



NORTH AMERICAN ENERGY STANDARDS BOARD

801 Travis, Suite 1675 • Houston, Texas 77002 • Phone: (713) 356-0060 • Fax: (713) 356-0067
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May 31, 2012
Submitted via email

Mr. Michael L. White
Acting Director, Office of the Federal Register (NF)
National Archives and Records Administration
800 North Capitol Street, NW, Suite 700
Washington, D.C. 20001

RE: Petition for rulemaking and request for comments, Docket No. NARA-12-0002

Dear Mr. White,

NAESB appreciates the opportunity to offer these comments regarding National Archives and Records Administration's (NARA) announcement of a petition for rulemaking and request for comments on the incorporation by reference process. We offer the following general comments for your consideration provided in Attachment A and direct you to the 2006 Energy Law Journal article "North American Energy Standards Board: Legal and Administrative Underpinnings of a Consensus Based Organization,"¹ authored by the NAESB General Counsel, William P. Boswell. We are available to answer any questions or provide any additional information.

With Best Regards,

Rae McQuade

Rae McQuade, President, NAESB

cc: Michael Desselle, Chairman of the NAESB Board of Directors
William P. Boswell, NAESB General Counsel
Jonathan Booe, Deputy Director, NAESB

¹ William P. Boswell & James P. Cargas, *North American Energy Standards Board: Legal and Administrative Underpinnings of a Consensus Based Organization*, 27 Energy L. J. 47 (2006).



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Comments of the North American Energy Standards Board

The North American Energy Standards Board (NAESB) is an ANSI accredited, non-profit 501(c) (6) corporation formed in 1994 with the support of the Department of Energy (DoE). The voluntary standards and model business practices designed by NAESB streamline the transactional processes of the natural gas and electric industries by promoting more competitive and efficient services in the wholesale and retail natural gas and electric markets.

NAESB maintains a membership of over three hundred corporate members representing the wholesale gas, wholesale electric, retail gas and retail electric markets and has more than two-thousand participants active in standards development. NAESB and its predecessor organization, the Gas Industry Standards Board (GISB), have developed voluntary consensus based standards in these industries for nearly twenty years with the support of the industry itself, as well as the Federal Energy Regulatory Commission (FERC), the DoE, the North American Electric Reliability Corporation (NERC), the National Association of Regulatory Utility Commissioners (NARUC) and state utility commissions among other governmental and energy industry agencies and organizations.

NAESB has developed over one thousand standards that have been adopted by regulatory bodies through the process of incorporation by reference (IBR). A large portion of the NAESB standards development activity is initiated by the industry to support and provide uniformity in the implementation of actions taken by government and other energy industry agencies. Requests for standards development activity may come from a number of sources, including the FERC, state commissions, other government agencies, the NERC, NAESB members and non-members.

NAESB adheres to the ANSI principles of openness, balance of interests, due process, consensus and the availability of an appeals process. Every step of the NAESB process is fully documented through agendas, work papers, minutes, voting records and transcripts in order to provide complete transparency of actions taken and decisions made in the creation of the standards. The standards are voluntary, industry driven and only made mandatory through the actions of regulators. The organization is prohibited from advocating the adoption of its standards by regulators and does not adopt standards that direct policy decisions unless previously approved by the Board of Directors.

Entities that may be affected by a standard have an opportunity to voice their opinions and vote through a balanced process regardless of their membership status in NAESB and without the payment of any fees. The balanced voting by market segment ensures that no single segment of the market is dominated by the others as standards are crafted and decisions are made. Participation in the NAESB process provides entities, regardless of their membership status, the opportunity to have a seat at the table for the development of standards that may require implementation by that entity.

This process requires administrative, legal, technical, and support services in addition to services that ensure that all materials are available electronically. NAESB's revenue is generated from member dues, courses, and sales of standards -- the intellectual property that results from NAESB's efforts. NAESB is not a government-funded entity -- our revenue stream is solely comprised of revenues from member dues, courses, and sales of standards.



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Should non-members have a need to review our standards, including those that are incorporated by reference, they can do so by:

- (1) purchase of the standards,
- (2) participation in NAESB courses – which may require a fee for attendance,
- (3) requests of waivers – in which case reasons are presented for approval, or
- (4) requests for access through an electronic product that allows for electronic review for a limited period, at no fee and with no ability by the requestor to copy, download or otherwise store the text of the standard itself.

This fee structure permits non-members to access our work products for evaluation purposes and for commenting to regulators when our work products are considered for adoption as a part of regulations. Non-members recognize that their participation is subsidized by the dues of the members. The fee structure also continues to encourage new members to NAESB and existing members to maintain their memberships in NAESB. Having such a revenue model allows NAESB to support development of its standards at a modest membership fee and an equally modest fee for purchase of standards. The fee structure noted has been in place since our organization's incorporation in 1994, and was designed to fund our development activities by encouraging membership in the organization while at the same time making our work products available to non-members at a modest fee, or at no cost for electronic review and evaluation over a specific time frame.

If NAESB were obliged to make its standards available free of charge to all interested parties regardless of membership or requests as noted above, then other revenue models would be required. This could include such actions as an increase in membership dues; full charges for attendance at all conference calls, web casts, or meetings for non-members; charges for requests for standards development for non-members; charges for participation in subcommittees for non-members; or government funding to compensate for the costs of preparing and maintaining the standards and supporting work products. Fully charging non-members for participation at meetings could limit industry participation in the standard development process, and thus limit the broad vetting by the industry for our work products. As a result, instead of non-members raising concerns and issues during the development process when they can be more easily considered and incorporated into the text of the standards, the concerns likely would not be raised until a government agency proposes to incorporate the standard – which can result in additional costs and delays borne by the industry and the government agency – introducing inefficiencies into the process of government agencies considering standards developed by organizations such as ourselves.

In short, if the standards were uniformly available without cost, the incentive to join NAESB as a member would diminish, and if that were to occur in enough numbers our ability to develop and maintain new and existing standards would be compromised, perhaps to the point that we would cease to exist. This is no mere 'parade of horrors' as, without the wherewithal to fund standards development, we simply could not continue to function.

If membership benefits no longer were at a level that encouraged companies to join, then the minimal amount that non-members pay to access copyrighted and protected work products (which are developed at a significant cost by the industry) should be balanced against assigning the burden of the same development



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undertaken by a governmental agency after the cross-industry private entity is no longer economically sustainable and ceases to perform the function. This begs the question: how does this satisfy the public interest?

United States policy has consistently relied on standards developed in the private sector and incorporated by reference (IBR) into the Federal Register to increase efficiency, obtain a wide consensus from varied industry participants, drive competition, and decrease federal procurement and operating costs. Federal agencies are mandated to use the IBR process for the adoption of technical standards to meet the directives of the National Technology Transfer and Advancement Act of 1995 (NTTAA)¹ and the OMB Circular A-119,² “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities.” Section 12(d) of the NTTAA was passed by the Congress in order to establish the policies of the existing OMB Circular A-119 in law. The NTTAA specifically mandates in Section 12(d) that “all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.”³ As cited by petitioners, the IBR process has been employed by federal agencies and approved by the Director of the Federal Register for the purpose of reducing the amount of material published in the Federal Register, but more importantly, to comply with the purpose of the NTTAA and OMB Circular A-119, to reduce reliance on “government unique standards.” In a memorandum, dated January 17, 2012, the heads of U.S. executive departments and agencies were reminded:

“The vibrancy and effectiveness of the U.S. standards system in enabling innovation depend on continued private sector leadership and engagement. Most standards developed and used in U.S. markets are created with little or no government involvement. This approach- reliance on private sector leadership, supplemented by Federal Government contributions to discrete standardization processes as outlined in OMB Circular A-119 remains the primary strategy for government engagement in standards development.”

While US policy supports the process of incorporation by reference, it also works to “observe and protect” the intellectual property of those innovators who created the standards. The NAESB protected work products are final actions awaiting standards publication in a given version or the published standards themselves. They are protected by federal copyright with exclusive rights given to NAESB regarding the reproduction, distribution, adaptation and display. NAESB supports free public electronic access to its standards, available for a limited evaluative period, at the request of interested parties. The standards are freely available to all NAESB members. All regulators have free access to any of our work products. Other interested parties may purchase standards at a nominal cost, request a waiver, or request electronic access through a product that protects our work products and provides the requestor with an evaluation copy for a set period of time.

¹ National Technology Transfer and Advancement Act of 1995. 15 U.S.C. §3701 et seq. (1996).

² Office of Mgmt. & Budget, Executive Office of the President, OMB Cir. A-119 Revised, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities (1998).

³ 15 U.S.C. §1307



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The petitioners suggest that the copyright protection afforded to standards incorporated by reference should be altered in the interest of public access. However, balancing copyright protection against a perceived lack of public access is only a single component to the complex U.S. policy supporting IBR of standards. Other factors to weigh include the public-private partnerships formed in standards development and the funding needed to support such working relationships, the feasibility of government funding to offset the costs incurred by the industry in standards development, the maintenance and related costs of the standards, and the protection of the standards text itself to ensure that it is current and correctly stated.

An analogy can be drawn between standards development organizations, which charge minimal fees for access to their copyrighted work products, and educational institutions or publishers which charge fees for the materials used by students. The educational texts might not be available if there were not a means to recover the cost of publication and related costs for faculty and staff to create the material in the first instance. To continue with the analogy, students are assessed a cost to purchase course materials, and would likely not complete the course successfully without them. This analogy does not fundamentally differ from the issue in the proposed rule, except that the entities needing access to the standards have far greater asset bases than the average student and are asked to pay a far smaller amount for access than the cost of the average textbook. Both are work products; both are intellectual property; both come into being as a result of the efforts of numerous parties; and both would not exist in the absence of some means of recovering the cost of creation and production.

In NAESB's opinion this is not a problem in need of a solution. Ample means exist to permit affected parties to obtain standards for review, for discussion, and for use in an academic environment at little or no cost. Moreover, affected parties in the industry likewise have the opportunity to obtain standards for use in their businesses at a cost that is, at best, incidental to the cost of any implementation mandated by regulation. The predicate here is that standards development organizations such as NAESB perform a valuable societal function that otherwise would have to be done by regulatory bodies, and that the regulatory bodies in question encourage this process as both more efficient and less costly. It would be ironic if the proposed rules were to have the unintended consequence of causing that process to wither because, without revenue, it would not be sustainable. As an option for NARA to consider, NARA could attain digital rights software so that it can digitally lend the one copy of the standards an agency is required to provide to NARA – which is similar to the process used by libraries, and fully protects the federally copyrighted materials of the standards organizations.

NAESB appreciates the opportunity to respectfully submit these comments. Please feel free to contact Jonathan Booe, Deputy Director, North American Energy Standards Board, at naesb@naesb.org or 713-356-0060, should you need additional information.