



United States Department of the Interior

OFFICE OF THE SOLICITOR
1849 C STREET, NW
WASHINGTON, DC 20240

IN REPLY REFER TO:

VIA U.S. MAIL

Mr. Carl Malamud
President, Public.Resource.Org
1005 Gravenstein Highway North
Sebastopol, CA 95472

SEP - 8 2015

Re: Your letter dated July 20, 2015

Dear Mr. Malamud,

I am writing to you on behalf of Solicitor Hilary Tompkins in response to your letter dated July 20, 2015. As you know, in that letter you identified a number of concerns with respect to the treatment of your public comment by the Bureau of Safety and Environmental Enforcement (BSEE) in conjunction with BSEE's proposed regulatory update concerning cranes mounted on fixed oil and gas platforms on the outer Continental Shelf (OCS). BSEE's proposed rule would incorporate by reference the updated Seventh Edition of American Petroleum Institute (API) Specification 2C (Spec. 2C), "Offshore Pedestal-mounted Cranes" (2012), into its regulations in place of the Sixth edition of API Spec. 2C currently incorporated by reference in BSEE regulations.¹

Your principal concerns focus on two issues: the initial unavailability of your comment in Hypertext Markup Language (HTML), the native file format in which you submitted your comment, and BSEE's decision to withhold publishing two comment attachments based on BSEE's determination that those attachments contain copyrighted material. Specifically, your attachments presented the Sixth edition of API Spec. 2C in two different formats.

With respect to the first issue, it is my understanding that the administrator of the Federal Docket Management System (FDMS) is responsible for maintenance of the public dockets on regulations.gov and the manner and format in which public comments are posted on that website. In any event, as you requested, FDMS ultimately posted your comment in the HTML format. Accordingly, it appears that FDMS has addressed your concern about your comment's file format and its accessibility.

In regard to your second issue concerning copyrighted material, I have confirmed that BSEE's incorporation by reference of materials into its regulations does not waive or vitiate any applicable copyright protections associated with those materials. The Office of the Federal

¹ 30 C.F.R. § 250.108(c) and (d) currently require compliance with the Sixth edition of API Spec. 2C. The proposed rule would require compliance with the Seventh edition of API Spec. 2C. BSEE's current incorporation by reference of the Sixth edition of API Spec. 2C is reflected in 30 C.F.R. § 250.198(h)(69).

Register (OFR) recently explained that relevant laws “have not eliminated the availability of copyright protection for privately developed codes and standards . . . incorporated into federal regulations.” 79 Fed. Reg. 66267, 66268 (Nov. 7, 2014). Based on API’s longstanding position and BSEE’s review of the standard itself, BSEE reasonably concluded that the Sixth edition of API Spec. 2C is a privately developed standard protected by copyright maintained by API.² As OFR noted, an agency’s incorporation by reference of a copyrighted standard does not eliminate applicable copyright protections. Therefore, BSEE reasonably and properly concluded that FDMS should not post on regulations.gov the attachments associated with your comment because those attachments contained copyrighted material. BSEE also properly described its obligations concerning copyrighted material in the notice of proposed rulemaking: “When a copyrighted industry standard is incorporated by reference into our regulations, BSEE is obligated to observe and protect that copyright.”³ However, consistent with BSEE’s longstanding practice, and with OFR’s regulations on incorporation by reference (1 C.F.R. § 51.5), BSEE also provided instructions in that notice on how the public may view the incorporated API standard on API’s public website.⁴

In addition, even though BSEE correctly decided not to post API Spec. 2C in the docket on regulations.gov because of the copyright protections, BSEE continues to make this standard available, without charge, for public review and inspection at its offices.⁵ Thus, BSEE has made the material it proposes to incorporate by reference reasonably available to interested parties and discussed the reasonable availability of this material in accordance with 1 C.F.R. § 51.5(a)(1).

Sincerely,



Dennis Daugherty
Assistant Solicitor, Offshore Resources
Division of Mineral Resources
Office of the Solicitor

Cc: Honorable Hilary C. Tompkins
Solicitor, U.S. Department of the Interior

Mr. Brian M. Salerno
Director, Bureau of Safety and Environmental Enforcement

² In fact, it is my understanding that your attachments, which reproduced the Sixth edition of API Spec. 2C, also reflected API’s copyright designation and prohibition against reproduction or transmission without prior written permission.

³ 80 Fed. Reg. 34113, 34114 (June 15, 2015).

⁴ Id.

⁵ Id.