



Glidepath to Compliance: Managing the Regulatory Risk/Return Trajectory in Educational Facility Enterprises

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Author's Note: This article provides general information only and does not constitute legal advice for any particular situation.

Perplexed by the proliferation of codes and standards with slow gains in funding to meet their objectives? Higher education and other enterprises in highly regulated sectors face a common problem in figuring out how to capture, assess, and calibrate risk in code and standards compliance.

Complicating typical out-of-step conditions among standards that update every 3-5 years is the federal-state-local alignment that enforces them. The federal government gives states the power to make decisions about matters not specifically assigned to the federal government. But in some states, municipalities have authority only when it is granted to them by the state. The determination of who has authority in which circumstance is not enshrined in a single state policy; rather, it is delegated by individual laws passed by the state legislature that assign authority to various entities in particular situations. The state legislature creates local municipalities and decides what powers they should have. State agencies typically try to comply with local ordinances—even when not required to—unless they have a compelling reason not to do so.

Even when an organization is able to proactively catch a regulatory issue, it must document for authorities having jurisdiction that it was successfully remediated and then show there is an ongoing process in place to mitigate risk for the future. The financial and health

care sectors, driven by Sarbanes-Oxley and the Joint Commission (JCAHO), are tooled up for regulatory compliance and robust enforcement.

ARGUABLY, WE ARE NOT FAR FROM A CONTINUAL STATE OF NON-CONFORMITY BECAUSE, TO PARAPHRASE BROOKS BAKER, FORMER APPA PRESIDENT, "BUILDINGS SOMETIMES FALL OUT OF COMPLIANCE EVEN BEFORE THEY ARE FINISHED BEING BUILT."

SECURE LINKAGE WITH LIKE-MINDED ORGANIZATIONS

APPA's mastery of the code and standard universe might be more fully realized with accreditation as a Standards Developing Organization (SDO) through American National Standards Institute (ANSI). Just as our facility-related documents refer to "other applicable standards," those other standards could reference one of our own. Much of what is needed to establish consensus for best practices is already in place. What effect might an ANSI/APPA standard have?

- The International Building Code would reference an ANSI/APPA standard on the special considerations in educational facilities which are commonly built, in stages, in wide time intervals, with mixed occupancy classes.

- Chapter 28 of NFPA 101 (The Life Safety Code) would reference an ANSI/APPA standard on dormitories and permit industry-specific exceptions that distinguish student housing from commercial-class apartments and hotels.
- The National Electric Safety Code (ANSI/IEEE C.2) would reference the unique "system with a system" conditions of campus power distribution networks that operate in a manner similar to cooperative and investor-owned utilities. To the extent there is a reasonable degree of uniformity, the newly developing utility best practices intended to promote safety, adequate service, and reliability would be considered as an analog for generally accepted operating guides and practices.
- Legislation pending in the U.S. House and Senate in the Campus Fire Safety Right-to-Know Act of 2007 (S.354 and HR.592) will require an annual report to the Secretary of Education and to all users of campus facilities. Campus fire safety information could be made uniform across our sector if we have a hand in setting the standard for counting, analyzing and presenting it.
- Re-shuffling of the training and "qualified person" definitions that appear in labor and trade association guidelines.

There are many other examples. It may not be possible, nor even desirable, to relax a local jurisdiction's adoption of other international standards. Many colleges and universities operate as "campus states" anyway with their own authority-having jurisdiction. It does not mean that everyone in our sector has to do things the same way, either. The conditions of maintenance and supervision for educational facilities in Florida can be, and probably should be, different from facilities in British Columbia.

It still needs to be determined if we need one document or several guidelines/standards (a discipline design guideline, an O&M standard, etc.). It would be important not to exaggerate the difference between “educational facility practice” from “commercial practice.” That might weaken the case for ANSI-accreditation. Still, such a standard, or groups of standards, could integrate the common elements of compliance tasks across our sector and among our consultants. The extent to which ANSI-accreditation benefits the goals of regulatory authorities will be mirrored in bottom-line benefits for our sector.

THE GLIDEPATH

A prospective ANSI/APPA standard would have to help us reckon with a problem that dominates all of our budgets: maintaining non-conforming facilities. Arguably, we are not far from a continual state of non-conformity because, to paraphrase Brooks Baker, former APPA president, “Buildings sometimes fall out of compliance even before they are finished being built.” Code updates, occupancy changes, and the sheer complexity of new building systems make the argument an urgent reality.

Thus, non-conformity may be close to being the rule—rather than the exception—in many colleges and universities in the United States. To deploy capital to limit risk, facilities professionals must travel along a glidepath, or a trajectory with a narrow tolerance. Too much repair and alteration will trigger a complete code upgrade; too little maintenance will result in denial of occupancy or loss of business continuity. There is risk on both sides of the mandate.

Even when conditions in a facility are grandfathered, risk does not disappear. Duty-of-care issues remain; retroactivity clauses in various codes and standards come into play. Take, for example, language that comes from the State of Michigan Bureau of Construction Codes:

Existing installations.

Existing electrical installations that do not comply with the provisions of the code shall be permitted to be continued in use unless the authority having jurisdiction determines that the lack of conformity with the code presents an imminent danger to occupants. Where changes are required for correction of hazards, a reasonable amount of time shall be given for compliance, depending on the degree of hazard.

This language is identical to Section 80.9(B) of the Administration and Enforcement Annex G of the 2008 NEC which many—but not all—jurisdictions adopt as enforceable. Design, even budgeting, decisions are made with highly personal views of the word “reasonable.” Imagine a facility manager having to decide between:

1. funding an effort to meet the “flash

- hazard” requirement that appears in NFPA 70E – Standard for Electrical Safety in the Workplace by marking incident energy numbers on equipment that may not need to be worked on energized by one electrician because the PPE requirement is aggressively enforced by OSHA; or,
2. funding alterations to a dormitory with a capacity of 500 students that does not meet current seismic zone requirements.

How can we make this decision a little less like a day at the track? An engineer’s solution might be, “give me funding to solve 5 percent of the problem and then in 20 years, we’ll have it finished.” This kind of percentage compliance speed resembles some local government requirements that a certain percentage (often 5 percent) of new multifamily housing meet more rigorous ADA physical accessibility requirements than



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required under the Fair Housing Act. How would you limit litigation risk in the intervening time?

Mitigating or limiting risk involves two steps: identifying the risk and developing a measure or strategy to address the foreseeable consequences. Strategies include shifting the risk to another party

(e.g., insurance or warnings), taking measures to avoid the risk (e.g., adopting new practices to eliminate), reducing the risk consequences (e.g., adopting protective safety measures or emergency responses) and accepting some of the consequences of the risk. Each strategy should be gauged by a reasonableness test which considers the

facts and circumstances.

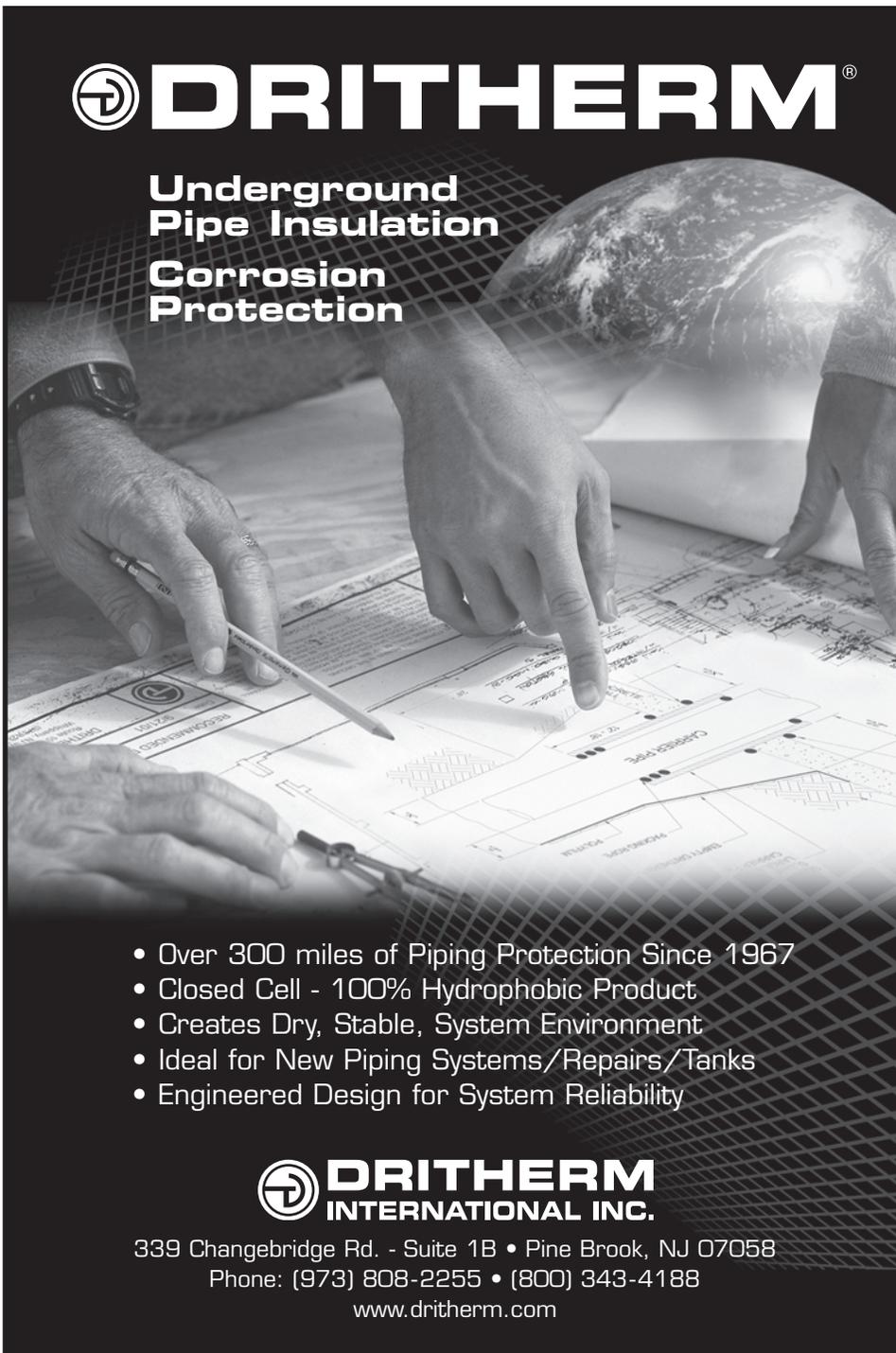
Stated another way, is there a duty of care to address a foreseeable risk of harm? A duty of care can be seen as a legal obligation requiring adherence to a standard of care to avoid foreseeable harm. While the obligation can arise from government laws and regulations, the obligation can also be a simple test of reasonableness—whether or how a reasonable man, under the circumstances, would act. If so, does compliance with codes or standards establish a reasonable response to the risk?

In some cases, the answer is yes. In other cases, the standards are only one measure of reasonable conduct. Codes and standards do, and should, allow for waivers and exceptions, and frequently are prospective, thereby “grandfathering” existing conditions because codes and standards alone do not take into account the specific facts and circumstances including the costs of complying. The risk of litigation, like acts of God, unfortunately cannot be avoided. The next best step to avoidance can be taking a reasonable response to a foreseeable risk and acting accordingly. Compliance with uniform codes and standards provide one strategy but not a safe harbor.

Perhaps the determination of conformity, and effective advocacy for damages, is more of an art than a science.

For additional context on this subject, go to the archives section at www.appa.org/facilitiesmanager to read Quality Measurement in a Facilities Management Environment (*Facilities Manager* May/June 2004) by Richard Robben, director of plant operations at the University of Michigan–Ann Arbor. ☎

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