly into the rule, or else permanently available to the public on a website without charge and without any restriction whatsoever on use.

1. The Proposed Incorporation by Reference

In the NPRM, the U.S. Coast Guard proposes a “complete revision of the commercial diving operation regulations” that cover commercial diving conducted from deepwater ports or deepwater port safety zones, or in connection with Outer Continental Shelf (OCS) activities, or from vessels that are required to have a Coast Guard certificate of inspection. The goals of the revision are “to improve safety, to reflect current industry best practices, and to facilitate the use of approved third-party organizations to ensure regulatory compliance.”

Yet the U.S. Coast Guard then undercuts its aim of improving safety by proposing that some of the content of the proposed rule in fact be shielded from the public and instead hidden behind a paywall.

The U.S. Coast Guard proposes to incorporate by reference the following materials:

1. *International Consensus Standards for Commercial Diving and Underwater Operations, 6th Edition, 2010 (“ADCI Standards”)*: While a “reading copy” of these industry consensus standards for commercial diving and underwater operations for commercial divers and others is available online,² strict prohibitions against reuse claimed by ADCI purport to prevent our posting an HTML version of this text incorporated by law on the Internet even if we purchased a copy for \$275.³
2. *IMO Resolution A.831(19), International Code of Safety for Diving Systems, 1995*: Internationally accepted minimum standards for design, construction and survey of diving systems on ships and floating structures engaged in commercial diving operations. While the text of the resolution A.831(19) is available online,⁴ the resolution is an amendment to the 1995 Code and is useless without the complete text as contained in the Code of Safety Diving Systems (1997 Edition) which is sold for £10 (\$15) with restrictions on use which are inappropriate for the text of the law.
3. *IMO Resolution A.692(17), Guidelines and Specifications for Hyperbaric Evacuation Systems, 1991*: International guidelines and specifications developed for design and operation of hyperbaric evacuation systems. Again, while the text of resolution A.692(17) is available online,⁵ the text can only be read within the context of Chapter 3 of the Code of Safety for Diving Systems.
4. *ASME PVHO-1-2012, Safety Standard for Pressure Vessels for Human Occupancy, 2012 (“ASME PVHO-1”)*: American standard for design, materials, fabrication, tests, inspection and marking of pressure vessels used for human occupancy. This standard also provides requirements for the design, fabrication, inspection, testing, cleaning, and certification of piping systems for PVHOs. This crucial safety standard is only available at a purchase price of \$200 with stringent restrictions on use imposed by the vendor and contains crucial information divers must know and which is required by law.

² http://www.underwatermagazine.com/pdf/ADCI_CS_Rev6.1.pdf

³ The copyright notice on the ADCI Standards reads: “No part of this book may be reproduced, stored in a retrieval system or transmitted in any form or by any means (electronic, mechanical, photocopying, microfilming, recording or otherwise)...”

⁴ http://www.imo.org/blast/blastDataHelper.asp?data_id=23908&filename=831%2819%29.pdf

⁵ http://www.imo.org/blast/blastDataHelper.asp?data_id=22513&filename=A692%2817%29.pdf

5. *ASME B31.1-2010, ASME Code for Pressure Piping, Power Piping, 2010* (“*ASME B31.1*”): American standard for design, materials, fabrication, tests, inspection, operation and maintenance of pressurized piping systems. This safety standard is only available at a purchase price of \$250 with stringent restrictions on use.
6. *ASME National Board Inspection Code, NBBPVI, NB23-2011* (“*ASME NBBPVI*”): American standard for inspection, repair and alteration of boilers, pressure vessels, and pressure relief devices. As a matter of policy, the National Board of Boiler and Pressure Vessel Inspectors only makes the latest (2013) version of the National Board Inspection Code available for sale, and previous versions, such as the one to be incorporated into the instant regulation, must be obtained from third-party vendors such as Thomson Reuters TechStreet for \$265.
7. *ANSI/ISO 15618-1:2001, Qualification testing of welders for underwater welding—Part 1: Diver-welders for hyperbaric wet welding* (“*ANSI/ISO 15618*”): American standard specifying essential requirements, ranges of approval, acceptance requirements, and certification for approval testing of diver-welder performance for welding steels underwater in hyperbaric wet environments. This standard is only available for \$173 from the ANSI Standards Store and is not available in the ANSI IBR Portal for limited access.
8. *ANSI/ACDE-01-2009, Divers—Commercial Diver Training—Minimum Standards*, (“*ANSI/ACDE-01-2009*”): American standard specifying minimum standards for commercial diver training including what is to be taught, minimum length of training required, minimum qualifications of instructors, and minimum facilities and equipment required to support commercial diver training. The Association of Commercial Diving Educators does make a version of this document available for viewing online,⁶ however the PDF file they distribute has disabled a number of crucial functions, including “document copying” which makes the document inaccessible to those that are visually impaired.
9. *Publication G-4.1, Cleaning Equipment for Oxygen Service, 2009* (“*Compressed Gas Association Publication G-4.1*”): Cleaning methods for cleaning equipment used in production, storage, distribution, and use of liquid and gaseous oxygen. The Compressed Gas Association makes this publication available for sale for \$99.⁷ While the CGA has committed to making any standards incorporated by reference in the CFR after January 2013 available, they will only be available in a heavily protected e-Pub format, which does not allow important tasks such as access by the visually impaired.

⁶ <http://www.acde.us/ansistd.pdf>

⁷ http://www.cganet.com/customer/publication_detail.aspx?id=G-4.1

10. *Publication G-7, Compressed Air for Human Respiration, 6th Edition, 2008, (“Compressed Gas Association Publication G-7”)*: Information relative to preparation, transportation, handling, storage, and use of compressed air used for human respiration. This publication is only available for \$23 in a heavily restricted format that prohibits reformatting and does not work with the visually impaired.⁸
11. *Publication G-7.1, Commodity Specification for Air, 6th Edition, 2011, (Compressed Gas Association Publication G-7.1)*: Specification requirements for air and data concerning quality, verification systems, sampling, analytical procedures, and typical uses for various grades and supplemental specification tables. This publication is only available for \$71 in a heavily restricted format that prohibits reformatting and does not work with the visually impaired.⁹
12. *Federal Specification, BB-N-411C, Nitrogen Technical, 2000 (“Federal Specification BB-N-411C”)*: U.S. specification outlining requirements for properties, purity, types, grades, classes, handling and storage of gaseous and liquid nitrogen. This military specification is from 1973¹⁰ and the year 2000 edition specified in the NPRM is actually a cancellation of the 1973 standard.¹¹ Neither the specification nor the cancellation are available on government web sites. In 2008, BB-N-411C was replaced¹² with Commercial Specification A-A-59503,¹³ which is also not readily available on government web sites.
13. *Federal Specification, Oxygen, Technical, Gas and Liquid, BB-O-925a, 1961 (“Federal Specification BB-O-925a”)*: U.S. specification outlining specification and standards for purity, sampling, inspection, testing, handling, storage and delivery of gaseous and liquid oxygen. This 1961 specification is not readily available from any government web sites.¹⁴
14. *ISO 9001—2008, Quality Management Systems—Requirements*: International standard specifying requirements for establishing, documenting, implementing, and maintaining a quality management system. This document costs \$173 in a restricted format and is not available for viewing on the ANSI IBR Portal.

⁸ http://www.cganet.com/customer/publication_detail.aspx?id=G-7

⁹ http://www.cganet.com/customer/publication_detail.aspx?id=G-7.1

¹⁰ <https://law.resource.org/pub/us/cfr/ibr/003/fedspec/BB-N-411C.pdf>

¹¹ https://law.resource.org/pub/us/cfr/ibr/003/fedspec/BB-N-411C_NOTICE-1.pdf

¹² https://law.resource.org/pub/us/cfr/ibr/003/fedspec/BB-N-411C_NOTICE-2.pdf

¹³ <https://law.resource.org/pub/us/cfr/ibr/003/fedspec/A-A-59503.pdf>

¹⁴ <https://law.resource.org/pub/us/cfr/ibr/003/fedspec/BB-O-925A.pdf>

15. *ISO 15618—2001, Qualification testing of welders for underwater welding—Part 1: Diver-welders for hyperbaric wet welding: International standard specifying essential requirements, ranges of approval, test conditions, acceptance requirements and certification for approval testing of diver-welder performance for welding steels underwater in hyperbaric wet environments. This document costs \$173 in a restricted format and is not available for viewing on the ANSI IBR Portal.*
16. *U.S. Navy Diving Manual, 6th Edition, April 2008: Specifications for diving principles and policies, air diving, mixed-gas surface supplied diving, closed-circuit and semiclosed-circuit diving, and diving medicine and recompression chamber operations. The U.S. Coast Guard only appears to make the 5th Edition available,¹⁵ though non-government sites have made the 6th Edition available with no restrictions on use.¹⁶*

In summary, 16 standards are specified in the NPRM, which would cost \$1,717 to purchase. Our issue is not solely with the cost of purchase, a significant barrier to those that wish to read the law. Copyright assertions, terms of use restrictions, and the disabling of numerous important technical functions through “digital rights” plugins that are required to view the document all make it exceedingly difficult for citizens to speak the law.

For example, it would be exceedingly difficult to reformat the text of the proposed rule and all the standards it incorporates by reference into the proposed rule in a single modern format, such as a series of HTML pages, which would be more readily accessible to those on different platforms (such as mobile phones) and for those unable to access the documents in their current formats (such as those with visual impairments).

If compliance with the regulation is to be maximized, then people need ready access to the regulation, including incorporated materials. Unfortunately, the proposed rule fails to make the incorporated materials reasonably available.

2. Availability of the Standards Under the NPRM Proposal

The texts of the public safety standards that the U.S. Coast Guard proposes to incorporate into the rule are not included in the rule itself, nor has the U.S. Coast Guard placed any of the standards online, nor have the private organizations that have published the standards made them available for free, unrestricted public access online.

Instead, the proposed rule, at §197.202, provides:

All approved material is available for inspection at the U.S. Coast Guard by calling the Office of Regulations and Administrative Law at 202-372-3870 or emailing HQS-SMB-CoastGuardRegulationsLaw@uscg.mil, and is available from

¹⁵ http://www.uscg.mil/foia/healy/Number%20101-218/num_181.pdf

¹⁶ http://www.usu.edu/scuba/navy_manual6.pdf

the sources listed below. It is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030 or go to http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

We contacted the Office of Regulations and Administrative Law by email and requested that copies of all the incorporated materials be emailed to us. To date no response has been received for our request. We also attempted to contact the Office of Administrative Law by telephone at the above-cited number, but no person answered the phone and no voice mail capability was provided

As noted in Section 1, finding these materials is exceedingly difficult, requires purchases from a large number of sources, and most of the materials are provided only under restrictions on use that make it impossible for us to use the integral text of the proposed law to inform our fellow citizens of their rights and obligations.

These technical standards are not passing references incidental to the prime purpose of the proposed regulations, they are an essential part of those regulations. For example, the crucial ADCI Standards (“International Consensus Standards for Commercial Diving and Underwater Operations, 6th Edition, 2010”) form essential requirements in each of the following sections of the proposed regulations: 46 CFR §§ 197.220, 197.222, 197.240, 197.242, 197.243, 197.244, 197.245, 197.250, 197.260, 197.261, 197.262, 197.263, 197.266, 197.267, 197.270, 197.275, 197.276, 197.277, 197.279, 197.280, 197.281, and 197.282.

This is not a trivial use of the listed standards they form an integral part of the proposed rule. The rule cannot be understood without reference to the 16 named standards.

3. The Interests of Commenters

Public Resource, a non-profit organization, would be one of the many entities adversely and unlawfully disadvantaged if the U.S. Coast Guard issues a final rule that incorporates standards without providing a means for people to obtain and use those standards without charge and without restriction. Public Resource’s mission is to improve public access to government records and the law. The issuance by the U.S. Coast Guard of a regulation incorporating by reference standards that are only available to those who pay a fee is the kind of government action that Public Resource works to prevent.¹⁷

¹⁷ Public Resource is currently being sued by six standards development organizations (SDOs) in two separate cases pending in the U.S. District Court for the District of Columbia over Public Resource’s actions to post online standards incorporated by reference into federal regulations. *American Society for Testing and Materials et. al. v. Public.Resource.Org*, D.D.C. 1:13-cv-01215, <https://archive.org/details/gov.uscourts.dcd.161410/>; *American Educational Research Association et. al. v. Public.Resource.Org*, 1:14-cv-00857, <https://archive.org/details/gov.uscourts.dcd.166323/>. In each of case, plaintiffs claim that Public Resource has infringed their copyrights, a charge that Public Resource firmly denies.

More generally, such a rule would make it less likely that affected people who need access to the law—first responders, businesses, workers, oversight bodies, community leaders, journalists, and others—would have access to the law, as discussed below.

Those affected parties include the Undersigned Certified Divers, all co-signatories to this comment:

Joichi Ito is the Director of the Media Lab at the Massachusetts Institute of Technology. Mr. Ito has received certification from the Professional Association of Diving Instructors (PADI) as a Instructor Development Course (IDC) Staff Instructor, and Emergency First Response (EFR) Instructor, and is also a Divers Alert Network (DAN) Instructor. Mr. Ito holds a total of 36 instructor ratings.¹⁸

David Helvarg is the Executive Director of the Blue Frontier Campaign, a nonprofit organization with a mission to promote unity, provide tools to and raise awareness of the solution-oriented marine conservation community. Mr. Helvarg is the author of 6 books and an award-winning journalist who has produced more than 40 broadcast documentaries for PBS, The Discovery Channel, and others. Mr. Helvarg is a licensed private investigator, body-surfer and PADI-certified scuba diver.

Buck Calabro is a professional computer programmer who holds NAUI certification as an open water recreational diver and takes an interest in diving issues as well as good government. He has been certified for over 15 years, diving in fresh and salt water. Mr. Calabro feels strongly that in this day and age, government information needs to be available on the Internet and this is particularly true for important safety information incorporated into federal law.

Grant W. Graves is an award winning director and director of photography. Mr. Graves has been a bottom diver on the NOAA USS Monitor Project and is one of the only divers to have penetrated the Monitor's engine space to document its in situ condition via video prior to its recovery by the US Navy. He is a PADI Course Director with over forty specialties, technical diving instructor trainer for mixed gas, wreck diving, gas blending, and rebreathers, public safety diving instructor trainer, cave, and wreck diving explorer. He is a Divers Alert Network (DAN) Examiner (instructor trainer trainer) and holds certifications as an Emergency Medical Technician and Advanced Diving Medical Technician. Mr. Graves also holds a U.S. Coast Guard Captain's License.

Aaron Turner is a professional computer software engineer who has been a PADI-certified Open Water diver for one year. As a relatively new diver who is interested in both his own safety as well as those he dives with, he is interested in learning about best practices from a variety of diving disciplines—both recreational and commercial. Mr. Turner feels strongly that government information needs to be freely available on the Internet and this is especially true for important safety information incorporated into federal law.

¹⁸ <http://diving.ito.com/instructor>

Wendy Turner is a professional program manager specializing in computer security and big data systems. She has been a PADI-certified Open Water diver for one year and believes that diving can be a safe and rewarding sport only if people are well educated and prepared. Limiting access to important safety information and regulations for commercial divers to only those people who have the money to pay for them prevents recreational divers from learning from the larger diving community and needlessly puts people's lives at risk.

4. Affected Parties and the Public Interest

The NPRM describes the “Affected Population” for the rule as follows:

Based on a review of current Association of Diving Contractors International industry information and Bureau of Labor Statistics diving population data, there are almost 200 domestic firms involved in commercial diving operations, of which 87 are subject to Coast Guard jurisdiction. Approximately 75 of these firms are registered with ADCI and, as such, are required to comply with the ADCI consensus standards. We estimate there are 12 firms covered by Coast Guard jurisdiction that are not members of ADCI.

While these firms would be required to obey the new regulations, other entities have an interest in shaping, understanding, evaluating, and monitoring compliance with the rules.

The Centers for Disease Control and Prevention have concluded that the death rate for commercial divers is 40 times that of other workers.¹⁹ A wide range of individuals and entities may want or need to know the law as to commercial diving, including public safety standards incorporated by reference. Most divers take a strong interest in their personal safety and the personal safety of those they dive with, and access to technical safety standards required by law are important and relevant to this highly motivated group of people, including amateur, professional, and commercial divers.

Government officials, from the federal to the local level, may have responsibility for oversight and for acting as critical first responders in the event of an emergency, and the proposed regulation does not insure that these crucial technical specifications are available to local and state officials who are on the front lines assisting our U.S. Coast Guard in making our waters safe.

Media may need to read and understand the law to fairly and accurately report on issues affecting the safety of the community. Policy and advocacy organizations, including those representing people in communities or workplaces affected by commercial diving safety, need ready access to the law to do their work.

These standards are not only for the use and benefit of a small group. While not everyone has the training and experience to readily evaluate or monitor compliance

¹⁹ David Helvarg, Risks Run Deep for Divers, <http://www.bluefront.org/wordpress/risks-run-deep-for-divers/> See also Center for Disease Control. MMWR Weekly. Deaths Associated with Occupational Diving, June 12, 1998; 47(22); pp. 452-455.

with the standards incorporated in the proposed regulation, many people do, and interested advocacy and media outlets, among others, may seek out employees, volunteers, consultants and others who have such capacity to advise them.

Yet even though commercial diving safety is very much a matter of public concern, the U.S. Coast Guard appears to be acting as if the details of these issues can comfortably be left in the hands of those who already have purchased the relevant standards incorporated into law, or can easily afford to purchase such standards.

Developments with respect to other areas of regulation, such as within the U.S. Department of Transportation—real-life, high-stakes matters like the tragic, multiple-fatality incidents involving the 2010 Deepwater Horizon Gulf oil spill and the 2010 San Bruno, California, natural gas pipeline explosion—underscore the importance of public access to standards incorporated by reference.

In the wake of the Deepwater Horizon spill in the Gulf of Mexico, with the oil production industry under heavy scrutiny by government, the media, and the public, the American Petroleum Institute eventually posted on its website many of its safety standards, including all of the standards that had been incorporated by reference into federal law.²⁰ Until that decision by the API, as the Deepwater Horizon poured oil into the Gulf for five months, and in the weeks after, it had been difficult for citizens to evaluate the adequacy of federal regulations, because key components of those regulations were hidden behind pay walls.

Similarly, when a natural gas pipeline in San Bruno, California, exploded that same year, “the House of Representatives considered whether relevant pipeline safety standards should have been more freely accessible to first responders.”²¹ Should those standards, in a life-threatening emergency situation and beyond, have been readily available to first responders? Of course.

When matters get serious, our society has had to get serious, and allow the law to be readily available for key actors and for the public to review.

The status quo approach undermines public safety. First responders, government agencies, workers, companies, and others should have the easiest access possible to these standards so that they may understand their legal obligations, be prepared to react effectively in an emergency, to educate themselves easily before any emergency occurs, and to discuss and debate means for improving safety laws. But not all affected entities can afford to pay the steep prices for all the standards incorporated into proposed and final U.S. Coast Guard safety standards.

In this regard, we are in strong agreement with a 2012 comment to the Pipeline and Hazardous Materials Safety Administration (PHMSA) as it considered the

²⁰ Administrative Conference of the United States, “Incorporation by Reference in Federal Regulations,” draft for committee review (“ACUS report”), Oct. 19, 2011, at 28, <https://www.acus.gov/sites/default/files/Revised-Draft-IBR-Report-10-19-11.pdf>

²¹ ACUS report at 26.

implementation of section 24 of the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011.²² That comment was offered jointly by the Western Organization of Resource Councils (WORC), a regional network of seven grassroots community organizations with 10,000 members and 38 local chapters, and Dakota Rural Action, a grassroots family agriculture and conservation group:

Representing the public interest, we strive to create a more fair and open government. Secret laws, or a government that only allows access to laws by a segment of the public able to pay for it, goes in direct opposition to the values of a participatory democracy...

As of June 2010 there were 85 standards referenced in 46 CFR 192, 193, 195. For a citizen to have access to these referenced standards they would have to pay private organizations upwards of \$2,000. These associated costs are an insurmountable burden for an average citizen, making it practically impossible for the public to knowledgeably comment in a rulemaking proceeding, or to propose changes to regulations that already incorporate referenced standards.

5. Law Governing the Availability of Standards Incorporated by Reference

The fundamental law of the United States requires that the government make standards that are incorporated by reference into federal regulations widely available to the public, without charge, and that such standards be deemed in the public domain rather than subject to copyright restrictions. Citizens have the right, without limitation, to read, speak, and disseminate the laws that we are required to obey, including laws that are critical to public safety and commerce. Open, effective, and efficient government and robust democracy require such free availability of standards incorporated by reference.

A. The Freedom of Information Act and Regulations Governing Incorporation by Reference Compel the U.S. Coast Guard To Make These Incorporated Standards Freely Available

The Freedom of the Information Act allows the Director of the Federal Register to deem as effectively published in the Federal Register material that is incorporated by reference into a regulation, but only if such material is “reasonably available to the class of persons affected thereby.” **5 U.S.C. § 552(a)(1)**. Title 51 of 1 CFR implements this provision. The Director of the Federal Register is charged with approving each instance of incorporation by reference requested by federal agencies. In carrying out this responsibility, the Director “will assume in carrying out the responsibilities for incorporation by reference that incorporation by reference... is intended to benefit both the Federal Government and the members of the class affected...” **1 CFR § 51.1(c)(1)**. In order to be eligible for incorporation for a reference, a publication must meet standards including that the publication “does not detract from the usefulness of the Federal Register publication system” and “is

²² <https://law.resource.org/pub/us/cfr/regulations.gov.docket.03/090000648108a95b.pdf>

reasonably available to and usable by the class of persons affected.” 1 CFR § 51.7(a)(2)(ii) and (a)(3).

The advent of the Internet has fundamentally transformed what it means for material to be reasonably available. The Internet has brought the possibility that all standards incorporated into federal law can be instantly available online, linked directly to the relevant provisions of the CFR.

Before the Internet, it was impractical to offer within the pages of the Federal Register and Code of Federal Regulations the often voluminous standards incorporated by reference into agency rules; the regulations, at 1 CFR § 51.7(a)(3) specifically note that material is eligible for incorporation by reference if it “[s]ubstantially reduces the volume of material published in the *Federal Register*.”

The widespread availability of the Internet, along with technologies like high-speed scanners and large-capacity hard drives, eliminates any argument that incorporation of standards through simple reference—as opposed to publishing the full text of the standard with the regulations—is needed to save space or trees.

Indeed, the Internet era provides a tremendous opportunity for government to inform its citizens in a broad and rapidly updated manner about the legal standards that must be met in carrying out daily activities. It also allows for companies, non-profits, and citizens to utilize and organize this information to enhance compliance, better understand the provisions of law, improve public safety, increase economic efficiency and opportunity, and highlight opportunities for effective reform.

Another strong advantage of widespread public availability of standards incorporated by reference would be to highlight the need for government to replace old, outdated standards with new ones. Public Resource has conducted an extensive examination of the Code of Federal Regulations with specific focus on incorporations by reference, coupled with an extensive examination of the Standards Incorporated by Reference (“SIBR”) database maintained by the National Institute of Standards and Technology. Many standards incorporated by reference into the CFR have been superseded by new standards from the SDOs. Greater public access to standards incorporated by reference into federal regulations might alert policy and industry communities to the fact that federal rules are too often connected to outdated private standards and are in need of updating to improve public safety.²³

Today, the only thing impeding the broader availability to the public of standards incorporated by reference is the belief of some SDOs that they have the right to bar the public from reading and speaking these provisions of law, because they fear that broader public access will reduce their volume of sales of such standards.

²³ See letter from Carl Malamud, Public.Resource.Org, to Amy Bunk, Office of the Federal Register, Comments on Agency/Docket Number NARA 12-0002, April 6, 2012, https://bulk.resource.org/courts.gov/foia/gov.nara.ofr.20120406_to.pdf

The NPRM's statement assertion that the incorporated standards are available for inspection at the National Archives and the U.S. Coast Guard offices does not fix the problem: People should not be expected to travel from their homes to Washington DC in order to read the laws they are bound to obey. This solution is also inadequate because the agencies are unlikely to allow people to make copies of the standards so that they may consult them once they leave the federal buildings where they are held. Requiring citizens to memorize hundreds of pages of law is tantamount to denying them access entirely.

Given all these factors, the U.S. Coast Guard should determine that the mandates of FOIA and the public interest require that the standards it incorporates by reference into its final rule be written directly into the rule or else available on a public website without charge, and without limitation of use.

That would include the U.S. Coast Guard making clear that its obligations would not be satisfied by the relevant SDO posting its standard with the kind of restrictions that some SDOs have imposed as they have, in recent years and months, posted some standards on their own websites—forcing persons wishing to read the standards to register, prohibiting copying, or printing, or bookmarking, curtailing search capacity, or otherwise limiting the capacity of all persons to read, speak, and use standards that have become binding law.

Presented with a petition by legal scholars, along with Carl Malamud of Public Resource, making the argument for free online access, the Office of the Federal Register recently addressed and modified its regulations governing incorporation by reference in a final rule (“the OFR rule”) issued on November 7, 2014, and effective January 6, 2015.²⁴ We believe that language in the preamble to this OFR rule inappropriately elevates copyright assertions of the SDOs over the mandates of FOIA. But the OFR rule, which became effective on January 6, 2015, does not in any respect bar the U.S. Coast Guard (or any other agency) from making its own judgments as to its legal and public obligations regarding standards incorporated by reference and taking appropriate steps in this rulemaking to ensure that the law, including standards incorporated in the instant rule, is freely available to all.

OFR refused to grant the petition's central request—that it hold that material incorporated by reference in the Code of Federal Regulations be available online and free of charge. But OFR gave as its reason its view that OFR itself lacked the power to issue such a broad rule for all federal agencies: “petitioners’ proposed changes to our regulations go beyond our statutory authority.” OFR explained: “we are a procedural agency. We do not have the subject matter expertise (technical or legal) to tell another agency how they can best reach a rulemaking decision.”

In the preamble to its final rule, OFR indicated that agencies do have the discretion to make the text of standards incorporated by reference available free of charge:

²⁴ <https://www.federalregister.gov/articles/2014/11/07/2014-26445/incorporation-by-reference>

One commenter stated that since it is the text of standards that must be available (citing Veeck for the proposition that the law is not subject to copyright law), agencies should copy the text of IBR'd standards and place the text online. In a footnote, the commenter suggested that OFR require agencies to place the text of their "regulatory obligations" in their online dockets. This way the "text of the legal obligation and not the standard as such" is available online for free. [footnote omitted]

We leave it to the agencies to determine if they should follow this commenter's suggestion.

The OFR preamble, therefore, confirms what should be obvious: that specific agencies may make their own choices about reasonable availability, including placing incorporated standards online. The U.S. Coast Guard should act here to do just that.²⁵

B. The Constitution and Judicial Decisions of the United States Compel the U.S. Coast Guard To Make These Incorporated Standards Freely Available

As discussed in greater detail in Public Resource's comment in OMB Request for Information 2012-7602,²⁶ the U.S. Supreme Court in *Wheaton v. Peters*, 33 U.S. 591 (1834), and *Banks v. Manchester*, 128 U.S. 244 (1888), held that the law "is in the public

²⁵ We note that the U.S. Coast Guard's NPRM is contrary to law for the additional reason that it fails to meet new specific requirements imposed on agencies by the new OFR rule.

The OFR rule, effective January 6, 2015, requires agencies to:

1. Discuss, in the preamble of the proposed rule, the ways that the materials it proposes to incorporate by reference are reasonably available to interested parties or how it worked to make those materials reasonably available to interested parties; and summarize, in the preamble of the proposed rule, the material it proposes to incorporate by reference. 1 CFR § 51.5(a).
2. The OFR rule imposes similar requirements in the final rule. 1 CFR § 51.5(b).

The NPRM does not specifically indicate how the standards "are reasonably available." Nor does the NPRM discuss the actions that Coast Guard took to ensure that the incorporated materials are reasonably available to interested parties. Nor does the NPRM provide any significant summary of the contents of the standards it proposes to incorporate, as the new OFR rule requires.

Similarly, the NPRM's failure to provide access to the text of the incorporated standard violates the provisions of the Administrative Procedure Act that require agencies to give people an opportunity to comment on proposed rule making. The APA requires that an NPRM include "either the terms or substance of the proposed rule or a description of the subjects or issues involved." 5 U.S.C. § 553(b)(3). The bare-bones discussions of the standards to be incorporated by reference into the instant rule do not meet this agency.

²⁶ https://law.resource.org/pub/us/cfr/notice.omb.20120411_to.pdf

domain and thus not amenable to copyright.” *Veeck v. Southern Bldg. Code Congress International, Inc.*, 293 F.3d 791, 796 (5th Cir. 2002) (*en banc*), cert. denied, 539 U.S. 969 (2003). *Wheaton, Banks*, and the *en banc* decision of the United States Court of Appeals for the Fifth Circuit in *Veeck* all concerned comparable fact patterns: One private party was trying to stop another private party from publishing material that was part of the law. In none of those three cases was anyone trying to prevent the first party from selling copies of such material, and we do not question the right of SDOs to sell standards incorporated by reference into law. Rather, we believe, as the courts concluded in those cases, that once material has become law, then other parties have the right to read it and to speak it, without limitation—and that that proposition clearly applies to standards incorporated by reference into federal law, notwithstanding assertions of copyright by SDOs.

The principle that the law must be public and available to citizens to read and speak has its roots in the concept of the rule of law itself, as well as central provisions of our Constitution. See generally Thomas Henry Bingham, *The Rule of Law*, 37–38 (Penguin Press 2011) (“The law must be accessible...the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations.”); Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* 34 (Cambridge Univ. Press, 2004) (“Citizens are subject only to the law, not to the arbitrary will or judgment of another who wields coercive government power. This entails that the laws be declared publicly in clear terms in advance.”). That is why, going back to ancient times, societies that replaced the rule of tyrants with the rule of law prominently displayed the laws in public places for all to see. See, e.g., Robert C. Byrd, *The Senate of the Roman Republic: Addresses on the History of Roman Constitutionalism* 33, 128, 135 (U.S. Government Printing Office, 1995).

As this history suggests, open access to the law is essential to a free society. Citizens are expected to obey the law, but they cannot do so effectively if they do not know it. Further, the First Amendment right to freedom of speech is imperiled if citizens are barred from freely communicating the provisions of the law to each other. *Cf. Nieman v. VersusLaw, Inc.*, No. 12-2810, at *2 (7th Cir. Mar. 19, 2013) (“The First Amendment privileges the publication of facts contained in lawfully obtained judicial records, even if reasonable people would want them concealed.”). By the same token, equal protection of the laws and due process are jeopardized if some citizens can afford to purchase access to the laws that all of us are bound to obey (with potential criminal penalties for non-compliance), but others cannot. *Cf. Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (a state violates the Equal Protection Clause “whenever it makes the affluence of the voter or payment of any fee an electoral standard”); see also Magna Carta 1297 c. 9 (cl. 29) (1297) (“We will sell to no man, we will not deny or defer to any man either Justice or Right.”).

Consistent with these fundamental principles, it is unlawful and unreasonable for the U.S. Coast Guard to make these standards part of binding United States law without providing a means for citizens to access them without cost or restriction.

6. Granting Citizens Access to Their Own Laws Will Not End the Creation of Public Safety Standards

Opposition to allowing citizens to freely read and speak the public safety standards that are incorporated into law seems to rest on the premise that allowing such access will end the standards-creation process and thereby imperil safety. The argument advanced is that if the government required that all materials incorporated by reference be available for free, then SDOs would react not by making their standards truly available to the public online but rather by ending or curtailing their work to create standards and/or by resisting government efforts to incorporate their standards into law.

Those assumptions of fact and law have been soundly refuted.

The *en banc* U.S. Court of Appeals for the Fifth Circuit in *Veeck* specifically addressed the policy and empirical issues regarding what might happen if courts, as that court did, expressly upheld the right of a citizen to communicate the law, in that case the right of a citizen to post the building code of his town, derived from a model code published by SBCCI, on the Internet. Rather than assume that the entire system of private standard-setting might collapse, the Fifth Circuit examined the arguments and determined that allowing citizens to speak their own laws would not end this beneficial system:

Many of SBCCI's and the dissent's arguments center on the plea that without full copyright protection for model codes, despite their enactment as the law in hundreds or thousands of jurisdictions, SBCCI will lack the revenue to continue its public service of code drafting. Thus SBCCI needs copyright's economic incentives.

Several responses exist to this contention. First, SBCCI, like other code-writing organizations, has survived and grown over 60 years, yet no court has previously awarded copyright protection for the copying of an enacted building code under circumstances like these. Second, the success of voluntary code-writing groups is attributable to the technological complexity of modern life, which impels government entities to standardize their regulations. The entities would have to promulgate standards even if SBCCI did not exist, but the most fruitful approach for the public entities and the potentially regulated industries lies in mutual cooperation. The self-interest of the builders, engineers, designers and other relevant tradesmen should also not be overlooked in the calculus promoting uniform codes. As one commentator explained,

...it is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less. Trade organizations have powerful reasons stemming from industry standardization, quality control, and self-regulation to produce these model codes; it is unlikely that, without copyright, they will cease producing them.

¹ Goldstein § 2.5.2, at 2:51.

Third, to enhance the market value of its model codes, SBCCI could easily publish them as do the compilers of statutes and judicial opinions, with “value-added” in the form of commentary, questions and answers, lists of adopting jurisdictions and other information valuable to a reader. The organization could also charge fees for the massive amount of interpretive information about the codes that it doles out. In short, we are unpersuaded that the removal of copyright protection from model codes only when and to the extent they are enacted into law disserves “the Progress of Science and useful Arts.” U.S. Const. art. I. § 8, cl. 8.

293 F.3d at 806 (footnotes omitted).

These conclusions expressed by the court in *Veck* are even more powerful today. Notwithstanding the issuance of the *Veck* decision itself, and the U.S. Supreme Court’s denial of review after being informed by the Justice Department that “[t]he court of appeals reached the correct result,”²⁷ SDOs have continued to create and issue standards for another decade. SDOs also have continued to press federal and state authorities to incorporate their standards into law.²⁸

Given these factors, we strongly believe that, if the U.S. Coast Guard and other agencies required that only standards made available without restriction be eligible for IBR, then (1) SDOs would continue to promulgate standards and urge their incorporation into law; (2) SDOs, government, and various private entities would make standards incorporated by reference available to the public without restriction, and the courts would uphold any challenges to such action, allowing the U.S. Coast Guard and other agencies to be confident that standards it was considering for IBR approval would indeed be publicly available.

Conclusion

Public Resource, the Undersigned Certified Divers, and a wide range of other parties are affected by the proposed rule and the incorporation by reference of the applicable standards. Many such parties cannot reasonably afford to purchase all the relevant standards incorporated by reference in these areas. In our society, based on the rule of law, all citizens must have ready access to their own laws. Public safety will be greatly improved if these standards are made available to the public without charge or restriction on use.

²⁷ Brief for the United States as Amicus Curiae, *S. Bldg. Code Cong. Int’l, Inc. v. Veck* (2003) (No. 02-355), at 1, available at <http://www.justice.gov/osg/briefs/2002/2pet/6invt/2002-0355.pet.ami.inv.pdf>.

²⁸ See *Public.Resource.Org, Inc.’s Counterclaim For Declaratory Judgment, Answer To Complaint For Injunctive Relief, And Jury Demand, American Society For Testing And Materials v. Public.Resource.Org, Inc.*, Case No. 1:13-cv-01215-EGS, Aug. 6, 2013, at 9–15. <https://archive.org/download/gov.uscourts.dcd.161410/gov.uscourts.dcd.161410.21.0.pdf>

Because it is illegal and arbitrary to publish the proposed rule without making the incorporated materials freely available, the U.S. Coast Guard should re-publish the proposed rule with the standards available freely online, and it should re-open the comment period. The U.S. Coast Guard should not incorporate these materials into any final rule until and unless they are written directly into the rule, or else permanently available to the public on a website without charge and without any restriction on use.

Sincerely yours,

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