

# Comment of Public.Resource.Org and Co-Signatories on Plastic Pipe Rule

## Manifest

Notice of Proposed Rulemaking: Pipeline Safety, Plastic Pipe Rule

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Pipeline and Hazardous Materials Safety Administration  
U.S. Department of Transportation -  
Docket Operations -  
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## 1. Introduction

Public.Resource.Org (“Public Resource”) and the undersigned affected parties submit this comment to object to one aspect of the proposed Pipeline and Hazardous Materials Safety Administration (PHMSA) regulation: It proposes to incorporate by reference sixteen public safety standards that are not reasonably available to people affected by the rule, as required by law. [1]

This rule is vitally important to public safety. After a series of tragic explosions, pipeline safety has become an issue of strong public interest. As Representative Peter DeFazio recently told *Politico*, “This is life or death. Pipelines blow up and people die.” [2]

As PHMSA acknowledges, pipeline safety regulations have not stayed current with advances in the design and manufacture of plastic pipe. It is clear that PHMSA needs new regulations, and that the content of these regulations will have a major impact on pipeline safety and protection of the public and our environment.

What is not clear is why PHMSA believes that it is appropriate—or in the interests of greater safety—to issue a proposed or final rule that includes major components that many people, including many interested parties, will not be able to fully access because they are only available online on a restricted and temporary basis; because obtaining these components of the law with fewer restrictions requires payment of exorbitant fees; and because of improper assertion of copyright claims that deter people from communicating the text of these provisions—that deter them from speaking their own laws.

Accordingly, Public Resource and the undersigned affected parties are not commenting on the substantive merits of the proposed rule. Instead, we ask PHMSA to recognize that it has acted illegally and arbitrarily at this Notice of Proposed Rulemaking (NPRM) stage in not making these sixteen standards—which are integral parts of the rule—available to the public online on a free, unrestricted, and permanent basis, just as the other provisions of the regulation are available.

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 PHMSA proposes to exclude the texts of these standards from the text of the regulation. Nor does PHMSA propose to link the online version of the regulation to websites offering free and unrestricted access to the standards or to encourage those websites to develop such free and unrestricted access.

Instead, PHMSA apparently expects people to access versions that are available from private organizations, subject to a series of elaborate requirements and restrictions, with no guarantee that those standards will remain available without charge, even on such a restricted basis, or else to purchase the standards, also with significant restrictions, from the same private organizations, which claim the right to prohibit even purchasers from sharing these provisions of the law with others.

This failure to make the sixteen 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 full access to the safety rules are less likely to obtain such access if they must pay for it, and piece together the components of a rule from a multitude of documents.

Because it is illegal and arbitrary to publish this proposed rule without making incorporated standards freely available, PHMSA 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, PHMSA 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.

## **2. The Proposed Incorporation by Reference**

In the NPRM, PHMSA proposes to incorporate by reference into the rule the following standards (with their purchase prices from the relevant standards development organization listed after):

- ASTM D2513-12a<sup>el</sup> “Standard Specification for Polyethylene (PE) Gas Pressure Pipe, Tubing, and Fittings” [[\\$58.50 pdf only](#)]
- ASTM F2785-12 “Standard Specification for Polyamide 12 Gas Pressure Pipe, Tubing, and Fittings” [[\\$49 pdf or hardcopy](#)]

- ASTM F2945-12a “Standard Specification for Polyamide 11 Gas Pressure Pipe, Tubing, and Fittings” 11/27/2012 [[\\$58.50 pdf only](#)]
- ASTM F2620-12 “Standard Practice for Heat Fusion Joining of Polyethylene Pipe and Fittings” 11/01/2013 [[\\$74.40 pdf only](#)]
- ASTM D2564-12 “Standard Specification for Solvent Cements for Poly (Vinyl Chloride) (PVC) Plastic Piping Systems” 08/01/2012 [[\\$43 pdf or hardcopy](#)]
- ASTM F2817-10 “Standard Specification for Poly (Vinyl Chloride) (PVC) Gas Pressure Pipe and Fittings For Maintenance or Repair” (PVC components only) 08/01/2013 [[\\$51.60 pdf only](#)]
- ASTM F2897-11a “Standard Specification for Tracking and Traceability Encoding System of Natural Gas Distribution Components (Pipe, Tubing, Fittings, Valves, and Appurtenances)” 11/01/2011 [[\\$58.80 pdf only](#)]
- ASTM/ANSI F2600-09 “Standard Specification for Electrofusion Type Polyamide-11 Fittings for Outside Diameter Controlled Polyamide-11 Pipe and Tubing” 4/1/2009 [[\\$43 pdf or hardcopy](#)]
- ASTM F2767-12 “Specification for Electrofusion Type Polyamide-12 Fittings for Outside Diameter Controlled Polyamide-12 Pipe and Tubing for Gas Distribution” 10/15/2012 [[\\$43 pdf or hardcopy](#)]
- ASTM/ANSI F2145-13 “Standard Specification for Polyamide 11 (PA 11) and Polyamide 12 (PA12) Mechanical Fittings for Use on Outside Diameter Controlled Polyamide 11 and Polyamide 12 Pipe and Tubing” 05/01/2013 [[\\$43 pdf or hardcopy](#)]
- ASTM/ANSI F1948-12 “Standard Specification for Metallic Mechanical Fittings for Use on Outside Diameter Controlled Thermoplastic Gas Distribution Pipe and Tubing” 04/01/2012 [[\\$43 pdf or hardcopy](#)]
- ASTM F1973-13 “Standard Specification for Factory Assembled Anodeless Risers and Transition Fittings in Polyethylene (PE) and Polyamide 11 (PA11) and Polyamide 12 (PA12) Fuel Gas Distribution Systems” 05/01/2013 [[\\$51.60 pdf only](#)]
- ASME/ANSI B 16.40-08 “Manually Operated Thermoplastic Gas Shutoffs and Valves in Gas Distribution Systems” 04/30/2008 [[\\$42 pdf or hardcopy](#)]

- PPI TR-4/2012 “PPI Listing of Hydrostatic Design Basis (HDB), Hydrostatic Design Stress (HDS), Strength Design Basis (SDB), Pressure Design Basis (PDB) and Minimum Required Strength (MRS) Rating For Thermoplastic Piping Materials or Pipe” [[no charge](#)]

PHMSA also proposes to “update” the following incorporated standards:

- ASTM F1055-98 (2006) “Standard Specification for Electrofusion Type Polyethylene Fittings for Outside Diameter Controlled Polyethylene Pipe and Tubing” [[\\$51.60 pdf](#)] [[3](#)]
- PPI TR-3/2012 “Policies and Procedures for Developing Hydrostatic Design Basis (HDB), Hydrostatic Design Stresses (HDS), Pressure Design Basis (PDB), Strength Design Basis (SDB), Minimum Required Strength (MRS) Ratings, and Categorized Required Strength (CRS) for Thermoplastic Piping Materials or Pipe. [[no charge](#)] [[4](#)]

The total cost for 14 standards from ASTM and ASME is \$711. The other two standards, from the Plastic Pipe Institute, are available online free of charge. The cost per page of some of these standards is quite remarkable. For example, ASTM F1055-98(2006) is 8 pages long and costs \$51.60.

Also remarkable is the fact that the current versions of these standards (those not required by law) are almost always cheaper than the historical versions being required by the government. For example, the government is incorporating ASTM F1973-13, which costs \$51.60 for a 6-page document. F1973-13 has been superseded by F1973-13e1, which includes a minor technical change in the standard, and is being sold for \$43.00.

### **3. Availability of the Standards**

For citizens to comment on the proposed regulation, and to comply with the final regulation, they need ready access to the provisions of the regulation. Unfortunately, provisions of the regulation, namely the above incorporated standards, are not reasonably available.

In contrast to a January 2015 NPRM in which PHMSA opined that the only people actually “affected” by its proposed hazardous materials regulation “already have

access” to the standard incorporated by reference and that “[o]ther interested parties may purchase these standards from the [Association of American Railroads] for \$390.00,” PHMSA has, for the instant NPRM, taken note of new and looming obligations on the agency (*see supra* [24] ), to make standards incorporated by reference more available to the general public. In furtherance of such obligations, according to the NPRM, “PHMSA has contacted each SDO and has requested a hyperlink to a free copy of each standard that has been proposed for incorporation by reference. Access to these standards will be granted until the end of the comment period for this proposed rulemaking.” [5] PHMSA has created a webpage that links to sites where the standards development organizations that have issued the relevant standards do offer links to versions of the standards. Unfortunately, these measures still fail to provide the public with appropriate access to their own laws. [6]

Most of the proposed incorporated standards are issued by ASTM. On a webpage entitled “PHMSA” ASTM provides links to the ASTM standards incorporated by reference. [7] The page includes a warning: “These are read only files. It is unlawful to download or print these files. Any other reproduction or use of these documents, in full or in part, without the expressed written permission of ASTM International is strictly prohibited.” In fact, the files can be downloaded only with the Adobe Acrobat Reader. The files are pdfs, engineered so they cannot be printed, and so text cannot be selected and pasted into other documents. These limitations, coupled with the ASTM warning not to reproduce or use the documents without ASTM's written permission, make it more difficult for citizens to review the documents and to share commentary on them with others. Moreover, Public Resource, and others, know that these are not mere threats by ASTM; ASTM, along with other standards development organizations (SDOs), have sued Public Resource in federal court for posting ASTM standards already incorporated into law. [8]

ASTM also now has built an online “Reading Room” containing documents that already are incorporated by reference into law. [9] If the proposed ASTM standards are indeed incorporated into the final rule, perhaps ASTM will post them in this reading room, where, sadly, as binding federal law, they would be even more difficult to use and access than they are as part of the proposed rule. Accessing rules in the reading room requires a user to provide an email address and password, a name, physical address, and phone number, and agreement to complex and lengthy terms and conditions. The standards there may then be viewed, extremely grudgingly, through a small portal inside a browser window. The text looks like a fax from the late 1980s, the print is small, an entire page cannot be viewed without scrolling up and down, and every page has grey



large-print copyright warnings stamped multiple times under the text. Buttons allow the reader to enlarge the text, but then even less of the page may be viewed at once. Helpful, crystal clear buttons above and below this travesty advise the reader that they may buy the standards. See Figure 1.

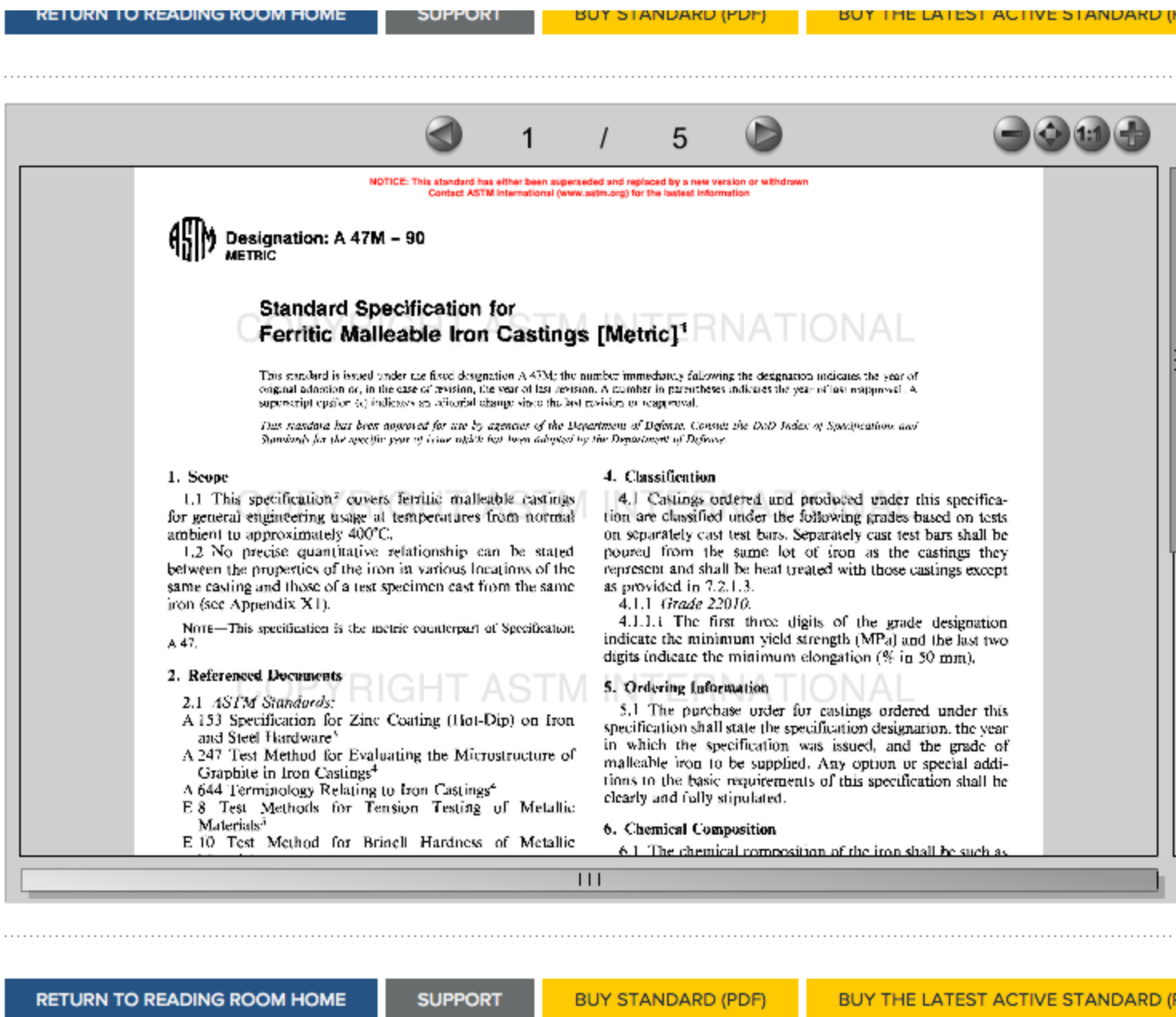


Figure 1: ASTM Reading Room

Note: This embedded image uses the SVG standard and may not be viewable on some older browsers.

To access the single ASME standard that PHMSA has proposed to incorporate by reference, a user following the link listed on the PHMSA web site to the ASME website is first presented with a cryptic screen that simply says “Enter email address to proceed.” [10] There is no indication of what is available or the terms, simply a



demand for personal identification. After entering an email address, the user is asked to furnish a password, then is directed to a screen where the user must provide ASME with an email address and password, a name and physical address (phone number requested, but optional), and then must signify agreement to terms and conditions. ASME tells the user what comes next and how it plans to restrict a user's ability to access the proposed provisions of law:

*To access the Work, you will be required to download the secure FileOpen plug-in. You also must register and provide your email address to ASME for verification purposes and so that ASME can send you a unique access link. This link will direct you to an encrypted file containing the text of the Work. The file will be viewable only via the Adobe Reader or Acrobat with the FileOpen plug-in, and only during the 90-day NPRM Public Comment Period. The FileOpen plug-in is free to download and may be removed when no longer needed by following the instructions provided here:*

<http://plugin.fileopen.com/remove.aspx>.

*ASME has put in place certain technological safeguards to restrict access to and use of the Work. You agree not to override, circumvent, disable, or otherwise interfere with these safeguards.*

*ASME reserves the right in its sole discretion to restrict or terminate your access to the Work at any time if it suspects that you have not complied with these Terms, or for other reasons that ASME determines in good faith are necessary or appropriate. ASME will not be liable to you for any loss or damage that may result from such restriction or termination.*

After all this, the user is finally able to read the standard, but each time the standard is opened their Internet address and user ID is logged and most functionality, including printing, copying, and access by people who are visually impaired, is disabled. In addition, the file is "locked" to the computer it was opened on and is the only copy a particular user ID is allowed to use. If you were to change to another computer during the comment period, you would not be able to view the file. If you download it using a browser that does not have the FileOpen plugin for the PDF viewer, it is saved as a zero-byte file because authorization did not complete and you are not able to go back and download the file again. A new account with a different email address would have to be created.

Finally, there are two standards issued by the Plastics Pipe Institute. PPI has imposed fewer technical restrictions—it is physically possible to download, select, and print these and other PPI standards, without a fee—but PPI warns the user in a copyright notice on each standard, “No part of this work may be used or reproduced in any manner whatsoever without written permission.”

ASTM and ASME are both using different versions of the FileOpen plugin. Even when the reader has bought the standards, the FileOpen plugin and Digital Rights Management embedded in the PDF files impose significant restrictions on the ability of a user to work with the material, and has a particularly strong impact on two classes of users:

- People who are blind or visually impaired.
- People who must work in a large organization with a centralized Information Technology department.

The FileOpen plugin is incompatible with accessibility software. For example, the ASTM reading room facility displays only in Adobe Acrobat Reader, but when the user tries to use the “Read Out Loud” function, all they hear is “Empty Page.” Many federal workers are required to use the Code of Federal Regulations, including standards incorporated by reference into law and the use of Digital Rights Management software makes it impossible for those who are visually impaired to access the document. This is a clear violation of the requirements of Section 508 that “individuals with disabilities who are Federal employees to have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities.” [11]

President Obama, through a series of memoranda and orders, has repeatedly emphasized that Section 508 is vital to “ensure that all federal employees have the information and data they need to do their jobs.” [12] We cannot think of any information more important that federal employees “need to do their jobs” than the Code of Federal Regulations, the law which they enforce.

Elaborate and arbitrary Digital Rights Management schemes limit the ability of the visually impaired to access data, but have an equally dramatic effect on those in large organizations, such as agencies of the federal government. Most Information Technology departments do not allow users to install new software without a thorough security review, a process that can take a long time and often results in a denial of the

request if IT is unable to understand the security implications of the new software. At PHMSA, for example, engineers working in the Office of Pipeline Safety need to get special permission from IT before they can install any software. Allowing different private organizations to each require their own special plugins and Digital Rights Management schemes makes it very hard for an engineer at an agency such as PHMSA or any of the state hazmat and pipeline safety agencies to access the standards they are charged with enforcing.

In addition to precluding access by technical means, the effects of stringent terms of use and copyright assertions, watermarking of each page of individual standards with the name of the purchaser, and other such measures fill even the most determined citizens with trepidation if they wish to speak these laws to their fellow citizens, even if they can afford the \$711 it costs to initially purchase the documents.

## **4. The Interests of Commenters**

Public Resource, a non-profit organization, would be one of the many entities adversely and unlawfully disadvantaged if PHMSA 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 PHMSA of a regulation incorporating by reference standards that are only available with restrictions and fees is the kind of government action that Public Resource works to prevent.

DeSmogBlog is a leading online source of information on climate and energy issues, and on public relations campaigns aimed at distorting the truth. TIME Magazine named DeSmogBlog in its "25 Best Blogs of 2011" list. Its articles and stories are routinely highlighted in the world's most popular news outlets and blogs and generated stories in major media outlets including The New York Times, The Guardian, BBC, The Globe and Mail, Associated Press and CBC. DeSmogBlog, whose staff is based in the United States and Canada, regularly covers pipeline safety issues and incidents, exposing problems, unearthing government information, analyzing laws and regulations, and addressing issues in greater detail than many others in the media. DeSmogBlog's accurate and timely coverage benefits from broad access to provisions of law. The issuance of a PHMSA rule that incorporates standards only available with restrictions and fees would hinder DeSmogBlog's ability to do its job, to keep the public fully and accurately informed about pipeline issues.

Eric Ball is a San Bruno resident located near the 2010 San Bruno pipe explosion. He has lived in San Bruno since 2005. Mr. Ball and his wife considered the purchase of one of the homes damaged by the explosion.

James Creech is an attorney who lives and works in Burlingame, near the site of the San Bruno explosion. Growing up on the Peninsula he has many friends that live and work in San Bruno. He followed the news from the tragedy and the subsequent investigations and court cases closely. He believes the issue of pipeline safety is of great importance to him and all his fellow citizens in the mid-Peninsula area. In order to understand the regulations governing this critical safety issue, citizens should have access to as much detailed information, and in particular public safety standards that are incorporated into law.

James Cutsinger is a resident of San Mateo. He is a First Responder with the San Mateo County Sheriff's Department Search and Rescue Team. He was at the scene of the San Bruno blast the day after it happened. Mr. Cutsinger believes it is important that federally mandated technical standards be freely available so that emergency personnel and first responders are able to educate themselves about these important topics.

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.

## **5. Affected Parties and the Public Interest**

PHMSA explains the purpose of the new regulation as follows:

*The use and availability of plastic pipe have changed over the years with technological innovations in the products and best practices used in plastic pipe installations. Progress in the design and manufacture of plastic pipe and components has resulted in materials with higher strength characteristics. Manufacturers are instituting new practices related to traceability. Operators are incorporating best practices. Together, these measures have the potential to improve with pipeline safety and integrity. Some of these strides have been highlighted in petitions that are detailed below. The pipeline safety regulations have not stayed current with some of these products; this*

*rulemaking is an effort to propose a number of revisions to incorporate these changes in the interest of pipeline safety...□*

*While there has been much progress, both Federal and State inspectors, have noticed some issues related to the installation of plastic pipe that should be addressed in the pipeline safety regulations. In an effort to address these issues, respond to petitions and update the regulations with respect to the products and practices used in plastic pipe system without compromising safety, PHMSA is proposing revisions to the Federal Pipeline Safety Regulations (PSR) in 49 CFR part 192. This focus will limit these proposals to plastic pipelines in gas service and subsequently to new, repaired, and replaced pipes.*

The proposed regulation focuses in particular on the issue of traceability and tracking in the event of incidents or recalls involving plastic pipe:

*In many cases, the lack of adequate traceability for plastic pipe (i.e., appropriate markings that help identify the location of manufacture, lot information, size, material, pressure rating, temperature rating and, as appropriate, type, grade, and model, etc., of the pipe and components) and tracking of pipe location (i.e., a means of identifying the location of pipe and components within the pipeline) prevents operators from having enough information to identify systemic issues related to incidents involving plastic pipe. Further, the lack of this information makes it difficult for operators and regulators to determine whether plastic pipe or component failures are related to a certain type or vintage of material, specific product defect or design, heat/lot of the product, or whether it was produced by a certain manufacturer at a certain time.*

*In addition, the issue can result in excessive pipe excavations due to an inability to locate the affected sections of pipe or fittings when responding to plastic pipe or component manufacturer recalls.*

These tracking and traceability changes, which are detailed in ASTM F2897, are significant, allowing the creation and operation of a gas pipe registry to provide distribution integrity management, a system widely supported by industry and required by federal law. [13] If there is an incident, such as a component failing, these

requirements mean that the pipeline operator can quickly find similar components in the system, who installed them, and their history. Just as this information is of importance to the pipeline operator, if there is a serious situation such as an explosion, the requirements imposed by law for tracking and traceability are of great interest to journalists, regulators, and the general public.

According to the NPRM, industry groups also have petitioned PHMSA to increase the design factor for PE pipe to allow for use of PE pipe with smaller wall thicknesses, a change with significant cost savings for pipeline operators. [14] The regulation also would allow for expanded use of Polyamide-11, permit incorporation of PA-12 pipe, propose requirements for the design of risers associated with plastic pipe, and create new requirements for pipe fittings. The last requirement, according to the NPRM, responds to repeated safety issues:

*PHMSA and others (e.g., NTSB and certain States) have observed problems with mechanical fittings or joints becoming loose or pipe being pulled out from fittings, leading to leaks and, in certain cases, incidents. Failures can occur when there is inadequate restraint for the potential stresses on the two fitted pipes, when the couplings are incorrectly installed or supported, or when the coupling components (e.g., elastomers) degrade over time.*

The regulations also are aimed at addressing safety problems relating to plastic pipe installation and repair, for example, the NPRM states:

*PHMSA and the States are aware of a number of incidents related to cross-boring, where plastic pipe installed via trenchless excavation (e.g., directional drilling) has come in contact with or been installed right through another underground utility such as a sewer line.*

and

*PHMSA and States have observed issues where some operators have used stainless steel band clamps, intended and designed for temporary repairs on plastic pipe used in gas distribution, as a permanent repair solution. While clamps can be an effective temporary solution in certain situations, such as during an incident to stop the release of gas, PHMSA believes that these*

*clamps should be used only as a temporary repair measure until the pipe can be replaced. PHMSA is also aware of at least one manufacturer that has issued a letter saying its repair clamps are intended for temporary repairs only and should be replaced with a more permanent solution. Therefore, PHMSA proposes the incorporation of a new section (§ 192.720) to prohibit the use of leak-repair clamps as a means for permanent repair on gas pipe used in distribution service.*

These PHMSA observations make plain the many ongoing challenges in improving plastic pipe safety.

Pipeline safety is of critical importance to public safety. Since 1995, there have been 5,601 serious pipeline incidents with 360 fatalities, 1,367 injuries, and \$7,011,889,624 of property damage (See Table 1). The 3-year average from 2012-2014 shows 285 incidents per year, the highest in the 20-year period. [15]

**Table 1: PHMSA Pipeline Incidents: (1995-2014)**

Calendar Year	Number	Fatalities	Injuries	Property Damage Current Year \$
1995	259	21	64	\$74,291,229
1996	301	53	127	\$160,065,297
1997	267	10	77	\$108,382,011
1998	295	21	81	\$171,394,251
1999	275	22	108	\$175,046,770
2000	290	38	81	\$253,056,430
2001	233	7	61	\$77,717,793
2002	258	12	49	\$125,156,634
2003	295	12	71	\$164,206,832
2004	309	23	56	\$310,036,267
2005	334	16	47	\$1,450,053,109
2006	257	19	34	\$155,261,146
2007	267	16	46	\$149,596,100
2008	279	8	55	\$580,732,073
2009	275	13	62	\$177,671,037
2010	263	19	103	\$1,602,295,620
2011	288	12	51	\$414,085,015
2012	251	10	54	\$228,398,883



Calendar Year	Number	Fatalities	Injuries	Property Damage Current Year \$
2013	300	9	45	\$343,384,679
2014	305	19	95	\$296,584,987
Grand Total	5,601	360	1,367	\$7,017,416,162

*Data Source: US DOT Pipeline and Hazardous Materials Safety Administration*

The 2010 natural gas pipeline explosion in San Bruno, California, helped to heighten public concern. The explosion killed eight people, injured more than 60, and destroyed 38 homes. [16] A 2011 PHMSA report, “The State of the National Pipeline Infrastructure,” emphasized multiple concerns specifically regarding plastic pipe:

*The National Transportation Safety Board (NTSB) has reported that plastic pipe installed in natural gas distribution systems from the 1960’s through the early 1980’s may be vulnerable to brittle-like cracking resulting in gas leakage and potential hazards to the public. Hundreds of thousands of miles of plastic pipe have been installed, with a significant amount installed prior to the mid-1980’s. Significant industry and regulatory effort...has been focused on characterizing which plastic pipes are of greatest concern...□ [17]*

Clearly, the regulations are aimed at addressing serious observed public safety issues, where accidents could cause serious disruptions, deaths, and injuries. These matters are thus of broad interest to a wide range of organizations and individuals—not just to large companies that can readily afford to purchase all the applicable standards incorporated into PHMSA law.

Small businesses and their workers may participate in or interact with plastic pipe systems and with the hazards they may present. Government agencies, 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. 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 pipe safety issues, need ready access to the law to do their work. People want to know how the law affects hazards that could harm them.

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 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.

Public concern about pipeline safety and hazardous materials has been heightened by past tragedies—not only the San Bruno explosion but also the 2010 Deepwater Horizon Gulf oil spill. The importance of public access to standards incorporated by reference becomes more stark when considering such real-life, high-stakes matters.

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 (API) eventually posted on its website many of its safety standards, including all of the standards that had been incorporated by reference into federal law.

[18] 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 the San Bruno pipeline exploded that same year, “the House of Representatives considered whether relevant pipeline safety standards should have been more freely accessible to first responders.” [19] 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, and 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 PHMSA safety standards.

In this regard, we are in strong agreement with a 2012 comment to PHMSA as it considered the implementation of section 24 of the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011. [20] 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.*

## **6. 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 PHMSA 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 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. Among the findings of Public Resource's review is that many of the standards incorporated by reference into federal law are simply unavailable for purchase. [21]

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.

Standards incorporated into current PHMSA regulations hundreds of dollars to purchase a copy, and any serious inquiry into federal public safety requirements inevitably requires consultation with several standards incorporated into law. Prices like that make the standards unavailable for the vast majority of Americans, perverting the fundamental principles of notification and an informed citizenry, and violating FOIA's mandate that incorporated standards be reasonably available.

Given all these factors, PHMSA 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 PHMSA 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. [22]

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. [23] 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 PHMSA (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.”

Later 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:

*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. PHMSA should act here to do just that. [24]

## **B. The Constitution and Judicial Decisions of the United States Compel PHMSA To Make These Incorporated Standards Freely Available**

As discussed in greater detail in Public Resource’s comment in OMB Request for Information 2012–7602, [25] 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 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 PHMSA to make these two standards part of binding United States law without providing a means for citizens to access them without cost or restriction.

## **7. 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 *Veeck* are even more powerful today. Notwithstanding the issuance of the *Veeck* 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,” [26] 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. [27]

Given these factors, we strongly believe that, if PHMSA 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 PHMSA and other agencies to be confident that standards it was considering for IBR approval would indeed be publicly available.

## **8. Conclusion**

Public Resource, the undersigned affected parties, 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 two standards are made available to the public without charge.

Because it is illegal and arbitrary to publish the proposed rule without making the two incorporated standards freely available, PHMSA should re-publish the proposed rule with the standards available freely online, and PHMSA should re-open the comment period. PHMSA should not incorporate these standards 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.

The Code of Federal Regulations, along with the U.S. Code, defines the rights and obligations of citizens and are the rules which govern our country. Those laws must be available to citizens to know their rights and obligations. As S. Joe Bhatia, the President of the American National Standards Institute, said: "A standard that has been incorporated by reference does have the force of law, and it should be available." [28] We agree with Mr. Bhatia and urge PHMSA to make sure that all citizens have access to these important public safety standards.

Sincerely yours,

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Executive Director and Managing Editor  
DeSmogBlog

Eric Ball

James Creech

James Cutsinger

David Halperin  
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Carl Malamud  
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## 9. Notes

- [1] - Pipeline and Hazardous Materials Safety Administration, Pipeline Safety: Plastic Pipe Rule, PHMSA-2014-0098, RIN 2137-AE93, 80 FR 29263, May 21, 2015.  
<https://www.federalregister.gov/articles/2015/05/21/2015-12113/pipeline-safety-plastic-pipe-rule>
- [2] - Elana Schor and Andrew Restuccia, "Pipelines blow up and people die," Politico, April 21, 2015, Updated July 13, 2015. <http://www.politico.com/story/2015/04/the-little-pipeline-agency-that-couldnt-117147.html>
- [3] - PHMSA states, "This specification is a 2006 reaffirmed version of the 1998 version, meaning the technical content of the standard itself hadn't changed but as a matter of process had to be reviewed by the ASTM technical committee to keep it active." PHMSA also adds that "there is a more current version of the F1055 standard (ASTM F1015-13) [sic] but PHMSA has chosen not to propose that version as the name and scope have expanded to include Crosslinked Polyethylene (PEX) Pipe and Tubing, a material not otherwise recognized in the 49 CFR part 192. PHMSA is open to comments on whether or not the latest version should be considered." Although PHMSA has thus asked for public comment on whether to incorporate instead the more recent version of the standard, F1055-13, that version is not available on the ASTM PHMSA IBR page described below, or in the ASTM reading room described below. ASTM sells it on their publications site for \$49 for a pdf.
- [4] - PHMSA notes, "This version is an update to the 2008 version currently - incorporated by reference." -
- [5] - Pipeline and Hazardous Materials Safety Administration, Hazardous Materials: Miscellaneous Amendments (RRR), Notice of Proposed Rulemaking, Docket PHMSA-2013-0225, RIN 2137-AF04, 80 FR 3787, January 23, 2015.  
<https://www.federalregister.gov/articles/2015/01/23/2015-00265/hazardous-materials-miscellaneous-amendments-rrr>
- [6] - PHMSA, Standards Incorporated by Reference, last visited July 16, 2015.  
<http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.6f23687cf7b00b0f22e4c6962d9c8789/?vgnnextoid=d5af714769382310VgnVCM>
- [7] - ASTM, PHMSA Public Access. <http://www.astm.org/phmsa> We note that ASTM unilaterally removed all public access on July 10, 20 days before the close of the

comment period. When contacted by PHMSA, ASTM agreed to restore access, but this task was not accomplished until July 17.

- [8] - Public Resource is currently being sued by six standards development organizations 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.
- [9] - ASTM, Reading Room, last visited July 17, 2015. <http://www.astm.org/READINGLIBRARY/index.html>
- [10] - ASME, Public Review, last visited July 17, 2015. <https://shop.asme.org/PublicReview/PHMSA/B16-4-2008>
- [11] - Section 508 of the Rehabilitation Act ([29 U.S.C. § 794d](#)), as amended by the Workforce Investment Act of 1998 ([Public Law 105-220](#)), August 7, 1998. <https://www.section508.gov/Section-508-Of-The-Rehabilitation-Act>
- [12] - Office of Management and Budget, Improving the Accessibility of Government Information, July 19, 2010. [https://www.whitehouse.gov/sites/default/files/omb/assets/procurement\\_memo/improving\\_accessibility\\_gov\\_info\\_07192010.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/procurement_memo/improving_accessibility_gov_info_07192010.pdf)
- [13] - "What Are the Required Elements of an Integrity Management Plan?" [49 CFR § 192.1007\(a\)\(5\)](#). See also Stephen C. Cooper, Gas Pipe Registry Provides Enhanced System Safety and Accountability, North American Oil and Gas Pipelines, May 14, 2013. <http://napipelines.com/checking-ids/>
- [14] - Gas Piping Technology Committee, Petition to PHMSA to allow above-ground, encased plastic pipe for regulator and metering stations, August 18, 2014, Docket 2014-0098-0004. <http://www.regulations.gov/#!documentDetail;D=PHMSA-2014-0098-0004> See also American Gas Association, Petition for Reconsideration to Adopt the Most Recent Version of ASTM D2513, Docket PHMSA-2014-0098-0001, July 10, 2014. <http://www.regulations.gov/#!documentDetail;D=PHMSA-2014-0098-0001>

- [15] - PHMSA, Pipeline Significant Incident 20 Year Trend, Date report run: July 16, 2015. <http://www.phmsa.dot.gov/pipeline/library/datastatistics/pipelineincidenttrends>
- [16] - National Transportation Safety Board, Pacific Gas and Electric Company Natural Gas Transmission Pipeline Rupture and Fire, NTSB/PAR-11/01, PB2011-916501, August 30, 2011. <http://www.nts.gov/investigations/AccidentReports/Reports/PAR1101.pdf>
- [17] - Secretary of Transportation, Report to America on Pipeline Safety, October 31, 2011. [http://opsweb.phmsa.dot.gov/pipelineforum/docs/SecretarysInfrastructureReport\\_Revised\\_per\\_PHC\\_103111.pdf](http://opsweb.phmsa.dot.gov/pipelineforum/docs/SecretarysInfrastructureReport_Revised_per_PHC_103111.pdf)
- [18] - 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>
- [19] - ACUS report at 26.
- [20] - Dakota Rural Action and Western Organization of Resource Councils, Implementing Incorporation by Reference (IBR) Requirements of Section 24, July 11, 2012. <https://law.resource.org/pub/us/cfr/regulations.gov.docket.03/090000648108a95b.pdf>
- [21] - 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](https://bulk.resource.org/courts.gov/foia/gov.nara.ofr.20120406_to.pdf)
- [22] - 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 a 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 two standards to be incorporated by reference into the instant rule do not meet this agency obligation.
- [23] - Office of the Federal Register, Incorporation by Reference, Final Rule, 79 FR 66267, November 7, 2014. <https://www.federalregister.gov/articles/2014/11/07/2014-26445/incorporation-by-reference>



[24] -As noted above, in contrast with an NPRM it issued in January 2015 that also incorporated standards by reference (see [80 FR 3787](#), Docket [PHMSA-2013-0225](#)), the current NPRM takes note of the fact that PHMSA has some new obligations, including this new OFR rule, effective January 6, 2015, which does require 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 with respect to the final rule. [1 CFR § 51.5\(b\)](#).

Another looming obligation acknowledged by the instant NPRM has been imposed by Congress: President Obama, in August 2013, signed [Public Law 113-30](#), revising [49 U.S.C. § 60102\(p\)](#) to read: "Beginning 3 years after the date of enactment of this subsection, the Secretary may not issue a regulation pursuant to this chapter [pipeline safety regulations] that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge." (This provision weakened a more detailed and urgent provision of law signed in January 3, 2012, [Public Law 112-90](#), Section 24 of which stated: "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.") How PHMSA will interpret this obligation going forward remains to be seen.

Public.Resource.Org and Greenpeace USA submitted a comment to PHMSA on this rulemaking. See Docket entry PHMSA-2013-0225-0049.

[https://law.resource.org/pub/us/cfr/regulations.gov.docket.06/ - PHMSA-2013-0225-0049.pdf](https://law.resource.org/pub/us/cfr/regulations.gov.docket.06/-PHMSA-2013-0225-0049.pdf) -

- [25] - Public.Resource.Org, Comment to the Office of Management and Budget, Request for Information OMB-2012-7602, April 11, 2012. [https://law.resource.org/pub/us/cfr/notice.omb.20120411\\_to.pdf](https://law.resource.org/pub/us/cfr/notice.omb.20120411_to.pdf)
- [26] - Brief for the United States as Amicus Curiae, S. Bldg. Code Cong. Int'l, Inc. v. Veeck (2003) (No. 02-355), at 1, available at <http://www.justice.gov/osg/briefs/2002/2pet/6invt/2002-0355.pet.ami.inv.pdf>.
- [27] - 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>
- [28] - S. Joe Bhatia, ANSI's New IBR Portal Provides Access to Standards Incorporated by Reference, Administrative Conference of the United States Blog, November 4, 2013 quoted in Carl Malamud, Testimony on Edicts of Government, House Judiciary Committee, January 14, 2014. <https://public.resource.org/edicts/>