



**AMERICAN PYROTECHNICS ASSOCIATION  
PETITION  
To The  
NFPA BOARD OF DIRECTORS  
On The  
STANDARDS COUNCIL DECISIONS (FINAL & SHORT) D#13-2**

**Submitted by:**

**Julie L. Heckman  
Executive Director  
American Pyrotechnics Association  
7910 Woodmont Avenue, Suite 1220  
Bethesda, MD 20814**

**May 16, 2013**

**Table of Contents**

- I. Summary of Grounds for Seeking Reversal of Council Decision D#13-2 and Withdrawal of TIA Log No. 1094. .... 2
- II. History Relevant to this Petition ..... 3
  - A. 1995 – 2007 ..... 3
  - B. 2007 – Present ..... 4
    - 1. Standards Council Decision D#08-19 ..... 5
    - 2. APA Responds to Standards Council Decision D#08-19..... 6
    - 3. The Standards Council Issues Decision D#12-4 Imposing Impossible Requirements and “Hinting” That It Might Issue a Tentative Interim Amendment ..... 7
    - 4. The Council Issues Decision D#12-17 Abandoning Its Prior Decision, Announcing Its Plans to Issue a TIA, Abandoning the Section 5 Process..... 9
    - 5. The Council Turns the TIA Process Over to the NFPA staff, Conducts No Public Hearing, Misleads the PYR TC Balloters in the Voting Process, and Disregards the Ballots ..... 13
    - 6. The Council issues TIA No. 1094 ..... 14
- III. Discussion of Grounds for Withdrawal of TIA..... 16
  - A. The Standards Council improperly disregarded the overwhelming vote of the Technical Committee that rejected the TIA language proposed in Standards Counsel Decision D#12-17..... 16
  - B. The TIA was adopted in violation of Sections 5.1 and 5.3 of the *NFPA Regulations Governing the Development of NFPA Standards*, which require that before any TIA is adopted, there must be a finding of an appropriate emergency. Here, no emergency has ever been asserted, nor is there anything in the record of this TIA that suggests that any emergency exists. .... 22
  - C. The TIA was adopted contrary to Standards Council Decision D#12-7, which directed the NFPA staff to work with the PYR TC to prepare the TIA. .... 26
  - D. The Standards Council unilaterally, without consultation or authority, and without proper basis, changed the NFPA standards development process to avoid consultation

with the PYR TC or notice to the public, by abandoning the two processes it announced it was considering and unilaterally short circuiting the process. .... 27

E. The TIA does not address any safety concerns at all. It was designed merely to reflect the animosity that certain NFPA staff and the President have toward consumer fireworks and to punish the consumer fireworks industry for not undertaking and completing testing requirements that could not have possibly been completed in the time given. .... 29

IV. Relief Requested: ..... 30

V. CONCLUSION..... 31

**AMERICAN PYROTECHNICS ASSOCIATION**  
**PETITION**  
**To The**  
**NFPA BOARD OF DIRECTORS**  
**On The**  
**STANDARDS COUNCIL DECISIONS (FINAL & SHORT) D#13-2**

**Petitioner:** Ms. Julie L. Heckman, Executive Director  
American Pyrotechnics Association (APA)  
7910 Woodmont Avenue, Suite 1220  
Bethesda, MD 20814

**Statement:** In accordance with Paragraph 1.7 of the *Regulations Governing Committee Projects*, the APA is hereby submitting a Petition regarding National Fire Protection Association (NFPA) Standards Council Decision D#13-2, issuing Technical Interim Amendment (TIA) Log No. 1094 to NFPA Standard 1124. This Petition seeks withdrawal of the TIA. The Short Decision D#13-2 is dated March 7, 2013 and was issued on March 14, 2013.<sup>1</sup> The Final Decision D#13-2 is dated March 7, 2013 and was issued on April 26, 2013.<sup>2</sup> The American Pyrotechnics Association (APA) submitted a Notice of Intent to File a Petition on March 22, 2013.<sup>3</sup> In the Notice of Intent to File a Petition, the APA also requested that the effective date of the TIA be stayed pending this appeal.<sup>4</sup> In a letter dated March 26, 2013, the Petitions Clerk to the NFPA Board of Directors (Board) advised that NFPA President Jim Shannon denied the request to stay the effective date of the TIA, despite APA's argument that the TIA will cause undue and irreparable harm.<sup>5</sup> The denial does not provide any reasons for denying the request to stay the effective date.

---

<sup>1</sup> NFPA, Standards Council Decision (Short) D#13-2 (decided March 7, 2013, issued March 14, 2013) (Exhibit 1) (hereinafter "Standards Council Decision (Short) D#13-2").

<sup>2</sup> NFPA, Standards Council Decision (Final) D#13-2 (decided March 7, 2013, issued April 26, 2013) (Exhibit 2) (hereinafter "Standards Council Decision D#13-2").

<sup>3</sup> APA, Notice of Intent to File a Petition, Standards Council Decision (Short Form) D#13-2 (March 22, 2013) (Exhibit 3).

<sup>4</sup> *Id.*

<sup>5</sup> NFPA Letter to APA re: Petition to the NFPA Board of Directors, Standards Council Decision (short form) D#13-2, Request for Interim Relief (March 26, 2013) (Exhibit 4) (hereinafter "NFPA Letter Denying Interim Relief").

**I. SUMMARY OF GROUNDS FOR SEEKING REVERSAL OF COUNCIL DECISION D#13-2 AND WITHDRAWAL OF TIA LOG NO. 1094.**

The TIA should be withdrawn because it was adopted in blatant violation of applicable NFPA procedures, and in complete disregard for the consensus building process that those regulations and procedures embody, as well as the requirements of the American National Standards Institute (ANSI), which NFPA is required to follow. The record demonstrates that the TIA was adopted as a pretext to attempt to destroy the consumer fireworks industry and advance the NFPA's "strong institutional policy against the use of consumer fireworks,"<sup>6</sup> despite the laws of 46 states, plus the District of Columbia and Puerto Rico, authorizing and supporting the sale of consumer fireworks, and the NFPA Board's approval for the development of NFPA 1124. While the Council apparently believes that consumer fireworks should not be used by anyone, the TIA does not regulate consumer *use* of fireworks at all, but rather restricts the size of consumer fireworks retail sales and storage facilities. NFPA takes this step, despite lacking any evidence that current retail sales and storage standards are demonstrably inadequate.

The Council violated numerous procedures in order to create the TIA, and could not have achieved its improper aims without committing such violations. Those violations include:

- A. The Standards Council improperly disregarded the overwhelming vote of the NFPA Technical Committee on Pyrotechnics (PYR TC) that rejected the TIA language proposed in Standards Council Decision D#12-17.
- B. The TIA was adopted in violation of Sections 5.1 and 5.3 of the *NFPA Regulations Governing the Development of NFPA Standards*, which require that before any TIA is adopted, there must be a finding of an appropriate emergency. Here, no emergency has ever been asserted, nor is there anything in the record of this TIA that suggests that any emergency exists.
- C. The TIA was adopted contrary to Standards Council Decision D#12-17, which directed the NFPA staff to work with the PYR TC to prepare the TIA.
- D. The Standards Council unilaterally, without consultation or authority, and without proper basis, changed the NFPA standards development process to avoid consultation with the PYR TC or notice to the public, by abandoning the two processes it announced it was considering and unilaterally short circuiting the process.
- E. The TIA does not address any safety concerns at all. It was designed merely to reflect the animosity that certain NFPA staff and the President have toward

---

<sup>6</sup> NFPA, Standards Council Decision (Final) D#12-4, at 2 (decided Aug. 9, 2012, issued Aug. 20, 2012) (Exhibit 5) (hereinafter "Standards Council Decision D#12-4").

consumer fireworks and to punish the consumer fireworks industry for not undertaking and completing testing requirements that could not have possibly been completed in the time given.

## **II. HISTORY RELEVANT TO THIS PETITION**

### **A. 1995 – 2007**

Since 1995, there has been a long history regarding which committee should be responsible for developing standards for the safe storage and retail display of consumer fireworks in retail establishments.<sup>7</sup> Time and again there have been efforts by those opposing the use of consumer fireworks at all to use the standards process as a stalking horse for pursuing that policy goal, and this has often manifested itself in efforts to manipulate committee jurisdiction. Ultimately, the Board voted to move forward with standards and specifically determined that jurisdiction on this issue rests with the PYR TC.

But the dispute did not end there. The Council's desire to end the sale of consumer fireworks completely was evident when the PYR TC sought to develop fire standards to implement NFPA 1124. On September 15, 2005, the PYR TC requested a further change in its scope to allow it to develop fire test standards needed to implement important requirements in NFPA 1124. In November 2005, instead of allowing the PYR TC to go forward, the Council unilaterally decided to defer action on the request, and instead proposed to:

1. Not allow the development of product standards or test procedures on the requested subjects by PYR TC, and instead have such standards developed by third party testing and certification organizations;
2. Limit the PYR TC to developing performance criteria on these subjects to be used by third party testing and certification organizations; and
3. Require that research or other adequate technical basis for any such performance criteria developed be presented.<sup>8</sup>

This decision was arrived at without any input from the PYR TC. The Council received overwhelming public support for the PYR TC to develop the proposed fire test methods. As a result, at its March 2006 meeting, the Council decided not to pursue its three proposed actions and to allow the PYR TC to proceed with the development of the fire tests standards.<sup>9</sup> But

---

<sup>7</sup> This history is described at length in APA Petition (Revised January 14, 2013) To the NFPA Board of Directors On the Standards Council Decisions (Final & Short) D#12-4 and D#12-17 (Jan. 14, 2013) (Exhibit 6).

<sup>8</sup> Final Minutes, NFPA Standards Council Meeting (Oct. 27, 2005) (Exhibit 7).

<sup>9</sup> NFPA Standards Council Decision D#06-04 (decided March 22, 2006, issued May 23, 2006) (Exhibit 8).

because of its belief that there was insufficient research or testing to support the proposed drafts of the fire test standards, and to place unnecessary roadblocks to PYR TC's efforts, the Council took the unprecedented step of deciding to impose three criteria that must be satisfied before the Council would allow the drafts to even enter the revision cycle:

1. The drafts must clearly state the performance criteria the test methods are designed to measure;
2. The performance criteria and test method would only be deemed sufficient if they reflected actual use conditions as demonstrated by full-scale testing, and
3. A credible independent third party review has been conducted to confirm the validity of the test methods.

**B. 2007 – Present**

At its October 2007 meeting, the Council was briefed on an October 1, 2007 Fire Protection Research Foundation (FPRF) report entitled "Fire Safety in Consumer Fireworks Storage and Retail Facilities – Hazard Assessment."<sup>10</sup> The report did not contain any evidence that Chapters 6 and 7 were demonstrably inadequate based on experience in the field. In fact, the data in support of NFPA 1124 was at least as good,<sup>11</sup> if not better, than data used to support the development of other sprinkler design criteria (e.g., NFPA 13). Nonetheless, based on this report, the Council decided to delete Chapters 6 and 7 from NFPA 1124, based on the premise that these chapters allegedly lacked an adequate technical basis. In addition, the Council decided to delete the responsibility for the storage and retail sales of consumer fireworks from the scope of the PYR TC. But the Council also decided to seek public comment on their decisions before they were implemented.

On June 2, 2008, the Council held a public hearing. Most of the speakers strongly opposed the Council's decision. In fact, the testimony overwhelmingly supported the PYR TC's continued work on developing the proposed test standards and Chapters 6 and 7 of NFPA 1124 and to retain their authority to do so.<sup>12</sup>

---

<sup>10</sup> Fire Protection Research Foundation, *Fire Safety in Consumer Fireworks Storage and Retail Facilities – Hazard Assessment Research Project*, prepared by Schirmer Engineering Corporation (Oct. 2007) (Exhibit 9).

<sup>11</sup> Data available upon request from APA. See also APA Letter to NFPA Standards Council re: FPRF Fire Safety in Consumer Fireworks Storage and Retail Facilities Hazard Assessment – Request for Proposals (March 27, 2007) (Exhibit 10).

<sup>12</sup> Transcript, NFPA Standards Council Hearing on the Retail Sale of Consumer Fireworks (June 2, 2008) (Exhibit 11).

1. Standards Council Decision D#08-19

On October 1, 2008, the Council issued another unprecedented decision, which was largely a broad-based and unsupported attack on the consumer fireworks industry.<sup>13</sup> On the one hand, it acknowledged that the NFPA had voted to support development of standards relating to consumer fireworks and that the Board had definitively assigned jurisdiction to do so to the PYR TC. It claimed a need to address a number of items, but not because there was evidence suggesting the current standards were inadequate. Rather, it said:

- There was a lack of data to support current retail sale and storage standards (but noted no evidence that those standards, which had been in place for years, were actually shown to be problematic);
- There is a strong NFPA policy disapproving the use of consumer fireworks and NFPA did not want to develop standards for retail sale and storage (even though the Board had clearly voted to do so);
- It claimed there has been “chaotic” processing of standards because it was unable to follow what some Technical Committees had done (but said it would not recount that history and did not provide a single example of a standard that was improperly adopted);
- It rejected the industry’s efforts to devote “energy and resources” as inexplicable (but never addressed what the industry actually was doing nor did it point to any examples of existing standards being inadequate). Without any discussion of the technical basis for its decision, other than passing references to “the record” and no evidence that the current standards were inadequate, the Council instead said: “the Council is disappointed by the response of the representatives of the consumer pyrotechnics industry.”<sup>14</sup>

Despite the NFPA vote to develop standards, the Council threatened to end the process for developing standards for the storage and retail sale of consumer fireworks. Instead, it decided to “allow” the PYR TC to continue its development of the proposed fire test standards and revisions to Chapters 6 and 7 of NFPA 1124, but only if very specific and detailed procedures, requirements, and deadlines established by the Council were met. The Council required the PYR TC to satisfy what have become known as the “nine points of light” - nine technical requirements that had to be satisfied through an unreasonably cumbersome process that involves obtaining the approvals of various other NFPA Technical Committees with

---

<sup>13</sup> NFPA, Standards Council Decision D#08-19 (decided July 24, 2008, issued Oct. 1, 2008) (Exhibit 12) (hereinafter “Standards Council Decision D#08-19”).

<sup>14</sup> *Id.* at 3.

expertise in the subject areas at both the Report on Proposals (ROP) and Report on Comments (ROC) phases, with a deadline of completing all the items by the 2012 annual cycle. ***Again, the Council did not cite a single example of how current standards proved inadequate in practice.*** The Council recognized the extraordinary cost and effort that would be required.<sup>15</sup>

Notwithstanding setting this aggressive time frame, the Council took over two months to issue its final decision on the matter. The Council also threatened to revise the scope of the PYR TC's authority so that it would no longer include the storage and retail sales of consumer fireworks and to summarily delete Chapters 6 and 7 from NFPA 1124 if the PYR TC did not satisfy the Council's nine demands. It gave no reason to make this threat other than its historic opposition to consumer fireworks generally.

In the spirit of seeking consensus, APA and others aggressively worked to meet these conditions, despite the belief that they were really just another effort by the Council to further its position that consumer fireworks should be banned. APA had faith that the procedure governing that process would ensure its integrity.

## 2. APA Responds to Standards Council Decision D#08-19

Since 2008, eight of the nine conditions have been met. The only remaining issue is the question of whether the current sprinkler standards should be retained. In that regard, much action has been taken. In an effort to comply with the conditions imposed by the Council, the APA conducted a number of fire tests, and that test information has been presented to numerous NFPA Committees and organizations, including the Technical Correlating Committee on Automatic Sprinkler Systems – Task Group to Review Sprinkler System Discharge Criteria.<sup>16</sup> Sprinkler testing had already been conducted in 2001 with Omega Point Laboratories specifically to help develop the sprinkler criteria laid out in the 2003 initial edition of the code. These tests formed the foundation for the first edition of Chapters 6 and 7 of NFPA 1124. Presentations were shared with the PYR TC in 2001 and 2002.<sup>17</sup> Final reports confirming those tests were prepared by Southwest Research Institute (SwRI) and submitted to NFPA.

It was not until around June 2010 that the Sprinkler Discharge Committee provided the APA with concerns regarding the test protocol that was used, even though it could point to no

---

<sup>15</sup> *Id.* at 12 (“Ultimately, of course, producing acceptable standards within the time framework set forth in this decision will require a concerted commitment of the industry or others to fund and implement reliable and reviewable research and testing.”).

<sup>16</sup> Memorandum from Technical Correlating Committee on Automatic Sprinkler Systems – Task Group to Review Sprinkler Criteria in NFPA 1124 to Jerry Farley, NFPA 1124 Task Group Chair, re: Task Group Review and Comments on Proposed NFPA 1124 Sprinkler Provisions (Oct. 28, 2009) (Exhibit 13).

<sup>17</sup> All of this information has been provided to the NFPA and is available to the Board upon request to the APA.

demonstrable inadequacy in the standard.<sup>18</sup> Proposals were discussed by the PYR TC and reported to the Discharge Committee in February 2011.<sup>19</sup> In response, the APA funded a research project by the Fire Protection Research Foundation to determine another appropriate test protocol. That report, “Sprinkler Protection Criteria for Consumer Fireworks Storage in Retail Facilities” (also referred to as the “Aon Report”), was completed in September 2011.<sup>20</sup> It was presented to the Discharge Committee that same year. For reasons that the Council has been unable to provide, and for which no record apparently exists, the Discharge Committee did not vote on PYR TC’s work.<sup>21</sup> The Discharge Committee voted to submit a Public Comment on NFPA 1124, but a comment was never submitted.<sup>22</sup> At the ROC meeting of the Discharge Committee,<sup>23</sup> an APA Consultant asked the Committee if it was still their position to have the language revised in NFPA 1124. The members of the Committee present at the meeting voted to support such language, and the APA Consultant prepared language to be addressed as a Committee Comment by the PYR TC. The language was adopted by the PYR TC<sup>24</sup> and was incorporated into NFPA 1124 without any subsequent action, such as a Notice of Intent to Make a Motion (NITMAM) or Appeal.

### 3. The Standards Council Issues Decision D#12-4 Imposing Impossible Requirements and “Hinting” That It Might Issue a Tentative Interim Amendment

In August 2012, despite the lack of any NITMAM’s or Appeals, the Council considered a revised edition of NFPA 1124 that incorporated eight of the nine conditions required by the APA and the language developed by the Discharge Committee. Instead, it issued Decision D#12-4 (decided August 9, 2012 and issued on August 24, 2012).<sup>25</sup> That decision cites no

---

<sup>18</sup> Letter from Southwest Research Institute to Secretary, NFPA Standards Council, re: Response to NFPA Standards Council Evaluation of Draft Test Methods (Proposed Standards) for Covered Fuses and Flame Breaks (July 7, 2010) (Exhibit 14).

<sup>19</sup> TC on Sprinkler System Discharge Criteria ROP Meeting Minutes (Feb. 10-11, 2011) (Exhibit 15); Exhibit 5 at 4, Standards Council Decision D#12-4.

<sup>20</sup> Fire Protection Research Foundation, *Sprinkler Protection Criteria for Consumer Fireworks Storage in Retail Facilities: Concept Test Plan* (prepared by Aon Fire Protection Engineering Corp.) (Sept. 2011) (Exhibit 16).

<sup>21</sup> Exhibit 5 at 6, Standards Council Decision D#12-4.

<sup>22</sup> Exhibit 15, TC on Sprinkler System Discharge Criteria ROP Meeting Minutes (Feb. 10-11, 2011).

<sup>23</sup> Discharge Committee Meeting (Sept. 22-23, 2011).

<sup>24</sup> NFPA Technical Committee on Pyrotechnics Minutes of ROC meeting – Minneapolis, MN (Oct. 14, 2011) (Exhibit 17); Memorandum from NFPA Technical Committee on Pyrotechnics, re: NFPA 1124 ROC TC Letter Ballot (A2012) (Oct. 26, 2011) (Exhibit 18).

<sup>25</sup> Exhibit 5, Standards Council Decision D#12-4.

evidence that the current standards present in NFPA 1124 for many years were demonstrably inadequate. It acknowledges that there were technical steps that needed to be undertaken, and that PYR TC had adopted an interim solution.<sup>26</sup> It also said:

[T]he Discharge Committee agreed that, at least through the Proposal Stage and strictly as an interim measure, the Pyrotechnics Committee could substitute prescriptive sprinkler criteria with a provision requiring an engineering analysis prepared by a fire protection engineer . . . the record shows that the Discharge Committee allowed this as an interim measure.<sup>27</sup>

Notwithstanding this, and claiming that the record was “difficult to follow,” the Council said “[t]here is no evidence in the record that the Discharge Committee either saw or approved of this provision[ ]. . . .”<sup>28</sup> Ignoring the evidence presented by the APA regarding alternative testing, it said, “the failure of the industry or others with an interest in selling consumer fireworks to have the necessary testing program initiated and completed . . . [and] there appears to have been no steps taken to conduct any tests or justification for the delay offered.”<sup>29</sup> Instead, it directed the PYR TC to either:

1. Conduct all required tests within a year; or
2. Process a Tentative Interim Amendment (TIA) to limit the threshold of all permanent Consumer Fireworks Retail Sales (CFRS) facilities and stores to below 3000 sq. ft. for new buildings and 7500 sq. ft. for existing buildings.<sup>30</sup>

Again, in an effort to focus on achieving consensus, APA did not appeal the entire decision, though it lacked any support and it seemed apparent it was motivated by the Council’s animus for consumer fireworks generally. Rather, on August 24, 2012, APA filed an appeal of the Directions for Further Processing contained in Decision D#12-4 (Short), seeking a delay in its processing pending reconsideration of the time frame for testing set forth in that decision, and requesting a hearing.<sup>31</sup> On September 24, 2012, APA wrote to the Council explaining again, in detail, why the testing time frame was unreasonable, proposing an

---

<sup>26</sup> *Id.* at 6.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Id.* at 7.

<sup>31</sup> Letter from APA to Clerk, NFPA Board of Directors, re: Notice of Intent to File a Petition, Standards Council Decision (Short Form) D#12-4 (Aug. 24, 2012) (Exhibit 19).

alternative schedule, clarifying the actions taken by the Discharge Committee that the Council was apparently unaware of, and noting that the Council had improperly revised NFPA 1124 in violation of the retroactivity clauses of NFPA 1124 and NFPA 13.<sup>32</sup> On October 29, 2012, APA was invited to speak at a Council hearing regarding its appeal.<sup>33</sup>

4. The Council Issues Decision D#12-17 Abandoning Its Prior Decision, Announcing Its Plans to Issue a TIA, Abandoning the Section 5 Process.

In October 2012, the APA proposed an alternative test protocol to the Council, in part, in recognition of the pending time frame<sup>34</sup> and the lack of financial support from interested parties for the Foundation test program.<sup>35</sup> In doing so, the APA advised the Council that based upon information from the Foundation, the original test program demanded by the Council could not possibly be completed by August 2013.<sup>36</sup> Further, the APA advised the Council that at least two primary insurance companies who insure against risk for virtually the entire consumer fireworks industry concluded that additional testing was unnecessary and unwarranted.<sup>37</sup> Evidence was submitted documenting that at least one test laboratory supported the alternative test program as a place to start. The Council was also made aware of a proprietary test program that is not available to the APA that was used to justify sprinkler design criteria.<sup>38</sup> The proprietary test program was deemed acceptable to the insurer for the properties in question. APA also requested an extension of the August 2013 time frame, but noted that if a special meeting was called of the Technical Committee on Sprinkler System Discharge Criteria it may be possible to have the requested technical information in time for a TIA to be issued in August 2013.<sup>39</sup> No evidence was presented that actual experience with the current standard suggested it was inadequate.

---

<sup>32</sup> Letter from APA to Secretary, Standards Council, re: D#12-4 – Issuance of NFPA 1124 (Sept. 24, 2012) (Exhibit 20).

<sup>33</sup> Transcript, NFPA Standards Council Meeting (Oct. 29, 2012) (Exhibit 21) (hereinafter “Transcript (Oct. 29, 2012)”).

<sup>34</sup> At the time, the Council indicated it would require a new standard to be presented, based on what it deemed to be adequate data, within a year. Exhibit 5 at 6, Standards Council Decision D#12-4.

<sup>35</sup> Exhibit 21 at 9-10, 14, 21-22, 30, Transcript (Oct. 29, 2012).

<sup>36</sup> *Id.* at 8, 14.

<sup>37</sup> *Id.* at 9. See also Letter from Charles Branyon, McGriff, Seibels & Williams, Inc., to Secretary, NFPA Standards Council, re: Standards Council Decision (Final): D#12-4 (Sept. 28, 2012) (Exhibit 22); and Letter from A.J. Stringer, Drayton Insurance Brokers, Inc., to NFPA Codes and Standards Administration, re: Council Decision D#112-4 [sic] NFPA 1124 (Oct. 1, 2012) (Exhibit 23).

<sup>38</sup> Exhibit 21 at 42, Transcript (Oct. 29, 2012).

<sup>39</sup> *Id.* at 19.

The Council denied APA's appeal of D#12-4 by decision dated October 30, 2012.<sup>40</sup> In so doing, it rejected the appeal, describing the test plans proposed by the APA this way:

Beyond vague representations, it offers little in the way of specifics as to what an alternative test plan should be, nor any independent assessment as to how such a plan would provide an adequate alternative to the Research Foundation Test Plan.<sup>41</sup>

Nowhere does the decision even mention the testimony from October 29, 2012 when an APA representative tried to address the alternative test plan, but an attorney for the Council consistently cut him off using courtroom cross-examination techniques.<sup>42</sup> The Council did not stop there. It announced for the first time that it was going to process the proposal it wanted enacted as a Tentative Interim Amendment ("TIA") under Regulation 5.11.<sup>43</sup> The Council abandoned the test option entirely, and modified the second option it had presented in its August decision. It summarily ordered NFPA staff to supplant the PYR TC and write a proposal that embodied option 2 from the August 9, 2012 decision (D#12-4). This has never happened before. It also ordered that:

[T]he Pyrotechnics Committee shall be balloted only on the question of whether the language of the TIA achieves the limitations on CFRS facilities and stores set forth above. The issuance of the TIA will be considered by the Council at its March 2013 meeting.<sup>44</sup>

The decision also set a new and higher bar for testing than that which had ever been imposed before:

- Anyone wishing to challenge any aspect of the third party testing dictated by the Council will "bear a **heavy** burden of demonstrating that any such plan is a valid alternative";

---

<sup>40</sup> NFPA Standards Council Decision D#12-17 (decided Oct. 30, 2012, issued Dec. 14, 2012) (Exhibit 24) (hereinafter "Standards Council Decision D#12-17").

<sup>41</sup> *Id.* at 4.

<sup>42</sup> Exhibit 21 at 38-40, Transcript (Oct. 29, 2012). An attorney for the Standards Council conducted a confrontational cross-examination of witnesses, and even interrupted them before they could answer regarding testing plans. Despite this tactic, testimony was provided demonstrating the reliability of the proposed alternative. *Id.* at 37-38 (referring to correspondence from SwRI).

<sup>43</sup> Exhibit 24 at 5-6, Standards Council Decision D#12-17.

<sup>44</sup> *Id.* at 5.

- Proponents must submit a report of the Research Foundation or “other reputable independent third party research and testing entity”;
- It must contain validation that it will have “appropriate and sufficient data”;
- Unlike the testing directed by the Council, it must first be reviewed by the Sprinkler System Discharge Committee;
- It must be subject to an information ballot to solicit committee members’ views;
- It must then be submitted to the Council as a request to recommence the development of sprinkler design criteria for such facilities and stores;
- The Council must then permit the recommencement of such standards development activities;
- It must follow the special procedures set forth in the 2008 Council decision;
- Any proposed change in criteria must be approved by the Discharge Committee in addition to processing by the PYR TC.<sup>45</sup>

While the Council stated that it was proceeding under Rule 5.11, it did not specify which portions of section 5 procedures it was intending to replace. The unusual and unprecedented nature of this decision – not only did the Council deny the appeal, but without notice raised and changed its prior decision substantially – was apparently retribution for the appeal filed by APA on December 20, 2012, asking for an appeal to the entire Board of Council Decision D#12-17.<sup>46</sup>

TIA Log. No. 1094 was never put out for public comment, nor was there any finding of an emergency. As directed by the Council, the NFPA staff sent its proposed ballot to the PYR TC members on January 2, 2013 for a “quick view” as a “courtesy,” though it had already been sent for editorial review.<sup>47</sup> None of the members of the PYR TC were consulted in the preparation of

---

<sup>45</sup> *Id.*

<sup>46</sup> Letter from APA to Clerk, NFPA Board of Directors, re: Petition to the NFPA Board of Directors, Standards Council Decision (Final # 12-17) (Dec. 20, 2012) (Exhibit 25); Letter from NFPA to APA, re: Petition to the NFPA Board of Directors, Standards Council Decision (Final) #12-17 (Dec. 20, 2012) (Exhibit 26).

<sup>47</sup> E-mail from N. Pearce, Sr. Fire Protection Engineer, NFPA (Jan. 2, 2013, 12:49 PM) (Exhibit 27) (hereinafter “E-mail from N. Pearce (Jan. 2, 2013, 12:49 PM)”).

the draft TIA.<sup>48</sup> Members of the PYR TC were given less than 24 hours before the ballot would be sent out for comment, but only as a matter of courtesy.<sup>49</sup> They were provided with copies of the Section 5 procedures and directed to refer to it in connection with returning their ballots.<sup>50</sup> APA responded with comments on the “courtesy” copy of the proposed TIA that were limited by order of the Council.

After waiting almost two months for the final decision to be issued, on January 11, 2013 (and revised on January 14, 2013), APA filed its appeal of Standards Council Decisions D#12-4 and D#12-17 to the NFPA Board.<sup>51</sup> Its grounds included detailed arguments:

- Explaining why the time frame established by the Council was physically unrealistic.
- Explaining why the massive new additional criterion for future testing added by the Council with no prior notice was unreasonable.
- Noting that the Council misrepresented that the TIA was to be submitted by the PYR TC when it is undisputed that it was actually prepared by the NFPA staff at the direction of the Council.
- Noting that the decisions did not identify the emergency conditions upon which the TIA would be based.
- Noting that the decisions did not contain a technical merit justification and that there was no evidence that the current standards, in place for years, are inadequate.
- Describing the demonstrable bias of the Council.<sup>52</sup>

---

<sup>48</sup> Nothing in the agenda or discussion from the PYR TC November 1 and 2, 2012 suggests that a TIA was proposed, discussed, or approved. NFPA 1123 A2013 ROC Meeting Agenda Package (Oct. 15, 2012) (Exhibit 28).

<sup>49</sup> *Id.* The deadline for comments was subsequently extended another 24 hours. E-mail from N. Pearce, Sr. Fire Protection Engineer, NFPA (Jan. 2, 2013, 3:50 PM) (Exhibit 29).

<sup>50</sup> *Id.*

<sup>51</sup> APA Petition to the NFPA Board of Directors on the Standards Council Decisions (Final & Short) D#12-4 and D#12-17 (Jan. 11, 2013) (Exhibit 30); APA Petition (Revised January 14, 2013) to the NFPA Board of Directors on the Standards Council Decisions (Final & Short) D#12-4 and D#12-17 (Jan. 14, 2013) (Exhibit 6).

<sup>52</sup> *Id.*

The decision to issue a TIA was merely a pretext to try and end the sale of fireworks to consumers, not to ensure those retail sales venues were safe for the general public or that fireworks are safely stored.

On March 1, 2013, a “duly appointed subcommittee of the NFPA Board” summarily, and with no discussion, dismissed this petition.<sup>53</sup> It did not mention or address any of the concerns raised by the APA.

5. The Council Turns the TIA Process Over to the NFPA staff, Conducts No Public Hearing, Misleads the PYR TC Balloters in the Voting Process, and Disregards the Ballots

Meanwhile, the Council moved inexorably forward with the TIA itself. On January 16, 2013, ten Principal Members of the PYR TC wrote to the Council objecting to the procedure that was used for issuance of the TIA; noting in particular that changing the name of the submitter from the Council to the PYR TC was a decision made unilaterally by the NFPA staff without consultation with the PYR TC; that there was no public hearing, and that the PYR TC was not given a chance to meet, discuss or vote on the TIA.<sup>54</sup> The APA submitted a similar request that the proposed TIA be withdrawn based on this improper process on January 16, 2012.<sup>55</sup> These concerns were ignored.

On January 29, 2013, the Secretary to the Standards Council wrote and acknowledged that the Standards Council had itself directed the issuance of the TIA (thereby confirming that it was wrong to identify the PYR TC as the submitter).<sup>56</sup> Ignoring the request that the Council withdraw the TIA, she treated the letter as a request to the Secretary to withdraw it, which she

---

<sup>53</sup> NFPA, Decision of the Board of Directors on a Petition Concerning Standards Council Decision Numbers 12-4 and 12-17 (March 1, 2013) (Exhibit 31).

<sup>54</sup> Letter from Principal Members of Technical Committee on Pyrotechnics to Secretary, NFPA Standards Council, re: Request for Withdrawal of Proposed TIA No. 1094, NFPA 1124 (Jan. 18, 2013) (Exhibit 32) (hereinafter “Letter from Principal Members (Jan. 18, 2013)”). It is particularly inexplicable that the PYR TC would submit to itself a TIA that it would then disagree with.

<sup>55</sup> Letter from APA to Secretary, NFPA Standards Council, re: Request for Withdrawal of Proposed TIA No. 1094, NFPA 1124 (Jan. 16, 2013) (Exhibit 33) (hereinafter “Request for Withdrawal (Jan. 16, 2013)”).

<sup>56</sup> E-mail from R. Foran, Division Manager, Codes & Standards Administration, Secretary to the NFPA Standards Council, re: NFPA Response to the Request for Withdrawal of Proposed TIA No. 1094, NFPA 1124 (Jan. 29, 2013) (Exhibit 34) (hereinafter “E-mail from Foran (Jan. 29, 2013)”).

denied.<sup>57</sup> She then gave APA four business days – until February 4 – to file an appeal to the Council for consideration at its March meeting.<sup>58</sup>

On January 30, 2013, the NFPA Administrator for Technical Products reported on the final balloting ordered by the Board on the TIA.<sup>59</sup> **Seventeen of the 32 voters disagreed that the language** proposed by the NFPA staff for the TIA “achieves the limitations on CFRS facilities and stores” set forth by the Council in Decision D#12-17 and so the TIA did not achieve the required  $\frac{3}{4}$  majority.<sup>60</sup>

As directed by the Secretary to the Council, on February 4, 2013, APA appealed to the Standards Council regarding the procedure being used to process TIA 1094.<sup>61</sup> Concerned with the prior pattern of staff interference, on February 26, 2013, APA wrote directly to all NFPA Board members to alert them to the highly irregular procedure associated with the Council’s actions in deciding to issue TIA 1094 and explaining in detail the improper manner in which the process was followed, and the lack of any evidence that the current standard was in need of being addressed by a TIA, which are reserved for emergency situations.<sup>62</sup> The improper action by the Council was noted, and the improper manner in which the process was subverted was also explained.<sup>63</sup> No response was received to these concerns.

#### 6. The Council issues TIA No. 1094

On March 14, 2013, the Council issued TIA Log No. 1094, and denied the APA’s January 4, 2013 petition.<sup>64</sup> No reason was given for the decision at that time. None of APA’s concerns were addressed. APA filed a Notice of Intent to Petition Standards Council Decision D#13-2 on

---

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* As the record indicates, the Council has taken months to write its decision, and given APA and others only days to file appeals.

<sup>59</sup> NFPA Memorandum from E. Carroll, Administrator, Technical Projects, to NFPA Technical Committee on Pyrotechnics, re: NPA 1124 Proposed TIA No. 1094 **FINAL TC BALLOT RESULTS** (emphasis in original) (Jan. 30, 2013) (Exhibit 35) (hereinafter “TIA No. 1094 Ballot Results”); Email from Rachel Robbins, Chair, NFPA PYR TC, to Amy Cronin, Secretary, NFPA Standards Council, re: Concerns about Process (Feb. 7, 2013) (Exhibit 36) (hereinafter “Email from NFPA PYR TC Chair (Feb. 7, 2013)”).

<sup>60</sup> *Id.*

<sup>61</sup> APA Appeal to the NFPA Standards Council on the Issuance of TIA Log No. 1094 (Feb. 4, 2013) (Exhibit 37).

<sup>62</sup> Letter from APA to NFPA Board of Directors re: APA Petition Concerning NFPA 1124 TIA (Feb. 26, 2013) (Exhibit 38).

<sup>63</sup> *Id.*

<sup>64</sup> Exhibit 1, Standards Council Decision (Short) D#13-2.

March 22, 2013, and also sought interim relief pending appeal, noting the undue and irreparable harm that was likely to result pending the appeal.<sup>65</sup> The request for interim relief was summarily denied on March 26, 2013 in a letter from the Petitions Clerk, claiming that the President denied it.<sup>66</sup> No reason was given.

The Council's Final Decision (D#13-2) was issued on Friday, April 26, 2013.<sup>67</sup> The Council reiterated its October 2012 opinion that the TIA is necessary "to address the ongoing delay and continuing failure of the consumer fireworks industry or other interested parties to implement a testing program necessary to support the development of technically substantiated sprinkler design criteria for such facilities."<sup>68</sup> The Council did not point to any evidence in the record or otherwise even suggest that current standards have been demonstrated to be inadequate. There was no discussion of any of the other issues raised in APA's appeal, including the Council's disregard for the NFPA standards development process, its failure to seek public comment or demonstrate the presence of an emergency.

The Council Final Decision D#13-2 did contain several other comments. First, it admitted it "requested" that NFPA staff "work with" the PYR TC, but failed to admit that it ordered the NFPA staff to write the TIA and that the PYR TC was not involved in that effort, and were given only a "quick look" as a "courtesy."<sup>69</sup> It then summarily rejected the vote of the majority of the PYR TC that disagreed that the language of the TIA as drafted by NFPA staff achieved the desired result.<sup>70</sup> The Council rejected the votes because it thought the explanations that accompanied them negated the votes themselves.<sup>71</sup> It cited no authority for this action. After taking six weeks to write this decision, the Council gave the parties 15 days to file an appeal to the Board.

---

<sup>65</sup> APA Notice of Intent to File a Petition, Standards Council Decision (Short Form) D#13-2 (March 22, 2013) (Exhibit 3).

<sup>66</sup> Exhibit 1, Standards Council Decision (Short) D#13-2.

<sup>67</sup> Exhibit 2, Standards Council Decision D#13-2.

<sup>68</sup> *Id.* at 1.

<sup>69</sup> *Id.* at 2.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

### III. DISCUSSION OF GROUNDS FOR WITHDRAWAL OF TIA

#### A. The Standards Council improperly disregarded the overwhelming vote of the Technical Committee that rejected the TIA language proposed in Standards Council Decision D#12-17.

As explained above, the Council sent letter ballots to the PYR TC members regarding TIA 1094 on January 4, 2012.<sup>72</sup> Among other things, the Administrator included the following sentence:

Please see Section 5 (copy enclosed) regarding the processing of TIAs from the *Regulations Governing the Development of NFPA Standards*.<sup>73</sup>

The ballot itself posed the following question:

Do you agree that this TIA complies with the directives of Council Decision #12-17 (attached) that is intended to limit storage and retail sales facilities to those facilities which NFPA 1124 does not now require to have automatic sprinkler systems.<sup>74</sup>

Seventeen of the 32 eligible voters disagreed.<sup>75</sup> Consistent with Rule 5.5(a), many voters included explanations. When it issued TIA 1094, the Council stated:

[A] final **informational** ballot of the Technical Committee to confirm that the language, now designated as TIA No. 1094, correctly achieved the limitation intended by the Council did not pass. These ballot results, however, identify no actual flaw in the language of the TIA, and the Council perceives none. Should the TIA contain any technical flaw in accurately achieving the limitation intended by the Council, the Technical Committee may provide technical corrections through a TIA or during the next revision cycle.<sup>76</sup>

The Council's action rejecting all of these ballots was improper for four reasons.

---

<sup>72</sup> NFPA Memorandum from E. Carroll, Administrator, Technical Projects, to NFPA Technical Committee on Pyrotechnics, re: NFPA 1124 Proposed Tentative Interim Amendment (TIA) No. 1094 (Jan. 4, 2013) (Exhibit 39) (hereinafter "Memo re: Proposed TIA (Jan. 4, 2013)").

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Exhibit 35, TIA No. 1094 Ballot Results.

<sup>76</sup> Exhibit 2, Standards Council Decision D#13-2 (emphasis added).

First, the Council has no authority to reject these ballots based on the content of the explanation that accompanied them. It did not suggest they were in any respect invalidly cast, or that the voters were not qualified. The rules on balloting provide:

Applicable voting rules provide in pertinent part:

**3.3.4.3 Ballots.** On matters pertaining to the content of NFPA Standards, Formal Interpretations, Tentative Interim Amendments, or Technical Committee/ Correlating Committee Scopes, a Meeting Vote is to establish a sense of agreement. Only the results of Ballots shall be used to determine the final position of the Technical Committee . . . .

(b) **How Members May Vote on Ballots.** Each Member shall record his or her opinion as "affirmative," "negative," or "abstaining" on the Ballot required in 3.3.4.3 within the time limit specified on the Ballot. A Member voting in the "negative" or recorded as "abstaining" shall include a statement of reasons with the Ballot. The reasons for negative votes on a specific issue being Balloted shall be transmitted to the Staff Liaison, who will compile and circulate to each Member, who can respond, reaffirm, or change his or her Ballot at that time. When reasons for negative votes are transmitted, affirmative comments and comments of nonvoting members shall be included.

(c) **Calculating Votes on Ballots.** A Member eligible to vote shall be one who is a Member of record as of the date of the mailing of the Ballot. In calculating the vote, those who have expressed in writing valid reasons for abstaining, those who returned negative Ballots without comments, and those who, after a second request, fail to return their Ballots shall be omitted from the calculations. In all cases, an affirmative vote of at least a simple majority of the total membership eligible to vote is required.

\* \* \*

**4.6.5.1 Informational Ballots.** In the case of a Return of an NFPA Standard (see Table 1, Column 3, Motions 13 and 14), an Informational Ballot shall be conducted to assist the Standards Council in the event of an Appeal . . . .

\* \* \*

**4.6.5.2 Supplementary Ballots.** Where the results of the Balloting following the NFPA Technical Meeting, because of inadvertence, error, or otherwise, yields confusing, conflicting, or mutually inconsistent NFPA Standard text, the Standards Council Secretary may direct that a Supplementary Ballot be conducted so as to determine the intent of the Committee . . . .<sup>77</sup>

\* \* \*

The Council’s actions violated 3.3.4.3 because it failed to use the results of ballots (the votes). It also violated 3.3.4.3(c). That provision states that abstentions are to be omitted if there are no “**valid** reasons” included for doing so, but negative votes may only be omitted where the voter fails to include “comments.”<sup>78</sup> The Council has no authority to determine the validity or relevancy of comments by negative voters as a basis for omitting the vote.

Second, in an effort to manufacture a way to subvert the majority vote of the PYR TC votes, the Council improperly called these ballots “informational” in its final decision, but neither Council Decision D#12-17 which dictated this procedure, nor the ballot itself, said the ballots were informational. In fact, the ballot reminded voters of the obligation as members of the Committee to vote. Informational voting is only available in the case of Return of an NFPA Standard.<sup>79</sup> There was no reason to refer to these votes as informational, other than to attempt to discount their validity.

Third, while the Council purported to change the procedures for processing the TIA via Section 5.11, it did not change the voting procedures. It did not require that voters “identify [an] actual flaw in the language of the TIA”,<sup>80</sup> yet it chose to ignore the votes because the votes supposedly did not identify such flaws. Section 5 does not require that ballot votes identify such flaws in order to be valid. Accordingly, the Council’s action in disregarding the majority of the votes that responded that they disagreed with the question presented should not have been thrown out. In fact, when counted, those votes would have resulted – and should result – in removal of the NFPA staff’s proposed language. If the Council wishes to amend NFPA 1124, it can direct that the proper procedures be followed.

Fourth, the Council may well have violated Rule 4.6.5.2. If it was confused by the many comments that disagreed with the draft language, that rule calls for a supplementary ballot in order to “determine the intent of the Committee.”<sup>81</sup> While that process is not mandatory,

---

<sup>77</sup> Regulations Governing the Development of NFPA Standards (2013) (“Regulations”) (emphasis added).

<sup>78</sup> *Id.* at 3.3.4.3(c).

<sup>79</sup> *Id.* at 4.6.5.1.

<sup>80</sup> See Exhibit 2, Standards Council Decision D#13-2.

<sup>81</sup> Regulations at 4.6.5.2.

unless the Council's intent was to strip the PYR TC entirely of its jurisdiction over this issue despite the direction of the Board, this path should have been followed. The fact is, the Council did not care about the intent of the PYR TC.

Finally, and most importantly, serious concerns over the irregularities of this voting process were raised by the voters themselves:

Vote of: Gary Brown

[T]he TIA has not undergone a procedurally correct discussion of its urgency or a consideration and balancing of whether it will accomplish a legitimate purpose of the NFPA 1124 Code. . . . I believe that the TIA is both substantively and procedurally flawed and should not be permitted to proceed.

\* \* \*

Vote of: Edward Cochran

I disagree with the process, which does not appear to follow NFPA requirements for TIAs. I can not approve a TIA without an explanation justifying its emergency status (required by NFPA), and I do not agree that this TIA was organically submitted by this Technical Committee. If council wishes to impose an action, especially a TIA, they should rigorously follow NFPA's regulations.

\* \* \*

Vote of: Felix James Grucci (Phil)

I do not agree with the manner this TIA was processed. The TIA in many ways does not comply with the NFPA requirements for submitting and validating a TIA. There is no justification noted to explain the emergency nature required of a TIA.

\* \* \*

Vote of: Garry Hanson

I have been on the NFPA Pyrotechnical TC committee for over 20 years and this action that the standards committee is doing circumvents at [sic] lot of the NFPA basic principals [sic] used to establish code development procedures.

\* \* \*

Vote of: Julie Heckman

I am voting against the TIA as it is not being processed in accordance with the Regulations. Under the Regulations, "The TC shall be separately balloted on both the technical merits of the amendment and whether the amendment involves an emergency nature." The ballot contains neither of these questions nor has the Submitter substantiated the technical merit of the proposed TIA nor has an Emergency Nature, as defined in the Regulations, been identified.

\* \* \*

Vote of: John Steinberg, MD

The technical committee (TC) has not discussed, drafted, written, prepared, or submitted this TIA. It was prepared by the Standards Council using language drafted by them or staff and delivered to the TC for approval. This is not proper procedure. The TC has not considered, debated, or discussed either the technical merits or the emergency nature of the proposed TIA. . . . This is a usurpation of the proper role of the TC and a violation of NFPA procedure for generation of code and TIA's.

This breach of process precludes allowing the TC to function in accordance with NFPA procedures and regulations. Thus, in my opinion, the TIA is not even eligible to be approved as submitted to the TC. . . . I would need to see sufficient technical merit described in detail before I could even consider imposing such a radical change in code upon an industry by a means that does not allow a full and open debate by the TC nor consideration of the TIA's impact on those affected.

\* \* \*

Vote of: Charles Weeth

The Council is essentially circumventing the Regulations by establishing a new TIA process by caveat, which flies in the face of the voluntary consensus development process that are the core of the NFPA code development process, and essential for American National Standards Institute (ANSI) accreditation. . . . [T]he requirement for these full scale automatic sprinkler tests is contrived and the deadline is arbitrary, and neither come close to any of the criteria of an emergency nature as required in 5.1(f).

\* \* \*

Vote of: William Weimer

Although not included in the Ballot, it should be noted that the proposed TIA does not meet any of the conditions for Emergency Nature. . . . The Council has inappropriately limited the responsibility of the Technical Committee by not allowing the Committee to vote on the Technical Merit; but rather to only vote on whether the proposed language accomplishes the direction provided by the Council.

\* \* \*

Vote of: Arthur Barber III (abstaining)

I will not vote a position on anything about a TIA that says it was originated by the Committee on Pyrotechnics as "submitter" when it was not, and when no ballot has been provided that includes the required separate vote on whether the issue is of an emergency nature that merits a TIA. Both are violations of the due process established by NFPA, regardless of the technical merits of the specific issue that the TIA addresses.<sup>82</sup>

The decision issued by the Council is flawed in that it did not respond to the APA's assertion, supported by the PYR TC ballots, that the proposed TIA was not of an emergency nature.

Instead, the decision indicated that the use of Section 5.11 is justified due to ongoing delays. The decision also did not address the failure to seek public comment on the proposed TIA, as required by ANSI, and the fact that the decision not to seek public comment was apparently made by NFPA staff. The decision also fails to address concerns raised by PYR TC members in their ballots and the PYR TC Chair who questioned the rationale behind the process used to issue the TIA.<sup>83</sup> It is astounding that an ANSI-approved organization would take action in the face of these serious questions about the voting process.

---

<sup>82</sup> Exhibit 35, TIA No. 1094 Ballot Results.

<sup>83</sup> *Id.*; Exhibit 36, Email from NFPA PYR TC Chair (Feb. 7, 2013) ("Why was the PYR committee even balloted on an issue that was purely administrative since it's been very clear that the goal is to process the TIA anyways regardless of the position of the committee? . . . [F]aith in the NFPA process has been really shaken.").

- B. The TIA was adopted in violation of Sections 5.1 and 5.3 of the *NFPA Regulations Governing the Development of NFPA Standards*, which require that before any TIA is adopted, there must be a finding of an appropriate emergency. Here, no emergency has ever been asserted, nor is there anything in the record of this TIA that suggests that any emergency exists.**

Council Decision D#13-2 identifies no technical flaw with the provisions of NFPA 1124, nor does it identify any incident or reason indicating an emergency nature justifying the issuance of the TIA using a process other than the normal standards development process. The sole reason given for issuance of the TIA was “the ongoing delay and continuing failure of the consumer fireworks industry or other interested party to implement the testing program necessary to support the development of technically substantiated sprinkler design criteria for such facilities.”<sup>84</sup> Whereas the normal process for issuing a TIA requires both technical merit and emergency nature, it is inconsistent with the *NFPA Regulations* for the Council to use a process that circumvents the normal process when neither a technical basis nor an emergency nature basis has been identified.

**Is it appropriate for the Council to issue the TIA despite the concerns raised by the Technical Committee, the Technical Committee Chair, the Appellant and without any Public Comment period without responding to those concerns and for the only reason identified in the Decision as being “ongoing delays”?**

Section 5 of the *NFPA Regulations Governing Committee Projects* (2013) addresses Tentative Interim Amendments (TIAs). Section 5.1 sets forth the “Content of a Proposed Tentative Interim Amendment”:

Each Tentative Interim Amendment (TIA) shall be submitted to the Council Secretary and shall include the following:

**(f) Statement of basis of conclusion that the TIA is of an emergency nature requiring prompt action.**<sup>85</sup>

The evaluation of the emergency nature of a TIA “shall include but not be limited to one or more of the following factors:

**5.3 Evaluation of Emergency Nature.** Determination of an emergency nature shall include but not be limited to one or more of the following factors:

---

<sup>84</sup> Exhibit 2 at 1, Standards Council Decision D#13-2.

<sup>85</sup> *NFPA Regulations Governing Committee Projects*, Section 5.1 (2013) (emphasis added).

(a) The document contains an error or an omission that was overlooked during a regular revision process.

(b) The document contains a conflict within the document or with another NFPA document.

(c) The proposed TIA intends to correct a previously unknown existing hazard.

(d) The proposed TIA intends to offer to the public a benefit that would lessen a recognized (known) hazard or ameliorate a continuing dangerous condition or situation.

(e) The proposed TIA intends to accomplish a recognition of an advance in the art of safeguarding property or life where an alternative method is not in current use or is unavailable to the public.

(f) The proposed TIA intends to correct a circumstance in which the revised document has resulted in an adverse impact on a product or method that was inadvertently overlooked in the total revision process, or was without adequate technical (safety) justification for the action.”

The procedures for processing TIAs are set forth in Sections 5.2 (Screening), 5.4 (Publication), 5.5 (Technical Committee Action), 5.6 (Council Action), 5.7 (Effective Date), 5.8 (Publication), and 5.10 (Subsequent Processing).

Section 5.11 “Exception” provides that:

When the Council authorizes **other procedures** for the processing and/or issuance of Tentative Interim Amendments, the provisions of this Section shall not apply.<sup>86</sup>

In Council Decision D#12-17, the Council states: “Specifically, the Council is, in accordance with its authority under *Regulations Governing Committee Projects*, at Section 5.11, directing the processing of a TIA . . . .”<sup>87</sup> Council Decision D#13-2, says: “TIA No. 1094 was developed pursuant to Rule 5.11.”<sup>88</sup> While the Council may have authority to change *procedures* outlined

---

<sup>86</sup> *Id.* at Section 5.11 (emphasis added).

<sup>87</sup> Exhibit 24 at 5, Standards Council Decision D#12-17.

<sup>88</sup> Exhibit 2, Standards Council Decision D#13-2.

in Section 5 for processing TIAs, it has no authority to waive the *substantive requirements* of Section 5, and in particular 5.1 and 5.3. Thus, regardless of what procedures are followed, there must be an emergency found within the meaning of Sections 5.1 and 5.3. The whole point of the TIA procedure is to provide a truncated process for emergency situations. None exists here. When it chose the TIA process, the Council said:

The Council has chosen this course of action because, by effectively eliminating the need for sprinkler design criteria in the consumer fireworks provisions, it addresses the reality that the Research Foundation Test Plan will not be completed and sprinkler design criteria developed and incorporated into NFPA 1124 within the timeframe required by the August 2012 Decision. It does so in a way that leaves in place the remaining consumer fireworks provisions that the Council agreed to issue in August of 2012. These provisions, as the Council stated in the August 2012 decision, were adequately processed in accordance with the 2008 Decision and clearly represented a significant step forward in the development of standards for the retail storage and sales of consumer fireworks.<sup>89</sup>

These do not constitute emergency grounds under section 5.3, nor do such grounds otherwise exist. The Council has identified no error or omission that was overlooked during a regular revision process.<sup>90</sup> In this regard, the Council's desire for more data or more testing does not mean that there was no data at all, nor has it suggested as much. The Council has not suggested that the TIA is being issued due to a conflict with another standard.<sup>91</sup> It has not suggested it is attempting to correct a previously unknown hazard.<sup>92</sup> In fact, despite repeated requests, the Council has not identified a single instance where the existing standards have not proven adequate, and the insurance companies who insure against these risks thought no changes should be made.<sup>93</sup> The Council has not suggested it is offering to the public a benefit that would lessen a recognized (known) hazard or ameliorate a continuing dangerous condition.<sup>94</sup> In fact, the TIA actually could create a greater danger by eliminating sprinkler

---

<sup>89</sup> Exhibit 24 at 5, Standards Council Decision D#12-17.

<sup>90</sup> NFPA Regulations Governing Committee Projects, Section 5.3(a) (2013).

<sup>91</sup> *Id.* at 5.3(b).

<sup>92</sup> *Id.* at 5.3(c).

<sup>93</sup> Letter from Charles Branyon, McGriff, Seibels & Williams, Inc., to Secretary, NFPA Standards Council, re: Standards Council Decision (Final): D#12-4 (Sept. 28, 2012) (Exhibit 22); and Letter from A.J. Stringer, Drayton Insurance Brokers, Inc., to NFPA Codes and Standards Administration, re: Council Decision D#112-4 [sic] NFPA 1124 (Oct. 1, 2012) (Exhibit 23).

<sup>94</sup> NFPA Regulations Governing Committee Projects at 5.3(d).

standard that currently apply to facilities. The TIA is also not being issued in recognition of an advance in the art of safeguarding property.<sup>95</sup>

Nor can the Council seriously contend that it is acting because an existing method was without adequate technical (safety) justification for the action.<sup>96</sup> The Council's reason for this action is manifestly clear – it opposes the use of consumer fireworks in all circumstances. It has never suggested that the information that was used to justify NFPA 1124 was flawed or inadequate. In fact, it never mentioned or even considered the data that had been submitted in support of the current 1124. Back in 2008 when it first raised these issues, the Council's complaints were that a number of technical proposals had been presented (and rejected) for lack of sufficient justification. In the case of sprinklers, other than referencing conclusory statements made in the Research Foundation Report, the Council never once pointed to a specific instance in which there is data demonstrating that any of the requirements in NFPA 1124 have proven inadequate.<sup>97</sup> The only difference between then and now is that the current NFPA staff and President oppose the use of consumer fireworks generally. It cannot be overlooked that NFPA 1124 was originally adopted after going through the rigorous NFPA standards development process.<sup>98</sup>

To confuse the matter more, even though the Council said in its Decision D#12-17 that it was creating new procedures under Section 5.11 to process the TIA, when it came to balloting PYR TC members, it included a full copy of Section 5 and directed the members' attention to it "regarding the processing of TIAs."<sup>99</sup> Why, if the Council intended to disregard Section 5 in its entirety, did it specifically send the PYR TC members Section 5 and draw their attention to it? Section 5.5(a) calls for members to comment on the emergency nature of the proposal as well as its technical merits, upon which many did comment.<sup>100</sup> If the Council did intend that Section 5.5(a) apply (because, after all, it sent them that rule along with the ballot), then that calls for voters to comment on whether an emergency exists. Here, virtually all balloters said that no such emergency exists.

**Whereas the Regulations were adopted by the Board, is it the intent of Section 5.11 to allow the Council to circumvent the normal process for issuing a TIA with no technical basis and no basis for emergency action; but rather due to "ongoing delays"?**

---

<sup>95</sup> *Id.* at 5.3(e).

<sup>96</sup> *Id.* at 5.3(f).

<sup>97</sup> Indeed all of the incidents in the Research Foundation Report predate NFPA 1124. Moreover, the Research Foundation Report failed to mention the data that had been submitted in support of the original NFPA 1124.

<sup>98</sup> See note 11, above.

<sup>99</sup> Exhibit 39, Memo re: Proposed TIA (Jan. 4, 2013).

<sup>100</sup> Exhibit 35, TIA No. 1094 Ballot Results.

The TIA should be withdrawn because the Council never made the requisite findings of an emergency even after it chose different procedures. It then compounded this error by telling voting members that they were to follow Section 5 procedures when they voted, then disregarded those procedures again.

**C. The TIA was adopted contrary to Standards Council Decision D#12-7, which directed the NFPA staff to work with the PYR TC to prepare the TIA.**

Council Decision D#12-7 on its face directed the NFPA staff to “work with” the PYR TC to develop the TIA. That did not happen. The NFPA staff authored the TIA without any consultation from the PYR TC, and then, in its own words, purely as a matter of “courtesy,” gave the PYR TC members just two days to take a “quick view,” even though it had already sent the TIA on to the editorial staff.<sup>101</sup> “Work with” does not mean dictate, and then give a “quick view” as a matter of “courtesy.” To exacerbate this, when the NFPA staff gave the PYR TC the “quick view” as a matter of “courtesy,” it identified the Council as the submitter.<sup>102</sup> When it actually issued the document, it changed the submitter to the PYR TC.<sup>103</sup> This is a gross misrepresentation of the facts, and cannot be tolerated. Even the Secretary of the Council admitted that the Council directed the Staff and not the PYR TC to draft the document, yet the PYR TC name was on it.<sup>104</sup>

Most members of the PYR TC vociferously objected to this misconduct,<sup>105</sup> but the Council ignored their concerns. It ignored their letters.<sup>106</sup> It ignored the separate letter from the APA.<sup>107</sup> And it ignored the multiple objections on the grounds contained in the ballot comments.<sup>108</sup> And it did so without any substantive explanation.

Finally, the TIA itself is wrong and misled the voters by saying it was submitted by the PYR TC when in fact it was not.

---

<sup>101</sup> Exhibit 27, E-mail from N. Pearce (Jan. 2, 2013, 12:49 PM).

<sup>102</sup> *Id.*

<sup>103</sup> Exhibit 39, Memo re: Proposed TIA (Jan. 4, 2013).

<sup>104</sup> Exhibit 34, E-mail from Foran (Jan. 29, 2013).

<sup>105</sup> Exhibit 35, TIA No. 1094 Ballot Results.

<sup>106</sup> Exhibit 32, Letter from Principal Members (Jan. 18, 2013).

<sup>107</sup> Exhibit 33, Request for Withdrawal (Jan. 16, 2013).

<sup>108</sup> Exhibit 35, TIA No. 1094 Ballot Results.

- D. The Standards Council unilaterally, without consultation or authority, and without proper basis, changed the NFPA standards development process to avoid consultation with the PYR TC or notice to the public, by abandoning the two processes it announced it was considering and unilaterally short circuiting the process.**

As explained above, while the Council has authority under Section 5.11 to use a different procedure than that which is specified in Section 5 for processing TIAs, it has no authority to adopt alternative procedures that violate ANSI requirements applicable to standards developers like NFPA.<sup>109</sup> Yet, that is exactly what it did.

ANSI requires that to be “accredited by ANSI, the developer’s procedures and practices for standards development shall meet the criteria.”<sup>110</sup>

First, ANSI requires openness and public comment:

### **2.1 Openness**

Timely and adequate notice of any action to create, revise, reaffirm, or withdraw a standard, and the establishment of a new consensus body shall be provided to all known directly and materially affected interests. Notice should include a clear and meaningful description of the purpose of the proposed activity and shall identify a readily available source for further information. In addition, the member’s name (or if membership is by organization, the name of the organization with a point of contact), affiliation and interest category of each member of the consensus body shall be made available to interested parties upon request.

### **1.5 Notification of standards development**

Notification of standards activity shall be announced in suitable media as appropriate to demonstrate an opportunity for participation by all directly and materially affected persons.<sup>111</sup>

The Council issued its decision to develop TIA Log No. 1094 on December 12, 2012. It voted to issue it on March 7, 2013. There was no public notice regarding this specific proposal. This is

---

<sup>109</sup> American National Standards Institute, *ANSI Essential Requirements: Due process requirements for American National Standards* (Exhibit 40) (hereinafter “ANSI Essential Requirements”).

<sup>110</sup> *Id.* at 4.1.

<sup>111</sup> Exhibit 40, ANSI Essential Requirements.

particularly important here because in every other instance where there has been public notice, the comments have overwhelmingly opposed what the Council wanted to do, and supported the PYR TC efforts.

**Is it appropriate for NFPA staff to decide to ignore a requirement of the NFPA process and the ANSI process to seek Public Comment?**

Second, ANSI requires that written procedures be used for the development of standards. ANSI rules provide:

**1.9 Written procedures**

Written procedures shall govern the methods used for standards development and shall be available to any interested person.<sup>112</sup>

Here, the process used involved NFPA staff processing the TIA to the exclusion of all others, and barely giving the PYR TC members, let alone anyone else, the chance to see it. There was no written procedure explaining this process. Nor was there any written procedure describing how the Council would consider whether to count votes that disagreed with its proposal.

Further, the Council's failure to understand and recount the record in this matter and its decision to base some actions on information outside the record is inconsistent with ANSI's policies of openness and transparency.<sup>113</sup>

**1.0 Essential requirements for due process**

These requirements apply to activities related to the development of consensus for approval, revision, reaffirmation, and withdrawal of American National Standards (ANS).

Due process means that any person (organization, company, government agency, individual, etc.) with a direct and material interest has a right to participate by: a) expressing a position and its basis, b) having that position considered, and c) having the right to appeal. Due process allows for equity and fair play. The

---

<sup>112</sup> *Id.* at 1.9.

<sup>113</sup> *See, e.g.*, Exhibit 5 at 5-6, Standards Council Decision D#12-4 ("Procedurally, the record concerning review by the Discharge Committee is difficult to follow."); Exhibit 24 at 2, Standards Council Decision D#12-17 ("[T]he Council identified, based **primarily** on the Research Foundation Report, nine subject areas of concern . . .") (emphasis added); Exhibit 12 at 3, Standards Council Decision D#08-19 ("Now having the benefit of **the Council's own knowledge of the history** of the treatment of standards development concerning the storage and retail sales of consumer fireworks and the Research Foundation Report, as well as the full record, . . .") (emphasis added). It is clear that the Council is acting on considerations outside the full record (which it has never identified).

following constitute the minimum acceptable due process requirements for the development of consensus.<sup>114</sup>

The Council has made no secret of its desire to see consumer fireworks banned. Although the NFPA voted to develop standards for the retail sale and storage of these products, the Council has apparently decided that having safe retail sales and storage standards will undermine its policy of opposing consumer use of these products. There is nothing fair about the Council using the process for setting standards for retail sales and storage of fireworks as a way to regulate consumer use of fireworks, especially when there has been no evidence that the current standards are inadequate or have failed to provide sufficient protection from fire dangers or safe public egress.

The notion that maintaining these standards will somehow impliedly indicate support for consumer use of fireworks is like saying that developing sprinkler standards for liquor stores somehow promotes drunken driving if the liquor is abused. The NFPA tells the public it is “responsible for 300 codes and standards that are designed to minimize the risk and effects of fire by establishing criteria for building, processing, design, service, and installation in the United States, as well as many other countries.”<sup>115</sup> The Council has improperly used the TIA process as a means of trying to end consumer use of fireworks. That is not its purpose and such actions should not be permitted.

It also violates fundamental fairness for decisions on this matter to be made by someone with personal and demonstrable animosity toward the fireworks industry. Here, the President denied APA’s request for a stay pending this appeal. It is known that the President vehemently opposes any consumer use of fireworks, regardless of how safely they are sold at retail establishments or stored.<sup>116</sup> The NFPA should recuse the President from involvement in these decisions.

- E. The TIA does not address any safety concerns at all. It was designed merely to reflect the animosity that certain NFPA staff and the President have toward consumer fireworks and to punish the consumer fireworks industry for not undertaking and completing testing requirements that could not have possibly been completed in the time given.**

A number of additional actions have occurred that raise serious questions about the integrity of the TIA process.

---

<sup>114</sup> Exhibit 40 at 1.1, ANSI Essential Requirements.

<sup>115</sup> NFPA Overview, *available at*: <http://www.nfpa.org/categoryList.asp?categoryID=495> (last accessed on May 9, 2013).

<sup>116</sup> Letters regarding NFPA Journal article, “A Long Road Back” (September/October 2004) (Exhibit 41).

First, we are seriously concerned about undue influence of NFPA staff who may have other agendas. Since filing the Petition on Decision D#12-17, the Executive Director of the Fire Protection Research Foundation has been named as a Vice-President of NFPA. The TIA refers back to Decision D#12-17, which mandates the use of a Fire Protection Research Foundation test protocol or if not used, unprecedented procedures to be followed to gain approval of the test protocol to be used.

**Is it appropriate for the Council to essentially mandate the use of a test protocol developed by an organization with such a close relationship to the NFPA? Is it not a conflict of interest for the standards developing organization to require the use of a specific entity from which its Senior Management stands to gain financially?**

Second, as described above, APA sought a stay of the TIA while it was being appealed, since the TIA could very well severely impact the industry in the interim. That request was reported to APA as having been denied individually by NFPA President James Shannon.<sup>117</sup> Given Mr. Shannon's well-documented personal opposition to any use of consumer fireworks, the prudent decision would have been to allow a neutral party (conceivably the NFPA Board or other disinterested members) to make such a decision. This raises serious questions about whether the process complies with ANSI Section 1.8, which states:

### **1.8 Appeals**

Written procedures of an ANSI-Accredited Standards Developer (ASD) shall contain an identifiable, realistic, and readily available appeals mechanism for the *impartial* handling of procedural appeals regarding any action or inaction. Procedural appeals include whether a technical issue was afforded due process.

(emphasis added). For APA to be afforded the due process required of any ANSI-accredited organization, unlike the appeals to date, it is incumbent on the Board to address these serious questions.<sup>118</sup>

#### **IV. Relief Requested:**

1. In accordance with the *Regulations Governing Petitions to the Board of Directors from Decisions of the Standards Council*, the APA respectfully requests that the full Board conduct a hearing to consider the Petition, rather than having the Initial Review phase conducted by a subcommittee. The tortured, questionable, and inappropriate procedures that have been followed here create serious questions about the integrity of the process and the possibility that NFPA could

---

<sup>117</sup> Exhibit 4, NFPA Letter Denying Interim Relief.

<sup>118</sup> ANSI requires that standards developers adhere to the criteria for accreditation or such accreditation may be withdrawn. Exhibit 40 at 4.1.3 and 4.1.4, ANSI Essential Requirements.

be in violation of ANSI requirements, which would jeopardize its accreditation, not to mention potentially breaching its fiduciary duties to its members. The APA has documented instances in which NFPA staff has unduly influenced the NFPA Standards Development Process. APA has serious concerns whether a subcommittee of the Board, appointed by the President who publicly opposes the entire consumer fireworks industry for reasons unrelated to safe storage, is an appropriate forum.

2. As a nonprofit organization and as permitted in the *Regulations*, the APA respectfully requests that the President waive the fee associated with filing a Petition.
3. The Board Decision should overturn Standards Council Decision D#13-2 and rescind the TIA. In the alternative, the Board determines to stay the effective date of the TIA and return it to the Council with instructions to process it in accordance with Section 5. More specifically, the process shall include a vote of the consensus body (Technical Committee) on the technical merit and the emergency nature of the TIA, in addition to an opportunity for public comment.
4. The Board should establish a time frame by which testing acceptable to the Sprinkler System Discharge Committee (SSD) shall be performed and the test results submitted to SSD. A recommended time frame that can be met is as follows:
  - a. Whereas 10 or more months have been lost since the original August Decision, including almost two months waiting for Decision D#12-17, two months between the Decision D#12-4 and the October Council meeting, and almost two months waiting for Decision D#13-2 and the March Council meeting, extend the original August 2013 deadline to at least August 2014, depending on when the Board rules on the Petition.
5. The Board should address all issues raised in this Petition, since they have never been addressed before, and must be, for this appeal to be meaningful and to provide APA, as a full member of NFPA, with appropriate insight to decide if further action regarding Decision D#13-2 is warranted.

## **V. CONCLUSION**

This TIA should be withdrawn. It was adopted in direct violation of Section 5 because there has never been a finding of an emergency. It was adopted solely to punish the consumer fireworks industry for supposedly not moving quickly enough to conduct certain tests (assertions that are not true). It was motivated not out of a concern for safe storage of consumer fireworks in retail facilities, but because the Council thinks consumer fireworks are

unsafe to use and should be made illegal everywhere. Failing to determine if an adequate emergency exists in order to use the TIA process, disregarding the clear votes of Committee members, failing to give public notice, and directing the NFPA staff to “ghost write” the TIA are examples of the evidence that shows the serious procedural errors that have occurred. There has been undue staff interference. The Council has ignored key aspects of the NFPA and ANSI processes, namely achieving consensus by the consensus body (NFPA Technical Committee) and seeking public comment.

The APA strongly believes that the primary issues set forth in this petition are of sufficient significance to the integrity of the NFPA standards development process and the interests of the NFPA as to require action by the full Board of Directors. Many of the issues we have identified transcend the parochial interests of the APA, and are likely to have significant potential impact on the NFPA as a whole. Furthermore, the APA ardently believes that this Petition is of the utmost importance to the pyrotechnics industry and, in particular, the consumer fireworks segment of the industry, who will undoubtedly be negatively impacted and face severe economic hardship if the Council’s decision is not overturned and the TIA withdrawn.

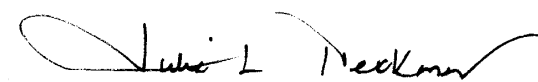
We stand fast in our resolve to fairly and reasonably represent our members in the NFPA standards development process in order to assure that our members’ products and businesses are not unfairly treated or inadequately or inappropriately addressed in the NFPA standards development process.

We believe also that the NFPA standards development process is at risk of either being or appearing to be guided not by sound and professional science, but by a biased policy against legitimate public and governmental interests in the sale and regulation of consumer fireworks in this country. Only through a hearing, full review and vetting by the Board of the procedures that have given rise to these extraordinary decisions can this perception be corrected.

Accordingly, we respectfully request that the Board of Directors grant our request for a hearing and full review of our petition by the entire NFPA Board.

Respectfully submitted,

American Pyrotechnics Association



Executive Director