



NORTH AMERICAN ENERGY STANDARDS BOARD

801 Travis, Suite 1675 • Houston, Texas 77002 • Phone: (713) 356-0060 • Fax: (713) 356-0067
email: naesb@naesb.org • Web Site Address: www.naesb.org

January 29, 2014
Submitted via mail and email

Ms. Amy Bunk
Director of Legal Affairs and Policy, Office of the Federal Register
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740

RE: Incorporation by Reference; Response to Petition and Notice of Proposed Rulemaking, Docket No. OFR-2013-0001

Dear Ms. Bunk,

NAESB appreciates the opportunity to offer these comments regarding the Office of Federal Register's response to petition and notice of proposed rulemaking concerning 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, Vice President, 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 standards development organization created for the purpose of developing voluntary standards and model business practices that 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 and its predecessor organization, the Gas Industry Standards Board formed in 1994, have developed more than three-thousand voluntary, consensus based standards in the energy industry for twenty years with the support of the Federal Energy Regulatory Commission, the U.S. Department of Energy, the North American Electric Reliability Corporation, the National Association of Regulatory Utility Commissioners and state utility commissions among other governmental and energy industry agencies and organizations.

As a large majority of these standards have been adopted by regulatory bodies through the process of incorporation by reference, they are made available to requesting parties through a number of methods. These methods include individual purchase, participation in NAESB courses, no-cost electronic access through a product that allows for electronic review of our standards for a limited period without the ability to copy, download or otherwise store the text of the standard itself, and, of course, membership within the Organization. In addition, parties may request a waiver to the reasonable purchase price of the standards; such requests are considered on case-by-case basis. NAESB will continue to offer these methods of access to the standards to ensure that they are reasonably available to all interested parties through several options for review.

NAESB will also continue to support regulatory bodies interested in NAESB standards by drafting reports that generally describe the new standards and modifications to existing standards that are included in each new publication of standards. This practice has been in place for many years and is intended to provide a high level summary of modifications made to the NAESB standards between versions for both regulatory bodies and industry participants that may be responsible for implementing the standards if adopted, as hundreds of standards are typically modified or added between publications. These summaries also supplement the extensive documentation maintained throughout the standards development process, including meeting minutes, transcripts and voting records, which can total hundreds, if not thousands of pages.

While NAESB generally supports the proposed rules, we are concerned about the lack of specificity in the regulations about what is sufficient to constitute “reasonable availability” and the proposed alternative requirement to provide summaries of standards. We believe NAESB’s current practices of submitting reports to regulatory bodies and providing multiple methods of access to standards should be sufficient to support interested entities that may have to comply with the proposed rules; however, issues may still exist for standards organizations that may not be able, financially or otherwise, to provide multiple methods of access to copyright protected materials for review and for agencies that may not be able to craft summaries that do not violate copyright law. The regulation is not clear as to how detailed such “summaries” must be; however, a summary should not be a repetition of the standard itself. Requiring overly detailed descriptions of the hundreds of individual standards in the materials incorporated by reference may present unintended challenges to regulatory bodies attempting to adopt copyright protected works. The sole purpose of summaries should be to alert potentially affected parties to items which may be of interest to them. That said, once the alert has been made it is incumbent upon the potentially affected party to read the text itself. Having an overly detailed summary is problematic for two reasons: first, it is not a substitute for the text, and



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second, agencies should not be placed in the position of having to argue, much less litigate, whether the summary was “detailed enough” and thus place form over substance. Any affected parties are bound by the full text of the rule(s), not the summary.

For these reasons, we request the Office of the Federal Register to consider the level of detail that should be required by agencies proposing materials for incorporation by reference and how it may impact both the agencies and those responsible for complying with the proposed material.

Finally, there is the question of perspective. In NAESB’s case any interested party may review the full text of our standards at no charge; they simply may not copy nor publish it. Should our standards be adopted by a regulatory body and become binding upon a reviewing party as a result of such adoption, the cost of acquiring use rights to the full text is de minimis compared to the cost of compliance itself. More colloquially, the tail should not wag the dog.

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