

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<p>AMERICAN SOCIETY FOR TESTING AND MATERIALS d/b/a ASTM INTERNATIONAL;</p> <p>NATIONAL FIRE PROTECTION ASSOCIATION, INC.; and</p> <p>AMERICAN SOCIETY OF HEATING, REFRIGERATING, AND AIR CONDITIONING ENGINEERS,</p> <p style="text-align: center;">Plaintiffs/ Counter-Defendants,</p> <p>v.</p> <p>PUBLIC.RESOURCE.ORG, INC.,</p> <p style="text-align: center;">Defendant/ Counter-Plaintiff.</p>	<p>Case No. 1:13-cv-01215-TSC</p>
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**PLAINTIFFS' THIRD SUPPLEMENTAL STATEMENT OF MATERIAL FACTS IN  
SUPPORT OF THEIR SECOND MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Rule 7(h), Plaintiffs American Society for Testing and Materials (“ASTM”), National Fire Protection Association, Inc. (“NFPA”) and American Society of Heating, Refrigerating, and Air Conditioning Engineers (“ASHRAE”) (collectively, “Plaintiffs”) hereby submit, in support of their Second Motion for Summary Judgment, this Third Supplemental Statement of Material Facts<sup>1</sup> as to which there is no genuine issue to be tried.

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<sup>1</sup> Plaintiffs filed an original Statement of Material Facts (Dkt. 118-2) (“SMF”), Supplemental Statement of Material Facts (Dkt. 155-1), and a Second Supplemental Statement of Material Facts (Dkt. 201). The facts contained in this Third Supplemental Statement of Material Facts are additional to the already-developed record. Plaintiffs also have relied on and cited to their prior statements of material facts in support of their Second Motion for Summary Judgment.

1. PRO stated that Exhibits 89 to 91 to the Supplemental Declaration of Matthew Becker “show[] the citation and text of at least one federal incorporation into the C.F.R. of each complete standard.” Opp. 8; *see also* Supplemental Declaration of Matthew Becker, previously filed at Dkt. 204-5 (“Supp. Becker Decl.”). As explained below, this is not accurate:

2. Exhibit 89 to the Supplemental Becker Declaration is titled “ASHRAE Editions Incorporated by Reference” and includes a chart listing each of the ASHRAE standards at issue, with a column for, *inter alia*, “C.F.R. Reference. Supp. Becker Decl. ¶ 57, Ex. 89. Though PRO posted ASHRAE’s standards in 2012, for three of the four identified works on Exhibit 89, PRO lists a C.F.R. reference from 2013 or later. *See id.*

3. Additionally, PRO’s chart does not actually demonstrate that the cited C.F.R. reference has any relation to large parts of the referenced works. Plaintiffs have prepared a chart that demonstrates this. *See* Wise Decl. II ¶ 14, Ex. 186. In short, the C.F.R. references that PRO provides in its chart relate to use of government funds to build new structures within the United States, yet the ASHRAE standards contain numerous non-prescriptive elements, including entire appendices of information related to how best to comply with the standards in foreign territories. *Id.* Plainly, those appendices (and other non-prescriptive elements in the ASHRAE standards) do not relate to the C.F.R. sections cited by PRO. Additionally, one of the ASHRAE works in question is a handbook that contains guidance related to compliance with ASHRAE standards, which was IBR’d to aid in compliance with other ASHRAE standards referenced in the same portions of the C.F.R. That handbook contains text pertaining to multiple ASHRAE standards, including those not IBR’d in that portion of the C.F.R., thus large portions of the handbook do not relate to the cited C.F.R. cite PRO provides. *Id.*

4. Exhibit 90 to the Supplemental Becker Declaration is titled “ASTM Editions Incorporated by Reference” and includes a chart listing each of the ASTM standards at issue, with columns for, *inter alia*, “C.F.R. Reference.” Supp. Becker Decl. ¶ 57, Ex. 90. For more than 20% of the ASTM Works (41 standards), Exhibit 90 identifies a citation to a provision of the C.F.R. that was not promulgated until after PRO posted the standards in 2012. Wise Decl. II ¶ 4, Ex. 176.

5. For approximately 30% of the ASTM Works (56 standards), Exhibit 90 identifies a citation to a provision of the C.F.R. that had been amended to eliminate reference to the ASTM Work at issue or to incorporate a different ASTM standard prior to the time PRO posted ASTM’s Works in 2012. *Id.*

6. Exhibit 91 to the Supplemental Becker Declaration is titled “NFPA Editions Incorporated by Reference” and includes a chart listing each of the NFPA standards at issue, with columns for, *inter alia*, “C.F.R. Reference.” Supp. Becker Decl. ¶ 58, Ex. 91. Plaintiffs have provided a chart that responds to each of the C.F.R. references that PRO identifies. *See* Wise Decl. II ¶ 3, Ex. 175.

7. As shown in Plaintiffs’ chart, Exhibit 91 does not contain any citation to a federal regulation that incorporates by reference four of the NFPA standards at issue. *See id.* (NFPA 1 (2003), NFPA 1 (2006), NFPA 54 (2006), NFPA 70 (2008)).

8. For the remaining 19 NFPA standards at issue, the federal regulations PRO identifies have no relevance to many portions of the standards. *See id.* For example, PRO’s Exhibit 91 identifies a regulation providing that “fixed extinguishing systems” must comply with NFPA 11 (2005), but that standard includes provisions related to fixed, semifixed, and portable systems—the standard’s provisions related to semifixed and portable systems are not necessary to complying with the regulation PRO identifies. *Id.* at 2; *see also generally* Supplemental

Declaration of James Pauley, previously filed at Dkt. 198-50, (“Supp. Pauley Decl.”) Ex. D (Dkt. 199, sealed). Similarly, Exhibit 91 identifies a regulation that requires veterans’ cemeteries to meet the architectural and structural requirements of NFPA 101 (2003); that regulation does not require compliance with the standard’s provisions related to one- and two-family dwellings, not to mention day-care occupancies, educational occupancies, industrial occupancies (or numerous others). Wise Decl. II ¶ 3, Ex. 175 at 19; *see also generally* Supp. Pauley Decl. Ex. T (Dkt. 199, sealed).

9. 164 of the 191 ASTM standards at issue are available for free read-only access on ASTM’s website; with respect to the remaining 27 ASTM standards at issue, ASTM is not aware of any regulation that has incorporated those standards by reference and PRO has not identified any. Declaration of Thomas O’Brien, previously filed at Dkt. 118-7, ¶ 60; Declaration of Jane Wise, previously filed at Dkt. 198-5, ¶ 157, Ex. 156. Each of the 23 NFPA standards at issue in this litigation is available for free read-only access on NFPA’s website. Supp. Pauley Decl. ¶¶ 40-41. Each of the 3 ASHRAE standards at issue in this litigation is available for free read-only access on ASHRAE’s website. Declaration of Stephanie Reiniche, previously filed at Dkt. 118-10, ¶ 19.

10. In at least eleven instances, PRO’s Internet Archive postings continue to display the ASTM Logo. Wise Decl. II ¶ 5, Ex. 177.

Dated: December 23, 2019

Respectfully submitted,

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