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July 20, 2015

Hon. Howard Shelanski, Administrator
Office of Information and Regulatory Affairs (OIRA)
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C., 20503

Hon. Hilary Tompkins, Solicitor
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C., 20240

Dear Mr. Shelanski and Ms. Tompkins:

I am writing to you about a comment I recently submitted to a Notice of Proposed Rulemaking (NPRM) by the Department of Interior's Bureau of Safety and Environmental Enforcement (BSEE) entitled "Oil and Gas and Sulphur Operations in the Outer Continental Shelf-Update of Incorporated Cranes Standard." 80 FR 34113. The NPRM consists of updating the version of American Petroleum Institute (API) Specification 2C ("Specification for Offshore Mounted Cranes") from the 2004 edition to the 2012 edition. The public comment period for this NPRM lasted 30 days.

The comment I submitted may be viewed on Regulations.Gov as docket entry BSEE-2014-0002-0013. My original submission consisted of 3 items:

- My core comment was submitted as an HTML file. The comment is also viewable on our site at:

  https://law.resource.org/pub/us/cfr/regulations.gov.docket.12/bsee.interior.gov.20150715.html

- Attached to the comment was an animated GIF file consisting of 27 frames. The GIF file contains low-resolution screen shots which illustrate the poor nature of public access provided during the comment period to the 2004 edition of API 2C. The file is also viewable on our site at:

  https://law.resource.org/pub/us/cfr/ibr/002/api.2c.2004.gif

- Also attached to the comment was an HTML file that I prepared. It shows a significant transformation of the usability and accessibility of the 2004 edition of API 2C, an illustration of how much better existing law can become by using modern standards. The file is also viewable on our site at:

  https://law.resource.org/pub/us/cfr/ibr/002/api.2c.2004.html

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I am writing to you today about the arbitrary and unreasonable way my comment was removed from public view and mangled by BSEE.

As a threshold question, I would like to say that the comment period for this rulemaking was only 30 days, an absurdly short amount of time considering the importance of this public safety standard. Considering the years of effort BSEE has invested with API to participate in the formulation and possible adoption of the 2012 version of the standard, it is not reasonable to curtail the public comment period so drastically. Executive Order 12866, states:

> Each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.

After I submitted my comment, I noticed that BSEE had created a PDF version of the HTML file I created for the comment. We took great pains to make our submission accessible to people who are visually impaired, and I was dismayed to see how badly BSEE mangled the file when it created a PDF version. The PDF file it created does not meet the standards for accessibility set by the U.S. Access Board.

We have submitted numerous comments in this HTML format, and no other agency creates a PDF version of our submission. I wrote to the Desk Officer at BSEE and furnished the Bureau with a better PDF file, but BSEE ignored repeated messages from me. It is not proper for BSEE to create a mangled version of my comment and to post it on the docket as if the submission came from me. They should remove the PDF file they created and let my HTML submission stand alone, or, at the very least, allow me to furnish them with a properly accessible PDF file.

BSEE did much more than simply mangle the format of my comment, however. With no notice to me, both of my attachments were removed and a notice is now displayed indicating that:

> **Reason Restricted:**
> This attachment is restricted to show metadata only because it contains copyrighted data.

Let me be very clear, my use of API 2C-2004 was not some random document. API 2C-2004 is the law of the United States and is incorporated by reference into BSEE's own regulations at 30 CFR 250.198(h)(69). My use of this important safety document was also not random; it was integral to the point of my comment and illustrated the importance of public accessibility and usability of federal law.

It is inappropriate for the BSEE Desk Officer to be deciding that a document is or is not copyright, particularly without notifying me of the determination. In this case, the Desk Officer was simply incorrect in censoring my comment. There are many reasons that the documents in question were properly submitted and should not have been restricted.

First, the Department of Justice's Office of Information Policy Guide on Copyrighted Materials (FOIA Update, Vol. IV, No. 4, 1983) is very clear about the status of U.S. law:

> As a threshold matter, the courts have over the years placed a "judicial gloss" on the Copyright Act to generally preclude copyright status for works embodying statutes, opinions, and regulatory matters, based upon the general principle that such governmental matters should properly be in the public domain. See, e.g., Building Officials & Code Administrators International, Inc. v. Code Technology, Inc., 628 F.2d 730, 734-35 (1st Cir. 1980).

This is the same position taken by the U.S. Copyright Office in the Compendium of U.S. Copyright Office Practices, Third Edition, § 313.6(C)(2):

> As a matter of longstanding public policy, the U.S. Copyright Office will not register a government edict that has been issued by any state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials…See Banks v. Manchester, 128 U.S. 244, 253 (1888) ("there has always been a judicial consensus, from the time of the decision in the case of Wheaton v. Peters, 8 Pet. 591, that no copyright could under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties"); Howell v. Miller, 91 F. 129, 137 (6th Cir. 1898) (Harlan, J.) ("no one can obtain the exclusive right to publish the laws of a state in a book prepared by him").

API 2C-2004 is clearly the law of the land because it was incorporated by reference. As Joe Bhatia, the President and CEO of the American National Standards Institute has said repeatedly: "A standard that has been incorporated by reference does have the force of law, and it should be available." This is particularly true when the law in question is being discussed in a federal rulemaking procedure such as this.

There is also substantial question, irrespective of the status as a federal law, about the validity of the copyright on API 2C-2004. The document was framed by a large committee of volunteers, and it is unclear if this large number of authors properly assigned their copyright to API. In addition, many of those participants in the process are employees of the U.S. government, who are precluded from owning and thus transferring a copyright interest in work they do as part of their official duties. 17 USC § 105 ("United States Government works").

Even if the document in question were covered under copyright, my use of it within the context of a rulemaking proceeding by the federal government was clearly fair use. As the Department of Justice stated in its Policy Guide:

> In fact, reproduction of a copyrighted document by a government entity for a purpose that is not "commercially exploitive of the copyright holder's market," such as copying a work to use as evidence in a judicial proceeding, has been held to constitute a "fair use." Jartech, Inc. v. Clancy, 666 F.2d 403, 407 (9th Cir.), cert. denied, 103 S. Ct. 58 (1982). Indeed, the leading commentator on copyright law has found it "inconceivable that any court would hold such reproduction to

> constitute infringement." 3 M. Nimmer, Nimmer on Copyright § 13.05[D][2] (1983).

Public participation in the regulatory process is a key aspect of our system of rulemaking. As President Obama stated in Executive Order 13563 (January 18, 2011):

> To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.

Removing substantial sections of my comment violates President Obama's Executive Order, violates the provisions of the Administrative Procedure Act (5 USC § 553), and deprives my fellow citizens of the opportunity to view the important technical findings that I submitted. It was improper for BSEE to make a unilateral and incorrect decision about copyright without notifying me and to remove my comment from public view.

Sincerely yours,

Carl Malamud
President and Founder
Public.Resource.Org

cc: David Halperin
Of Counsel
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