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Public Works for a Better Government

April 3, 2015

Federal Highway Administration
U.S. Department of Transportation
Docket Operations, M-30,
West Building Ground Floor, Room W12-140, 1200
New Jersey Avenue SE.,
Washington, DC 20590

Re: Comment of Public.Resource.Org and The Center for Auto Safety
Notice of Proposed Rulemaking
Docket Number: FHWA USDOT-2013-0053

Dear Sir or Madam:

Public.Resource.Org (Public Resource) and the Center for Auto Safety (CAS) submit this comment to object to one aspect of the proposed Federal Highway Administration (FHWA) regulation¹: It proposes to incorporate by reference ten public safety standards that are not reasonably available to people affected by the rule, as required by law.

Public Resource and the Center for Auto Safety are not commenting here on the substantive merits of the proposed rule. Instead, we ask the FHWA to recognize that it has acted illegally and arbitrarily at this Notice of Proposed Rulemaking (NPRM) stage in not making these standards—which are integral parts of the rule—available to our organizations and other members of the public without having to pay for them. This unwarranted action by FHWA places an unreasonable burden on members of the public who wish to review the entire rule in order to fully understand it and to make appropriate comments.

A final rule that incorporated the standards without making them freely available would be equally invalid. The new regulation would make these standards part of the law, yet FHWA proposes to exclude the texts of these standards from the text of the regulation. Nor does FHWA propose to link the online version of the regulation to websites offering free and unrestricted access to the standards. Instead, FHWA opines that interested persons should already own the standards or can go purchase them.

¹ <https://www.federalregister.gov/articles/2015/01/05/2014-30085/national-performance-management-measures-assessing-pavement-condition-for-the-national-highway>

In sum, FHWA has invited the public to comment on a law, and proposed that citizens be compelled to obey a law, that many affected parties cannot reasonably afford to read.

This failure to make the ten public safety standards, proposed to be part of the rule, reasonably available denies people basic access to their own laws, the laws they are both bound to obey and dependent upon for protection from serious dangers. In so doing, the proposed rule violates the Freedom of Information Act, the Due Process Clause of the Constitution, and the fundamental principle of responsive governments worldwide for millennia—that people are entitled to read and speak the laws that govern them, with no restrictions.

Because it is illegal and arbitrary to publish this proposed rule without making incorporated standards freely available, FHWA should re-publish the proposed rule with the ten incorporated public safety standards available online for free and re-open the comment period. As to any final rule, FHWA may not lawfully incorporate these ten standards into its regulation until and unless they are written directly into the rule, or else permanently available to the public on a website without charge and without any restriction whatsoever on use.

1. The Proposed Incorporation by Reference

The NPRM proposes performance measures for state Departments of Transportation to use to carry out the National Highway Performance Program (NHPP) and to assess the condition of pavements on the National Highway System (NHS) (excluding the Interstate System), bridges on the NHS, and pavements on the Interstate System.

According to the NPRM, FHWA “intends to make these performance aspects of the NHPP available to the public in a format that is easily understandable and accessible for download.” Yet FHWA then undercuts its position by proposing that some of the content of the proposed rule in fact be shielded from the public and instead hidden behind a paywall.

FHWA proposes to incorporate by reference 10 standards published by American Association of State Highway and Transportation Officials (AASHTO) “to codify the method and/or the device used to collect data for the metrics (i.e., IRI, Crack-ing_Percent, rutting, and faulting).”

In other words, the incorporation of the ten standards is aimed at improving public safety by mandating the ways in which data collection will be accomplished for purposes of promoting compliance with important safety rules. But if compliance with the standard is to be maximized, then people need ready access to the standard. Unfortunately, the proposed rule fails to make the standards reasonably available.

2. Availability of the Standards

The texts of the ten standards that FHWA proposes to incorporate into the rule are not included in the rule itself, nor has FHWA placed any of the ten standards online,

nor has AASHTO made the ten standards available for free, unrestricted public access online.

Instead, FHWA notes that all 10 of the AASHTO standards it proposes to incorporate are included in an AASHTO collection entitled, “*Standard Specifications for Transportation Materials and Methods of Sampling and Testing, 34th Edition and AASHTO Provisional Standards, 2014 Edition*,” which, notes FHWA, “is available for purchase at: https://bookstore.transportation.org/item_details.aspx?ID=2223.” A visit to that page reveals that the Member Price for this publication is \$625.00, and the Non-Member Price is \$750.00. Shipping is an additional \$38, bringing the total cost for most people to \$788.

FHWA indicates that it does not see the cost of the publication as an issue, because, “The FHWA believes that the entities most affected by this proposed regulation, namely State DOTs and MPOs, already own a copy of the incorporated AASHTO standards.”

FHWA also notes, “A copy of all of the incorporated documents outlined above will be on file and available for inspection at the National Archives and Records Administration. These documents will also be available for viewing at the Department of Transportation Library.”

3. The Interests of Commenters

Public Resource, a non-profit organization, would be one of the many entities adversely and unlawfully disadvantaged if FHWA issues a final rule that incorporates standards without providing a means for people to obtain and use those standards without charge and without restriction. Public Resource’s mission is to improve public access to government records and the law. The issuance by FHWA of a regulation incorporating by reference standards that are only readily available to those who pay a fee is the kind of government action that Public Resource works to prevent.²

More generally, a final rule that incorporates standards hidden behind paywalls would make it less likely that affected people who want and need access to the law—academic researchers, first responders, businesses, workers, oversight bodies, community leaders, journalists, non-profit advocacy groups, and others—would have access to the law.

One such entity is the Center for Auto Safety, a non-profit organization founded in 1970 by Consumers Union and Ralph Nader to provide consumers a voice for auto

² Public Resource is currently being sued by six standards development organizations (SDOs) in two separate cases pending in the U.S. District Court for the District of Columbia over Public Resource’s actions to post online standards incorporated by reference into federal regulations. American Society for Testing and Materials et. al. v. Public.Resource.Org, D.D.C. 1:13-cv-01215, <https://archive.org/details/gov.uscourts.dcd.161410/>; American Educational Research Association et. al. v. Public.Resource.Org, 1:14-cv-00857, <https://archive.org/details/gov.uscourts.dcd.166323/>. In each of case, plaintiffs claim that Public Resource has infringed their copyrights, a charge that Public Resource firmly denies.

safety and quality in Washington. CAS has always had a small budget but a big impact. With less than half what General Motors spends on a single Super Bowl commercial, CAS has taken on the auto giants and won for consumers. CAS has made major contributions to accomplishments including: Lemon laws in every state to make it as easy to take back a defective car as a defective toaster; recall of the infamous Ford Pinto for exploding gas tanks and the Firestone 500 tire for tread separation; exposure of GM Firebomb pickups with side saddle gas tanks that have burned to death over 1,000 people; state laws to force disclosure of secret warranties on cars that can save consumers billions of dollars each year; and safety and highway standards that have dropped the death rate on America's road from 5.2 per 100 million vehicles mile traveled in 1969 to 1.1 in 2010. CAS also has achieved numerous legal victories that have saved vital consumer, safety and environmental laws under assault by industry.

CAS has regularly participated in legislative and rulemaking processes of and challenged rules from FHWA and NHTSA. See, e.g., the following FHWA cases:

- CAS v. Tieman, [414 F.Supp. 215](#) (DDC 1977);
- CAS v. Bowers, [466 F.Supp. 829](#) (DDC 1979);
- CAS v. Cox, [580 F.2d 689](#) (DC Cir. 1982);
- CAS v. Dole, [582 F.Supp. 1444](#) (DDC 1984);
- CAS v. FHWA, [956 F.2d 309](#) (DC Cir. 1992).

Cox involved a procedural aspect of the interaction between FHWA and AASHTO in rulemaking, i.e., whether AASHTO could be considered an advisory committee to FHWA under the Federal Advisory Committee Act. The Court of Appeals for the District of Columbia held that AASHTO was an advisory committee when FHWA used “AASHTO in the interest of obtaining advice or recommendations for FHWA on proposed regulations.” *Id.* at 431.

Drawing on the organization's extensive expertise in auto and highway safety issues, CAS has carefully evaluated legislation and rules in an effort to improve safety. But CAS's capacity to analyze and offer improvements to proposed and final rules has long been hindered by agency practice to incorporate by reference public safety standards that are only readable for a fee and that, collectively, are too expensive for CAS to purchase. That is, again, the case here with respect to the instant NPRM.

4. Affected Parties and the Public Interest

As noted, in the NPRM, FHWA opines that “the entities most affected by this proposed regulation, namely State DOTs and MPOs, already own a copy of the incorporated AASHTO standards.” But the Freedom of Information Act requires that agencies only incorporate by reference into a regulation material that is “reasonably available to the class of persons affected thereby,” [5 U.S.C. § 552(a)(1)], not just to the entities that an agency believes are “most” affected.

In fact, entities other than state Departments of Transportation and Metropolitan Planning Organizations not only are affected by these regulations and the public safety standards incorporated therein, they have an interest in knowing the details of federal regulations in these areas, including such standards.

Implementation of the Moving Ahead for Progress in the 21st Century Act (MAP-21) is aimed at creating new performance management requirements to maximize the efficiency of federal highway funding. Imposing effective performance management requirements on state DOTs can help keep highway infrastructure assets in a state of good repair, and allow federal officials to better evaluate state DOT performance and the effectiveness of the federal highway aid program. These changes can help make roads and bridges safer for the public.

A wide range of individuals and entities may want or need to know the law as to these performance standards and highway safety, including public safety standards incorporated by reference. Academic researchers in civil engineering departments of universities may want to carefully evaluate the entire regulation, including incorporated standards. Small and medium-sized businesses and their workers may contract or interact with FHWA, state DOTs, MPOs, and others involved with highway safety. Government officials, from the federal to the local level, may have responsibility for oversight and for acting as critical first responders in the event of an emergency. Media may need to read and understand the law to fairly and accurately report on issues affecting the safety of the community. Policy and advocacy organizations, including those representing people in communities or workplaces affected by highway safety, need ready access to the law to do their work. Members of the public want to know how the law affects road dangers that could harm them.

Because individual states are to be evaluated based on the performance measures in the rule, included the incorporated standards, and because overall road safety is dependent upon the success of the MAP-21 regulations, all of these entities have a potential interest in the measures and whether they adequately address the critical safety concerns.

These standards are not only for the use and benefit of a small group. While not everyone has the training and experience to readily evaluate or monitor compliance with the ten standards incorporated in the proposed regulation, many people do, and interested advocacy and media outlets, among others, may seek out employees, volunteers, consultants and others who have such capacity to advise them.

Yet even though road safety is very much a matter of public concern, FHWA appears to be acting as if the details of these issues can comfortably be left in the hands of those who already have purchased the \$750 manual, along with other relevant standards incorporated into law, or can easily afford to purchase such standards.

Developments with respect to other areas of regulation within the U.S. Department of Transportation—real-life, high-stakes matters like the tragic, multiple-fatality incidents involving the 2010 Deepwater Horizon Gulf oil spill and the 2010 San Bruno,

California, natural gas pipeline explosion—underscore the importance of public access to standards incorporated by reference.

In the wake of the Deepwater Horizon spill in the Gulf of Mexico, with the oil production industry under heavy scrutiny by government, the media, and the public, the American Petroleum Institute eventually posted on its website many of its safety standards, including all of the standards that had been incorporated by reference into federal law.³ Until that decision by the API, as the Deepwater Horizon poured oil into the Gulf for five months, and in the weeks after, it had been difficult for citizens to evaluate the adequacy of federal regulations, because key components of those regulations were hidden behind pay walls.

Similarly, when a natural gas pipeline in San Bruno, California, exploded that same year, “the House of Representatives considered whether relevant pipeline safety standards should have been more freely accessible to first responders.”⁴ Should those standards, in a life-threatening emergency situation and beyond, have been readily available to first responders? Of course.

When matters get serious, our society has had to get serious, and allow the law to be readily available for key actors and for the public to review.

The status quo approach undermines public safety. First responders, government agencies, workers, companies, and others should have the easiest access possible to these standards so that they may understand their legal obligations, be prepared to react effectively in an emergency, and discuss and debate means for improving safety laws. But not all affected entities can afford to pay the steep prices for all the standards incorporated into proposed and final FHWA safety standards.

In this regard, we are in strong agreement with a 2012 comment to the Department’s Pipeline and Hazardous Materials Safety Administration as PHMSA considered the implementation of section 24 of the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011.⁵ That comment was offered jointly by the Western Organization of Resource Councils (WORC), a regional network of seven grassroots community organizations with 10,000 members and 38 local chapters, and Dakota Rural Action, a grassroots family agriculture and conservation group:

Representing the public interest, we strive to create a more fair and open government. Secret laws, or a government that only allows access to laws by a segment of the public able to pay for it, goes in direct opposition to the values of a participatory democracy...

³ Administrative Conference of the United States, “Incorporation by Reference in Federal Regulations,” draft for committee review (“ACUS report”), Oct. 19, 2011, at 28, <https://www.acus.gov/sites/default/files/Revised-Draft-IBR-Report-10-19-11.pdf>

⁴ ACUS Report at 26.

⁵ <https://law.resource.org/pub/us/cfr/regulations.gov.docket.03/090000648108a95b.pdf>

As of June 2010 there were 85 standards referenced in 46 CFR 192, 193, 195. For a citizen to have access to these referenced standards they would have to pay private organizations upwards of \$2,000. These associated costs are an insurmountable burden for an average citizen, making it practically impossible for the public to knowledgeably comment in a rulemaking proceeding, or to propose changes to regulations that already incorporate referenced standards.

5. Law Governing the Availability of Standards Incorporated by Reference

The fundamental law of the United States requires that the government make standards that are incorporated by reference into federal regulations widely available to the public, without charge, and that such standards be deemed in the public domain rather than subject to copyright restrictions. Citizens have the right, without limitation, to read, speak, and disseminate the laws that we are required to obey, including laws that are critical to public safety and commerce. Open, effective, and efficient government and robust democracy require such free availability of standards incorporated by reference.

A. The Freedom of Information Act and Regulations Governing Incorporation by Reference Compel FHWA To Make These Incorporated Standards Freely Available

The Freedom of the Information Act allows the Director of the Federal Register to deem as effectively published in the Federal Register material that is incorporated by reference into a regulation, but only if such material is “reasonably available to the class of persons affected thereby.” **5 U.S.C. § 552(a)(1)**. Title 51 of 1 CFR implements this provision. The Director of the Federal Register is charged with approving each instance of incorporation by reference requested by federal agencies. In carrying out this responsibility, the Director “will assume in carrying out the responsibilities for incorporation by reference that incorporation by reference ... is intended to benefit both the Federal Government and the members of the class affected...” **1 CFR § 51.1(c)(1)**. In order to be eligible for incorporation for a reference, a publication must meet standards including that the publication “does not detract from the usefulness of the Federal Register publication system” and “is reasonably available to and usable by the class of persons affected.” **1 CFR § 51.7(a)(2)(ii) and (a)(3)**.

One of the ways that FHWA has acted contrary to law here is apparent on the face of the NPRM: FHWA has applied an incorrect legal standard. The NPRM states that “the entities most affected by this proposed regulation, namely State DOTs and MPOs, already own a copy of the incorporated AASHTO standards.” But, as discussed, the Freedom of Information Act requires that agencies only incorporate by reference into a regulation material that is “reasonably available to the class of persons affected thereby,” [**5 U.S.C. § 552(a)(1)**], not just to the entities that an agency believes are “most” affected. Asserting that the incorporated standards are available to those “most affected” does not meet FHWA’s legal obligations.

Moreover, the advent of the Internet has fundamentally transformed what it means for material to be “reasonably available.” The Internet has brought the possibility that all standards incorporated into federal law can be instantly available online, linked directly to the relevant provisions of the CFR.

Before the Internet, it was impractical to offer within the pages of the Federal Register and Code of Federal Regulations the often voluminous standards incorporated by reference into agency rules; the regulations, at **1 CFR § 51.7(a)(3)** specifically note that material is eligible for incorporation by reference if it “[s]ubstantially reduces the volume of material published in the Federal Register.”

The widespread availability of the Internet, along with technologies like high-speed scanners and large-capacity hard drives, eliminates any argument that incorporation of standards through simple reference—as opposed to publishing the full text of the standard with the regulations—is needed to save space or trees.

Indeed, the Internet era provides a tremendous opportunity for government to inform its citizens in a broad and rapidly updated manner about the legal standards that must be met in carrying out daily activities. It also allows for companies, non-profits, and citizens to utilize and organize this information to enhance compliance, better understand the provisions of law, improve public safety, increase economic efficiency and opportunity, and highlight opportunities for effective reform.

Another strong advantage of widespread public availability of standards incorporated by reference would be to highlight the need for government to replace old, outdated standards with new ones. Public Resource has conducted an extensive examination of the Code of Federal Regulations with specific focus on incorporations by reference, coupled with an extensive examination of the Standards Incorporated by Reference (“SIBR”) database maintained by the National Institute of Standards and Technology. Many standards incorporated by reference into the CFR have been superseded by new standards from the SDOs. Greater public access to standards incorporated by reference into federal regulations might alert policy and industry communities to the fact that federal rules are too often connected to outdated private standards and are in need of updating to improve public safety.

Among the findings of Public Resource’s review⁶ is that many of the standards incorporated by reference into federal law are simply unavailable for purchase. For example, the NIST SIBR database has 96 entries for standards created by the Compressed Gas Association covering topics such as the Standards for Safety Release Devices, for Visual Inspection of Cylinders and the Safe Handling of Compressed Gases. CGA has an explicit policy of not making any historical standards available for purchase, either on their site or through their two designated retail outlets, Thomson Reuters Techstreet and the IHS Standards Store. It is thus

⁶ See letter from Carl Malamud, Public.Resource.Org, to Amy Bunk, Office of the Federal Register, Comments on Agency/Docket Number NARA 12-0002, April 6, 2012, https://bulk.resource.org/courts.gov/foia/gov.nara.ofr.20120406_to.pdf

impossible to buy some of the CGA standards required by law and very few, if any, public libraries have the documents in question.

Today, the only thing impeding the broader availability to the public of standards incorporated by reference is the belief of some SDOs that they have the right to bar the public from reading and speaking these provisions of law, because they fear that broader public access will reduce their volume of sales of such standards.

Standards incorporated into current FHWA regulations can run hundreds of dollars or more to purchase a copy. Prices like that make the standards unavailable for the vast majority of Americans, perverting the fundamental principles of notification and an informed citizenry, and violating FOIA's mandate that incorporated standards be reasonably available.

The NPRM's assertion that the incorporated standards are available for inspection at the National Archives and the Department of Transportation does not fix the problem: People should not be expected to travel from their homes to Washington DC in order to read the laws they are bound to obey. This solution is also inadequate because the agencies are unlikely to allow people to make copies of the standards so that they may consult them once they leave the federal buildings where they are held. Requiring citizens to memorize hundreds of pages of law is tantamount to denying them access entirely.

Given all these factors, FHWA should determine that the mandates of FOIA and the public interest require that the standards it incorporates by reference into its final rule be written directly into the rule or else available on a public website without charge, and without limitation of use.

That would include FHWA making clear that its obligations would not be satisfied by the relevant SDO posting its standard with the kind of restrictions that some SDOs have imposed as they have, in recent years and months, posted some standards on their own websites—forcing persons wishing to read the standards to register, prohibiting copying, or printing, or bookmarking, curtailing search capacity, or otherwise limiting the capacity of all persons to read, speak, and use standards that have become binding law.

Presented with a petition by legal scholars, along with Carl Malamud of Public Resource, making the argument for free online access, the Office of the Federal Register recently addressed and modified its regulations governing incorporation by reference in a final rule (“the OFR rule”) issued on November 7, 2014, and effective January 6, 2015.⁷ We believe that language in the preamble to this OFR rule inappropriately elevates copyright assertions of the SDOs over the mandates of FOIA. But the OFR rule, which became effective on January 6, 2015, does not in any respect bar FHWA (or any other agency) from making its own judgments as to its legal and public obligations regarding standards incorporated by reference and

⁷ <https://www.federalregister.gov/articles/2014/11/07/2014-26445/incorporation-by-reference>

taking appropriate steps in this rulemaking to ensure that the law, including standards incorporated in the instant rule, is freely available to all.

OFR refused to grant the petition's central request—that it hold that material incorporated by reference in the Code of Federal Regulations be available online and free of charge. But OFR gave as its reason its view that OFR itself lacked the power to issue such a broad rule for all federal agencies: “petitioners’ proposed changes to our regulations go beyond our statutory authority.” OFR explained: “we are a procedural agency. We do not have the subject matter expertise (technical or legal) to tell another agency how they can best reach a rulemaking decision.”

Later in the preamble to its final rule, OFR indicated that agencies do have the discretion to make the text of standards incorporated by reference available free of charge:

*One commenter stated that since it is the text of standards that must be available (citing Veeck for the proposition that the law is not subject to copyright law), agencies should copy the text of IBR'd standards and place the text online. In a footnote, the commenter suggested that OFR require agencies to place the text of their “regulatory obligations” in their online dockets. This way the “text of the legal obligation and not the standard as such” is available online for free.
[footnote omitted]*

We leave it to the agencies to determine if they should follow this commenter's suggestion.

The OFR preamble, therefore, confirms what should be obvious: that specific agencies may make their own choices about reasonable availability, including placing incorporated standards online. FHWA should act here to do just that.⁸

⁸ We note that FHWA's NPRM is contrary to law for the additional reason that it fails to meet new specific requirements imposed on agencies by the new OFR rule.

The OFR rule became effective January 6, 2015, the day after FHWA issued the instant NPRM. But the OFR rule was issued on November 7, 2014, and clearly governs the FHWA final rule here. Accordingly, FHWA should have conformed to the mandates of the OFR rule, which requires agencies to:

1. Discuss, in the preamble of the proposed rule, the ways that the materials it proposes to incorporate by reference are reasonably available to interested parties or how it worked to make those materials reasonably available to interested parties; and
2. Summarize, in the preamble of the proposed rule, the material it proposes to incorporate by reference.

1 CFR § 51.5(a). The OFR rule imposes similar requirements with respect to the final rule. **1 CFR § 51.5(b).**

The NPRM states:

The FHWA believes that the entities most affected by this proposed regulation, namely State DOTs and MPOs, already own a copy of the incorporated AASHTO standards.... A copy of all of the incorporated documents outlined above will be on file and available for inspection at the National Archives and Records Administration. These documents will also be available for viewing at the Department of Transportation Library.

This analysis does not specifically indicate how the standards "are reasonably available" simply by mentioning that the standards can be purchased, especially since the purchase price is \$750, or by noting the ability of citizens to read the standards by visiting a Washington DC reading room. Nor does the NPRM discuss the actions that FHWA took to ensure that the ten incorporated standards are reasonably available to interested parties.

Nor does the NPRM provide any significant summary of the contents of the standards it proposes to incorporate, as the new OFR rule requires.

Although compliance with these new provisions would not be sufficient to correct the fundamental flaw in FHWA's decision-making here—the failure to make its regulations reasonably available—the lack of compliance is further evidence of the agency's disregard of its duties.

Similarly, the NPRM's failure to provide access to the text of the incorporated standard violates the provisions of the Administrative Procedure Act that require agencies to give people an opportunity to comment on a proposed rule making. The APA requires that an NPRM include "either the terms or substance of the proposed rule or a description of the subjects or issues involved." **5 U.S.C. § 553(b)(3)**. The bare-bones discussions of the two standards to be incorporated by reference into the instant rule do not meet this agency obligation.

B. The Constitution and Judicial Decisions of the United States Compel FHWA To Make These Incorporated Standards Freely Available

As discussed in greater detail in Public Resource’s comment in OMB Request for Information 2012–7602,⁹ the U.S. Supreme Court in *Wheaton v. Peters*, **33 U.S. 591** (1834), and *Banks v. Manchester*, **128 U.S. 244** (1888), held that the law “is in the public domain and thus not amenable to copyright.” *Veck v. Southern Bldg. Code Congress International, Inc.*, **293 F.3d 791, 796** (5th Cir. 2002) (en banc), cert. denied, **539 U.S. 969** (2003). *Wheaton*, *Banks*, and the en banc decision of the United States Court of Appeals for the Fifth Circuit in *Veck* all concerned comparable fact patterns: One private party was trying to stop another private party from publishing material that was part of the law. In none of those three cases was anyone trying to prevent the first party from selling copies of such material, and we do not question the right of SDOs to sell standards incorporated by reference into law. Rather, we believe, as the courts concluded in those cases, that once material has become law, then other parties have the right to read it and to speak it, without limitation—and that that proposition clearly applies to standards incorporated by reference into federal law, notwithstanding assertions of copyright by SDOs.

The principle that the law must be public and available to citizens to read and speak has its roots in the concept of the rule of law itself, as well as central provisions of our Constitution. See generally Thomas Henry Bingham, *The Rule of Law*, 37–38 (Penguin Press 2011) (“The law must be accessible . . . the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations.”); Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* 34 (Cambridge Univ. Press, 2004) (“Citizens are subject only to the law, not to the arbitrary will or judgment of another who wields coercive government power. This entails that the laws be declared publicly in clear terms in advance.”). That is why, going back to ancient times, societies that replaced the rule of tyrants with the rule of law prominently displayed the laws in public places for all to see. See, e.g., Robert C. Byrd, *The Senate of the Roman Republic: Addresses on the History of Roman Constitutionalism* 33, 128, 135 (U.S. Government Printing Office, 1995).

As this history suggests, open access to the law is essential to a free society. Citizens are expected to obey the law, but they cannot do so effectively if they do not know it. Further, the First Amendment right to freedom of speech is imperiled if citizens are barred from freely communicating the provisions of the law to each other. Cf. *Nieman v. VersusLaw, Inc.*, **No. 12-2810, at *2 (7th Cir. Mar. 19, 2013)** (“The First Amendment privileges the publication of facts contained in lawfully obtained judicial records, even if reasonable people would want them concealed.”). By the same token, equal protection of the laws and due process are jeopardized if some citizens can afford to purchase access to the laws that all of us are bound to obey (with potential criminal penalties for non-compliance), but others cannot. Cf. *Harper v. Va. State Bd. of Elections*, **383 U.S. 663, 666** (1966) (a state violates the Equal Protection Clause “whenever it makes the affluence of the voter or payment of any fee an electoral

⁹ https://law.resource.org/pub/us/cfr/notice.omb.20120411_to.pdf

standard”); see also Magna Carta 1297 c. 9 (cl. 29) (1297) (“We will sell to no man, we will not deny or defer to any man either Justice or Right.”).

Consistent with these fundamental principles, it is unlawful and unreasonable for FHWA to make these two standards part of binding United States law without providing a means for citizens to access them without cost or restriction.

6. Granting Citizens Access to Their Own Laws Will Not End the Creation of Public Safety Standards

Opposition to allowing citizens to freely read and speak the public safety standards that are incorporated into law seems to rest on the premise that allowing such access will end the standards-creation process and thereby imperil safety. The argument advanced is that if the government required that all materials incorporated by reference be available for free, then SDOs would react not by making their standards truly available to the public online but rather by ending or curtailing their work to create standards and/or by resisting government efforts to incorporate their standards into law.

Those assumptions of fact and law have been soundly refuted.

The en banc U.S. Court of Appeals for the Fifth Circuit in *Veeck* specifically addressed the policy and empirical issues regarding what might happen if courts, as that court did, expressly upheld the right of a citizen to communicate the law, in that case the right of a citizen to post the building code of his town, derived from a model code published by SBCCI, on the Internet. Rather than assume that the entire system of private standard-setting might collapse, the Fifth Circuit examined the arguments and determined that allowing citizens to speak their own laws would not end this beneficial system:

Many of SBCCI's and the dissent's arguments center on the plea that without full copyright protection for model codes, despite their enactment as the law in hundreds or thousands of jurisdictions, SBCCI will lack the revenue to continue its public service of code drafting. Thus SBCCI needs copyright's economic incentives.

Several responses exist to this contention. First, SBCCI, like other code-writing organizations, has survived and grown over 60 years, yet no court has previously awarded copyright protection for the copying of an enacted building code under circumstances like these. Second, the success of voluntary code-writing groups is attributable to the technological complexity of modern life, which impels government entities to standardize their regulations. The entities would have to promulgate standards even if SBCCI did not exist, but the most fruitful approach for the public entities and the potentially regulated industries lies in mutual cooperation. The self-interest of the builders, engineers, designers and other relevant tradesmen should also not be overlooked in the calculus promoting uniform codes. As one commentator explained,

...it is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less. Trade organizations have powerful reasons stemming from industry standardization, quality control, and self-regulation to produce these model codes; it is unlikely that, without copyright, they will cease producing them.

1 Goldstein § 2.5.2, at 2:51.

Third, to enhance the market value of its model codes, SBCCI could easily publish them as do the compilers of statutes and judicial opinions, with “value-added” in the form of commentary, questions and answers, lists of adopting jurisdictions and other information valuable to a reader. The organization could also charge fees for the massive amount of interpretive information about the codes that it doles out. In short, we are unpersuaded that the removal of copyright protection from model codes only when and to the extent they are enacted into law disserves “the Progress of Science and useful Arts.” U.S. Const. art. I. § 8, cl. 8.

293 F.3d at 806 (footnotes omitted).

These conclusions expressed by the court in *Veck* are even more powerful today. Notwithstanding the issuance of the *Veck* decision itself, and the U.S. Supreme Court’s denial of review after being informed by the Justice Department that “[t]he court of appeals reached the correct result,”¹⁰ SDOs have continued to create and issue standards for another decade. SDOs also have continued to press federal and state authorities to incorporate their standards into law.¹¹

Given these factors, we strongly believe that, if FHWA and other agencies required that only standards made available without restriction be eligible for IBR, then (1) SDOs would continue to promulgate standards and urge their incorporation into law; (2) SDOs, government, and various private entities would make standards incorporated by reference available to the public without restriction, and the courts would uphold any challenges to such action, allowing FHWA and other agencies to be confident that standards it was considering for IBR approval would indeed be publicly available.

¹⁰ Brief for the United States as Amicus Curiae, *S. Bldg. Code Cong. Int’l, Inc. v. Veck* (2003) (No. 02-355), at 1, available at <http://www.justice.gov/osg/briefs/2002/2pet/6invit/2002-0355.pet.ami.inv.pdf>.

¹¹ See *Public.Resource.Org, Inc.’s Counterclaim For Declaratory Judgment, Answer To Complaint For Injunctive Relief, And Jury Demand, American Society For Testing And Materials v. Public.Resource.Org, Inc.*, Case No. 1:13-cv-01215-EGS, Aug. 6, 2013, at 9–15. <https://archive.org/download/gov.uscourts.dcd.161410/gov.uscourts.dcd.161410.21.0.pdf>; see also Public Resource, Comment of Proposed Revision of OMB Circular No. A-119, “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities” April 11, 2014, <https://law.resource.org/pub/us/cfr/regulations.gov.-docket.05/OMB-2014-0001-0002.pdf>

Conclusion

Public Resource, the Center for Auto Safety, and a wide range of other parties are affected by the proposed rule and the incorporation by reference of the applicable standards. Many such parties cannot reasonably afford to purchase all the relevant standards incorporated by reference in these areas. In our society, based on the rule of law, all citizens must have ready access to their own laws. Public safety will be greatly improved if these ten standards are made available to the public without charge.

Because it is illegal and arbitrary to publish the proposed rule without making the ten incorporated AASHTO standards freely available, FHWA should re-publish the proposed rule with the standards available freely online, and FHWA should re-open the comment period. FHWA should not incorporate these ten standards into any final rule until and unless they are written directly into the rule, or else permanently available to the public on a website without charge and without any restriction on use.

Sincerely yours,

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